

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE MANUEL PRIETO-ROMERO,
Petitioner-Appellant,
v.

A. NEIL CLARK, Officer in Charge, Detention and Removal Operations,
Northwest Detention center, et al.,
Respondents-Appellees.

On Appeal from the United States District Court for
the Western District of Washington, The Honorable Robert S. Lasnik, Presiding
W.D. Wash. No. C06-00786-RSL

**AMICI CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION
FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF
SOUTHERN CALIFORNIA IN SUPPORT OF PETITIONER-APPELLANT**

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IDENTITY AND INTERESTS OF AMICI CURIAE

Amici are the American Civil Liberties Union Foundation (ACLU) and the American Civil Liberties Union Foundation of Southern California (ACLU-SC). Amici have a longstanding interest in enforcing constitutional and statutory constraints on the federal government's power to subject non-citizens to administrative immigration detention, and have litigated a number of significant cases in the area. *See, e.g., Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006) (counsel of record); *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005) (counsel of record); *Clark v. Martinez*, 543 U.S. 371 (2005) (amicus); *Demore v. Kim*, 538 U.S. 510 (2003) (counsel of record); *Zadvydas v. Davis*, 533 U.S. 678 (2001) (amicus). Amici currently represent detainees in several other cases that concern the legality of the government's immigration detention policies, including cases before this Court. *See, e.g., Martinez v. Gonzales*, No. 07-56446; *Soeoth v. Gonzales*, No. 07-55549; *Diouf v. Gonzales*, No. 07-55337.

Amicus ACLU is a nationwide non-partisan organization of approximately 500,000 members dedicated to enforcing the fundamental rights of the Constitution and laws of the United States. The Immigrants' Rights Project of the ACLU engages in a nationwide program of litigation,

advocacy, and public education to enforce and protect the constitutional and civil rights of immigrants.

Amicus ACLU-SC is a state-wide, nonpartisan, nonprofit organization of over 40,000 members dedicated to the preservation of civil liberties and civil rights. The ACLU-SC has litigated a number of immigrants' rights cases as part of its overall mission of litigation and advocacy to protect immigrants' rights.

On October 15, 2007, this Court granted Amici's motion for appointment as pro bono amicus counsel.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amici ACLU and ACLU-SC state that they are not-for-profit corporations that have no parent companies, subsidiaries, or affiliates who have issued shares to the public.

INTRODUCTION

This case challenges the government's policy of subjecting non-citizens to prolonged civil detention during resolution of their administrative removal proceedings. The government's current practice, as exemplified by the instant case, is to detain non-citizens for months and even years while their removal proceedings are resolved without providing a meaningful hearing as to whether detention is justified. Individuals detained by the government in this manner include those with cases pending before the immigration courts or at the Board of Immigration Appeals (BIA), and those who have obtained stays from this Court pending judicial review of their removal cases.

As this Court and the Supreme Court have recognized, prolonged and indefinite immigration detention raises serious constitutional questions. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1076 (9th Cir. 2006); *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005). The government's prolonged detention of individuals like Petitioner violates the Due Process Clause of the Fifth Amendment because it bears no reasonable relation to a legitimate government purpose, and has been imposed without the kind of procedural safeguards that would be necessary to justify such detention. *See Zadvydas*, 533 U.S. at 690-92.

This Court, however, need not reach the serious constitutional questions posed by prolonged and indefinite immigration detention. The principle of constitutional avoidance, as well as ordinary principles of statutory construction, compel the conclusion that the general immigration detention statutes—*i.e.*, those that do not involve national security—authorize detention only for a period of time reasonably necessary to effectuate removal. *See Nadarajah*, 443 F.3d at 1079. Under this Court’s precedent, after a presumptively reasonable six-month period, the government cannot detain an individual unless it demonstrates at a constitutionally-adequate hearing that continued detention is justified. *See id.* at 1079-80; *Tijani*, 430 F.3d at 1242.

BACKGROUND

A. Three general immigration detention statutes govern the detention of most non-citizens in removal proceedings.¹ Detention pending completion of removal proceedings for non-citizens admitted to the United States is governed by § 236 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1226, which generally provides that while removal proceedings are

¹ In contrast to the three general detention statutes that govern ordinary cases, Congress specially provided for prolonged detention when a national security-related charge is the basis for removal. *See* 8 U.S.C. §§ 1531-37, 1226a (expressly authorizing continued detention beyond six months even where “removal is unlikely in the reasonably foreseeable future”).

pending, the government may detain non-citizens or release them on bond or “conditional parole.” *See* 8 U.S.C. § 1226(a). Section 1226 also includes a subsection providing for so-called “mandatory” detention of persons with certain criminal convictions under certain circumstances. 8 U.S.C. § 1226(c).

A second general detention statute, INA § 235, 8 U.S.C. § 1225, applies to persons not admitted to the United States, including those arriving in the country and seeking admission, as well as those present in the United States after entering without inspection. Under this statute, a non-citizen charged with being inadmissible “shall be detained” for a removal proceeding, 8 U.S.C. § 1225(b)(2)(A), or for further consideration of an asylum application, 8 U.S.C. § 1225(b)(1)(B)(ii), but may be released on parole pursuant to 8 U.S.C. § 1182(d)(5).

The third general immigration detention statute, INA § 241, 8 U.S.C. § 1231, governs detention of persons who have already received a final administrative order of removal, and applies to those who were previously admitted as well as those who were never admitted. In Section 1231, Congress provided that the government generally should remove a person with a final administrative order of removal within 90 days (known as the “removal period”), during which the person “shall . . . [be] detain[ed].” 8

U.S.C. § 1231(a)(2). “If the alien does not leave or is not removed within the [90-day] removal period, the alien, pending removal, shall be subject to supervision . . .” 8 U.S.C. § 1231(a)(3). Those ordered removed based upon certain grounds, including criminal convictions, or determined to be a risk to the community or unlikely to comply with the removal order “may be detained beyond the removal period.” 8 U.S.C. § 1231(a)(6). The Supreme Court has held that Section 1231(a)(6) authorizes detention beyond the removal period only when removal is significantly likely to occur in the reasonably foreseeable future. *Zadvydas*, 533 U.S. at 699.

In Section 1231, Congress recognized one circumstance in which physical removal may not occur soon after an administrative removal order: where the order is under review by a court. In such a case, Congress provided that the 90-day removal period does not begin until the completion of any judicial review for which the non-citizen has obtained a stay of removal. *See* 8 U.S.C. § 1231(a)(1)(B)(ii). The majority of courts—including this Court in an unpublished decision and implicitly in *Tijani*—have held that during such judicial review, Section 1231 does not apply and the individual’s detention remains governed by the pre-administrative order detention statute, Section 1226 (or in the case of non-admitted aliens, Section 1225). *See Tijani*, 430 F.3d at 1242 (treating detention pending

judicial review as governed by Section 1226); *Martinez-Jaramillo v. Thompson*, 120 Fed. Appx. 714, 717 (9th Cir. 2005) (unpublished) (“the language of the statute . . . stalls the beginning of the removal period where a stay of removal is granted pending judicial review.”).²

B. While the “vast majority” of removal cases are resolved relatively expeditiously, *see Demore v. Kim*, 538 U.S. 510, 530 (2003), those non-citizens whose removal cases are not within the “vast majority” are likely to face prolonged proceedings of indeterminate duration. Some removal proceedings may require years to complete at the administrative level because of remands from the BIA or the courts of appeals to immigration judges on complex points of law or for additional fact-finding. In addition, judicial review in this Court itself may necessitate well over a year. *See Tijani*, 430 F.3d at 1242 (noting that “foreseeable process” for petition for review of removal order in Ninth Circuit is “a year or more”); *see also* Ninth Circuit United States Courts 2006 Annual Report at 36-38, *available at* <http://www.ce9.uscourts.gov/publications/AnnualReport2006.pdf> (Median time from filing of appeal to disposition for Ninth Circuit in 2006 was 15.5

² *See also Wang v. Ashcroft*, 320 F.3d 130 (2d Cir. 2003); *Rodriguez-Carabantes v. Chertoff*, 2007 WL 1268500 (W.D.Wash. May 1, 2007); *Alafyouny v. Chertoff*, 2006 WL 1581959 (N.D. Tex. May 19, 2006) (collecting cases); *but see Akinwale v. Ashcroft*, 287 F.3d 1050 (11th Cir. 2002).

months).³

Non-citizens subjected to prolonged detention pending removal proceedings receive no hearings before an immigration judge or other impartial adjudicator to determine whether such detention is justified. Instead, the government sometimes conducts periodic “file reviews” based upon a paper record and without providing the non-citizen with an opportunity to be heard, to examine witnesses, or to challenge the government’s evidence, and without considering length of detention as a factor favoring release from detention.⁴ *See* 8 C.F.R. § 241.4(h).⁵

³ This figure almost certainly underestimates, substantially, the actual time to disposition in petitions for review where non-citizens obtain stays of removal. The median time calculation includes both cases terminated procedurally (of which there were 6,639) and cases disposed of on the merits (of which there were 6,421). However, cases terminated procedurally are decided far sooner than cases decided on the merits, and non-citizens who obtain discretionary stays of removal most likely have their cases resolved on the merits. *See infra* Section I.B.

⁴ ICE typically only conducts these paper reviews in cases pending before the courts of appeals, and not during the administrative process before the immigration judge or the BIA. For those detained pending proceedings before the immigration judge or BIA, the process varies. *See* 8 C.F.R. § 212.5 & Part 235 (describing parole process for persons detained pursuant to Section 1225); 8 C.F.R. § 236.1 (describing procedure for persons detained under Section 1226). None of these procedures consider whether prolonged and indefinite detention is justified under the circumstances of an individual’s case.

⁵ In part because immigration detention centers are not designed for prolonged confinement, conditions are frequently poor. *See* Amended Order Granting in Part and Denying in Part Defendants’ Motion to Dissolve the *Orantes* Injunction, *Orantes-Hernandez v. Gonzales*, No. CV 82-01107

C. Detainees subject to prolonged detention face removal proceedings for a variety of reasons. Some detainees are longtime lawful permanent residents whom the government charges with removability based upon criminal convictions. *See* 8 U.S.C. § 1227. Some individuals may ultimately prevail before the courts of appeals, even if both the immigration judge and the BIA have held that they are removable. *See, e.g., Li v. Ashcroft*, 389 F.3d 892 (9th Cir. 2004); *Vukmirovic v. Ashcroft*, 362 F.3d 1247 (9th Cir. 2004); *see also Thangaraja v. Gonzales*, 428 F.3d 870 (9th Cir. 2005) (awarding attorneys fees because government’s position not substantially justified); *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002) (criticizing BIA for “summarily dismiss[ing] [claims] without even purporting to engage in any substantive analysis or articulating any reasons for its decision.”). It is all too common for this Court and other courts of appeals to reverse decisions of immigration judges and the BIA based on mistakes of law. *See Benslimane v. Gonzales*, 430 F.3d 828, 829-30 (7th Cir. 2005) (Posner, J.) (noting that Seventh Circuit “reversed the Board of Immigration in whole or part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits” and that “adjudication

(C.D. Cal. Jul. 24, 2007), at 54-74 (copy attached as appendix) (District court judge in this Circuit examined detention conditions in nation’s 201 immigration detention facilities and found significant number of problems with conditions of confinement).

of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice”).

Other cases of prolonged detention involve persons who have no criminal record but have nonetheless been held in detention by the government pending completion of removal proceedings. This category includes people who arrive at a port of entry and apply for asylum. Such persons are detained by the government even though an immigration officer has determined that the person has a credible fear of persecution, 8 U.S.C. § 1225(b)(1)(B), and in many cases even when an immigration judge has found the individual is entitled to asylum or protection against removal under the Convention Against Torture. *See, e.g., Nadarajah*, 443 F.3d at 1071-75 (Sri Lankan torture victim and asylum applicant incarcerated for five years notwithstanding repeated grants of asylum by immigration judge and BIA).

SUMMARY OF ARGUMENT

This Court and the Supreme Court have recognized that prolonged and indefinite immigration detention “would raise a serious constitutional problem” under the Due Process Clause. *Zadvydas*, 533 U.S. at 690; *see also Nadarajah*, 443 F.3d at 1076; *Tijani*, 430 F.3d at 1242. To survive constitutional scrutiny, immigration detention—like all civil detention—

must bear a reasonable relation to a legitimate governmental purpose. *See Zadvydas*, 533 U.S. at 690 (citing *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)). Because of the significant liberty interest at issue, civil detention must also be accompanied by strong procedural protections to ensure that it remains reasonable. *See id.* at 692.

In the immigration context, the government typically asserts two justifications for detention—ensuring availability for removal and a corollary interest in preventing danger during the removal process. *See id.* at 690. This Court and the Supreme Court have reasoned that, when detention becomes prolonged, or the likelihood of removal in the reasonably foreseeable future is remote, the government’s justifications for detention become attenuated, and continued detention raises due process concerns. *See id.* at 690, 701; *Tijani*, 430 F.3d at 1242. For detention to withstand due process scrutiny, the government must therefore provide robust procedures, namely in-person adversarial hearings, where the government must prove that a non-citizen presents a sufficient flight risk or danger to justify detention, in light of detention’s length and the foreseeability of removal.

This Court, however, need not reach the constitutional problem posed by the government’s prolonged detention of non-citizens without any such hearings because the general immigration detention statutes should be read

to avoid this problem. This Court and the Supreme Court have held that that “Congress cannot authorize indefinite detention in the absence of a clear statement.” *Nadarajah*, 443 F.3d at 1076 (citing *Zadvydas*, 533 U.S. at 690). Because the general detention statutes at issue here lack the necessary clear statement, this Court and the Supreme Court have construed them to authorize detention for only a reasonable and brief period of time necessary to effectuate removal, presumptively six months. *See Zadvydas*, 533 U.S. at 699-701; *Nadarajah*, 443 F.3d at 1080; *see also Tijani*, 430 F.3d at 1242. Consistently with these decisions, this Court should construe the general detention statutes as permitting detention for a presumptively-reasonable six-month period. After this time, the government must either release a detainee or provide him a constitutionally-sufficient hearing, where the government bears the burden of proving that the detainee presents a sufficient flight risk or danger to justify detention, given the length of past detention and the imminence of removal. *See Tijani*, 430 F.3d at 1242.

ARGUMENT

I. The Government’s Practice of Subjecting Non-Citizens to Prolonged and Indefinite Detention Without Providing Meaningful Custody Hearings Violates Due Process.

Civil detention of any kind, including immigration detention, can only satisfy the requirements of due process if it is both reasonably related to a

legitimate governmental interest and accompanied by strong procedural safeguards to ensure that it remains reasonable. *See Zadvydas*, 533 U.S. at 690-92. In the immigration context, detention must be reasonably related to the government’s primary interest in ensuring availability for removal proceedings and its corollary interest in protecting against danger. *See id.* at 690. To be constitutionally permissible, detention must also be accompanied by strong procedural safeguards: in-person, adversarial hearings at which the government bears the burden of justifying detention, given detention’s length and the likelihood of removal in the reasonably foreseeable future. *See id.* at 691-92.

A. Due Process Forbids Prolonged and Indefinite Immigration Detention Unless It Is Reasonably Related to a Legitimate Governmental Purpose and Accompanied By Strong Procedural Protections.

Immigration detention restricts a fundamental liberty interest protected by the Due Process Clause. “Freedom from imprisonment—from Government custody, detention, or other forms of physical restraint, lies at the heart of the liberty that the Clause protects.” *Zadvydas*, 533 U.S. at 690. For this reason, prolonged immigration detention violates due process unless it is reasonably related to a governmental purpose. *See id.*; *see also Addington v. Texas*, 441 U.S. 418, 425 (1979) (“This Court repeatedly has recognized that civil commitment *for any purpose* constitutes a significant

deprivation of liberty that requires due process protection.”) (emphasis added). In a series of cases, this Court and the Supreme Court have set forth the due process framework applicable to prolonged and indefinite immigration detention under the various general detention statutes that govern the vast majority of immigration cases.

In *Zadvydas*, the Supreme Court considered prolonged and indefinite immigration detention under 8 U.S.C. § 1231(a), the general detention statute that governs detention of non-citizens ordered removed from the United States. The Court considered the detention of two non-citizens, both of whom had been ordered removed and exhausted all appeals, but who nonetheless remained detained because their deportation could not be effectuated due to problems in obtaining travel documents and because the government claimed that their release would pose a danger.

The Court began by clarifying that even detainees ordered removed have a strong liberty interest under the Due Process Clause. *See id.* at 690. The Court held that due process requires a “sufficiently strong special justification” to outweigh the significant deprivation of liberty of detention, as well as “strong procedural protections” to ensure that detention remains reasonable. *Id.* at 690-91. As to the government’s primary goal of ensuring availability for removal, “where detention’s goal is no longer practically

attainable, detention no longer bears a reasonable relation to the purpose for which the individual was committed.” *Id.* at 690 (quotations and citations omitted). As to the government’s corollary interest in protecting the public from danger, the Court found that due process does not permit the government to indefinitely detain based on this interest alone, absent “some other special circumstance, such as mental illness, that helps to create the danger.” *Id.* at 691 (citing *Kansas v. Hendricks*, 521 U.S. 346, 358, 368 (1997)).

The Court stressed that the post-final-order detention scheme lacked the kind of procedures that would be necessary to justify the indefinite and potentially permanent deprivation of liberty. *Id.* at 691-92. Rather than ordering the government to provide a constitutionally adequate hearing, however, the Court avoided the constitutional problems of prolonged and indefinite detention by reading Section 1231(a)(6) as authorizing detention for only a reasonable period of time necessary to effectuate removal. *Id.* at 701.

The Supreme Court next considered immigration detention in *Demore*, when it reviewed the constitutionality of mandatory detention without bond under 8 U.S.C. § 1226, another general detention statute, during “the limited period necessary” to complete removal proceedings in

most cases. 538 U.S. at 526. In upholding the constitutionality of the non-citizen’s detention, the Court relied on its understanding that, “[u]nder § 1226(c), not only does detention have a definite termination point, in the majority of cases it lasts for less than . . . 90 days.” *Id.* at 529. The Court stressed “[t]he very limited time of the detention at stake under 1226(c)” and relied heavily on the government’s representations that such detention lasts “roughly a month and a half in the vast majority of cases in which it is invoked and about five months in the minority of cases in which the alien chooses to appeal.” *Id.* at 529 n.12 & 530; *see also Nadarajah*, 443 F.3d at 1081 (*Demore* “grounded its holding by referencing a ‘brief period’ . . . of ‘temporary confinement’”) (citation omitted).

Subsequently, in *Tijani*, this Court resolved the question left open by *Demore*: the constitutionality of *prolonged* detention under Section 1226(c). The non-citizen in *Tijani* was detained for two years and eight months under Section 1226(c). 430 F.3d at 1242. This Court found it “constitutionally doubtful that Congress [would] authorize imprisonment of this duration.” *Id.* Like the Supreme Court in *Zadvydas*, this Court avoided reaching the constitutional issue, but it did so by construing the statute to require a hearing before an immigration judge where the government bears the burden of justifying continued detention. *Id.*; *see also Ly v. Hansen*, 351 F.3d 263,

268, 271 (6th Cir. 2003) (construing Section 1226(c) as authorizing detention for only “a time reasonably required to complete removal proceedings in a timely manner,” and finding one and one-half years of detention “especially unreasonable” where no chance of removal existed).

In *Nadarajah*, this Court again considered prolonged immigration detention, this time under other general immigration detention statutes, 8 U.S.C. §§ 1225(b)(1)(B)(ii) and (b)(2)(A). 443 F.3d at 1076. This Court relied on the Supreme Court’s constitutional avoidance decision in *Zadvydas*, and concluded that, like the general post-final-order detention statute in *Zadvydas*, the general pre-final-order detention statutes also do not authorize detention beyond a period of time reasonably necessary to effectuate removal. *Id.* at 1076, 1078.

Taken together, *Nadarajah*, *Tijani*, *Demore*, and *Zadvydas* express a straightforward constitutional standard for cases involving prolonged and indefinite detention under the general detention statutes. Due process requires immigration detention to be reasonably related to the governmental goals of effecting removal and preventing danger. Particularly once detention becomes prolonged, the government may not constitutionally subject a non-citizen to further immigration detention unless it can demonstrate in a constitutionally-adequate hearing that such detention is

justified, in light of its length and the imminence of removal.⁶

B. Due Process Requires an In-Person Adversarial Hearing Where the Government Bears the Burden of Justifying Continued Detention.

Zadvydas's discussion of the procedural requirements that must accompany immigration detention clarifies that due process requires, at a minimum, an in-person adversarial hearing to determine that detention is justified, rather than the written "custody review" procedure currently provided by the government in some cases.

In *Zadvydas*, the Supreme Court found the government's detention procedures inadequate because they involved only paper review by administrative agents. *See* 533 U.S. at 692 (citing 8 C.F.R. § 241.4(d)(1) (2001)). The Court observed that it has required more robust procedures even for the protection of property.⁷ *Id.* (citing, *inter alia*, *South Carolina v. Regan*, 465 U.S. 367, 393 (1984) (O'Connor, J., concurring)); *see also*

⁶ As in the case of post-final-order detention, alternatives far less restrictive than detention are available to the government in the pre-final-order context, including electronic monitoring and supervised release. *See Zadvydas*, 533 U.S. at 700.

⁷ Although *Zadvydas* could be read to suggest that only an Article III judge could authorize the substantial deprivation of liberty at issue in that case, Amici do not argue here that the government is required at the six-month juncture to hold detention hearings before such judges. *But see Armentero v. INS*, 412 F.3d 1088, 1088 (9th Cir. 2005) (Ferguson, J., specially concurring) ("Administrative agents cannot be vested with the authority to render decisions concerning the length of detention. Such decision-making power rests in the hands of a judicial officer.").

Goldberg v. Kelly, 397 U.S. 254, 268 (1970) (government’s failure to provide an in-person hearing prior to termination of welfare benefits was “fatal to the constitutional adequacy of the procedures.”); *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1 (1978) (due process requires, at minimum, opportunity for utility clients to argue cases with designated employees prior to termination of their utilities);⁸ *Califano v. Yamasaki*, 442 U.S. 682, 696 (1979) (in-person hearing required for recovery of excess Social Security payments where beneficiary was at fault, because “written review hardly seems sufficient to discharge the Secretary’s statutory duty to . . . assess the absence of ‘fault’”).⁹

Due process also requires that the government bear the burden of justifying prolonged and indefinite detention at the hearing. In *Zadvydas*,

⁸ The continuing vitality of cases such as *Goldberg* and *Memphis Light* is not in doubt, notwithstanding their age. See, e.g., *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 772 (2005) (Souter, J., concurring) (citing, *inter alia*, *Goldberg* and *Memphis Light*).

⁹ The justification for an in-person hearing in the prolonged detention context is particularly strong given that the hearing may well call for determinations concerning the non-citizen’s credibility, as it relates to his or her willingness to appear for removal should the government ultimately prevail in the immigration case. See, e.g., *Califano*, 442 U.S. at 697 (paper review without in-person hearing failed to satisfy due process because determination at issue “usually requires an assessment of the recipient’s credibility”). Cf. 18 U.S.C. § 3142 (treating “character” of defendant as relevant criteria in assessing bail eligibility); *Manimbao v. Aschroft*, 329 F.3d 655, 661 (9th Cir. 2003) (in asylum context, immigration judges are in “superior position” to assess credibility).

the Supreme Court criticized the regulations governing prolonged immigration detention for placing the burden of proof on the non-citizen. 533 U.S. at 692. The Court clarified that it had struck down other civil commitment schemes for improperly allocating the burden of proof on the detainee. *Id.*

Consistently with *Zadvydas*, this Court held in *Tijani* that the government must bear the burden of proof in hearings to justify prolonged immigration detention. *Tijani*, 430 F.3d at 1242. *Tijani* in turn relied upon the Supreme Court’s unanimous decision in *Cooper v. Oklahoma*, 517 U.S. 348 (1996), which held that “due process places a heightened burden of proof on the State in civil proceedings in which the ‘individual interests at stake’ . . . are both ‘particularly important’ and ‘more substantial than mere loss of money.’” *Id.* at 363 (citations and quotations omitted). *Cf. Foucha v. Louisiana*, 504 U.S. 71, 94 (1992) (Kennedy, J., dissenting) (it is “beyond question” that “in civil proceedings the Due Process Clause requires the State to prove both insanity and dangerousness by clear and convincing evidence.”); *Santosky v. Kramer*, 455 U.S. 745 (1982) (due process requires proof by clear and convincing evidence before termination of parental rights).

C. The Government Must Demonstrate That Detention Is Reasonably Related to Ensuring Availability for Removal and Preventing Danger, Given Detention’s Length and the Foreseeability of Removal.

In addition to explaining why due process requires the government to bear the burden of proof at in-person adversarial hearings, the Supreme Court and this Court have also discussed the factors relevant at such a hearing to determine whether detention is justified. Under the analysis in *Zadvydas* and *Tijani*, the government must prove that its interest in ensuring availability for removal proceedings, and its corollary interest in protecting the society from danger, are sufficient to justify detention in light of its length and the likelihood of removal occurring in the reasonably foreseeable future. *Cf. United States v. Salerno*, 481 U.S. 739, 747 n.4 (1984) (suggesting that if pretrial detention is excessively prolonged it would violate Due Process).

In the post-final-order context of *Zadvydas*, the Supreme Court focused on both the length of detention and the foreseeability of removal, reasoning that when “removal seems a remote possibility at best,” the government’s interest in preventing flight and thus ensuring availability for removal is “weak or nonexistent,” and that its corollary interest in preventing danger could not alone justify prolonged and indefinite immigration detention. 533 U.S. at 690. Removal was not reasonably

foreseeable for the petitioners in *Zadvydas*, who had already been detained for prolonged periods, because the government was unlikely to obtain travel documents for them.¹⁰

In the pre-final-order context considered by this Court in *Tijani*, detention had already become prolonged because there, as in the instant case, the immigration process had not been “expeditious.” 430 F.3d at 1242. Further, removal was not likely to occur in the reasonably foreseeable future: the non-citizen in that case had petitioned for judicial review and this Court estimated that the “foreseeable process in this court . . . is a year or more.” *Id.* In such circumstances, this Court held that the detainee must be released unless the government proves that its interests in preventing flight and danger justify continued detention. *See id.*

Applying the logic of *Tijani* and *Zadvydas* here, prolonged pre-final-order detention is not permitted by due process unless the government provides procedures where it bears the burden of demonstrating that its interests in preventing flight and danger are sufficient to justify detention in light of its length and the imminence of removal.

¹⁰ The Supreme Court in *Demore* also focused on length of detention in upholding the constitutionality of a “brief” period of pre-final-order mandatory detention. *Demore*, 538 U.S. at 513; *see also id.* at 533 (Kennedy, J., concurring) (if detention were to become prolonged, due process calculus would change).

These procedures are required irrespective of the fact that pre-final-order detention will at some point come to an end. The mere fact that detention will end at the conclusion of removal proceedings does not mean that the detainee's removal is significantly likely to occur in the reasonably foreseeable future. Indeed, in *Nadarajah*, this Court rejected the government's claim that detention was not indefinite (and removal foreseeable) because the petitioner's case would one day be decided. 443 F.3d at 1081; *see also Ly*, 351 F.3d at 272 ("appeals and petitions for relief are to be expected as a natural part of the process. An alien . . . cannot be [indefinitely] detained merely because he seeks to explore avenues of relief that the law makes available to him."). Moreover, as the Sixth Circuit has clarified, "although an alien may be responsible for seeking relief, he is not responsible for the amount of time that such determinations may take. . . . The entire process, not merely the original deportation hearing, is subject to the constitutional requirement of reasonability." *Id.*; *see also Welch v. Ashcroft*, 293 F.3d 213, 227 (4th Cir. 2002) ("[t]he *Zadvydas* Court stresses repeatedly that post-order detention may be 'indefinite, perhaps permanent.' . . . [Petitioner's] detention pending a final removal order is similarly indefinite."); *id.* at 231-32 (Williams, J., concurring).

In many cases removal is not reasonably foreseeable for an additional reason: detainees who prevail in their removal cases will never be removed. Detainees who have obtained discretionary stays pending judicial review in this Court have necessarily shown at least a colorable challenge to their removal order, and accordingly may never be removed if they ultimately prevail. *See Maharaj v. Ashcroft*, 295 F.3d 963, 966 (9th Cir. 2002) (to obtain discretionary stay, non-citizen must show either “a probability of success on the merits and the possibility of irreparable harm, or . . . that serious legal questions are raised and the balance of hardships tips sharply in [their] favor.”);¹¹ *see also supra* pp. 10-11.¹²

Of course, in cases like Petitioner’s, where the government has

¹¹ Non-citizens obtain temporary, automatic stays under *De Leon v. INS*, 115 F.3d 643 (9th Cir. 1997) until this Court rules on their applications for discretionary stays.

¹² The government has argued that it should be allowed to detain non-citizens indefinitely pending completion of judicial review because non-citizens can agree to be deported and pursue judicial review after they are abroad. This argument is inconsistent with *Tijani*, where this Court imposed constitutionally-driven limits on detention even though the detainee could have agreed to be deported to pursue his claim from abroad. In addition, non-citizens forced to pursue their claims from abroad may suffer the irreparable harm they sought to avoid through obtaining a stay from this Court, if, for example, they face torture or persecution abroad, or are not allowed to return to the United States in the event they ultimately prevail in their removal case. *Cf. Oyedeji v. Ashcroft*, 332 F. Supp. 2d 747, 753 (M.D. Pa. 2004) (“[t]he price for securing a stay of removal should not be continuing incarceration. . . . [Petitioner] should not be effectively punished for pursuing applicable legal remedies.”).

imposed extremely lengthy detention, the deprivation of liberty may be so great that due process requires release irrespective of the foreseeability of removal. *See Nadarajah*, 443 F.3d at 1080 (“[a] detention of nearly five years . . . is plainly unreasonable under any measure.”); *Tijani*, 430 F.3d at 1249 (Tashima, J., concurring) (sheer length of 30-month detention renders it unreasonable). The Supreme Court has clarified that, “for detention to remain reasonable, as the period of prior postremoval confinement grows, what counts as the ‘reasonably foreseeable future’ conversely would have to shrink.” *Zadvydas*, 533 U.S. at 701. Taken to its logical conclusion, if the period of confinement is extraordinarily lengthy, detention is unreasonable regardless of foreseeability of removal.

II. None of the General Immigration Detention Statutes Authorizes Prolonged and Indefinite Detention Absent Constitutionally Sufficient Procedures.

This Court may avoid reaching the constitutional questions raised by prolonged and indefinite detention pending removal proceedings by applying normal canons of statutory interpretation. In *Nadarajah*, this Court held that the general detention statutes do not authorize prolonged and indefinite detention absent a clear statement to the contrary. 443 F.3d at 1076-77. Unlike detention statutes governing national security cases, the general detention statutes contain no such clear statement. *Id.* at 1078-79.

Nadarajah held that the general detention statutes therefore authorize detention only for a “brief and reasonable” period of time necessary to effectuate removal, presumptively six months. *Id.* at 1079. After detaining a non-citizen for this period of time, the government must release the non-citizen unless it provides constitutionally sufficient procedures to determine whether continued detention is justified. *See Tijani*, 430 F.3d at 1242.

A. Congress May Not Authorize Prolonged and Indefinite Detention Absent a Clear Statement.

The Supreme Court and this Court’s precedent firmly establish that Congress may not authorize prolonged and indefinite detention under the general detention statutes absent a clear statement to that effect. *See Zadvydas*, 533 U.S. at 699; *Nadarajah*, 443 F.3d at 1076; *Tijani*, 430 F.3d at 1242. In the absence of a clear statement, the Court must read an immigration detention statute as authorizing detention for only a reasonable period of time.

The clear statement rule derives from two rationales. First, as explained above, statutes authorizing prolonged and indefinite immigration detention raise serious constitutional problems, and should therefore be read to avoid that result, given that it is the duty of every court to adopt any “fairly possible” construction of a statute that allows it to avoid resolving a serious constitutional issue. *See Zadvydas*, 533 U.S. at 689. Second,

Congress has shown that it knows how to clearly authorize prolonged detention by passing statutes that explicitly authorize prolonged immigration detention in the national security context. *See Nadarajah*, 443 F.3d at 1078-79 (citing 8 U.S.C. §§ 1226a, 1537). For this reason, statutes that are not equally explicit must be read to authorize detention for only a reasonable period of time.

The Supreme Court first articulated a clear statement rule for prolonged and indefinite detention in *Zadvydas*. The government claimed that 8 U.S.C. § 1231(a)(6) authorized such detention because Section 1231(a)(6) authorizes the detention of aliens “beyond” the 90-day period after entry of a final removal order. The Supreme Court rejected that interpretation of the statute, clarifying that “if Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms.” *Zadvydas*, 533 U.S. at 697. The Court read a reasonable time limitation into the statute—six months—and construed the statute to authorize detention beyond that period only where there was a “significant likelihood” that detention would end in “the reasonably foreseeable future.” *Id.* at 701.¹³

¹³In *Clark v. Martinez*, the Supreme Court re-affirmed *Zadvydas*’s clear statement rule when it rejected the government’s argument that another statute, 8 U.S.C. § 1182(d)(5)(A), authorized indefinite detention of inadmissible non-citizens even if Section 1231 could not be construed as

This Court has applied *Zadvydas*'s clear statement rule in two cases involving the general detention statutes. In *Nadarajah*, the Ninth Circuit considered whether the general immigration detention statutes authorized the detention of a non-citizen for four-and-a-half years pending completion of removal proceedings. Relying upon the clear statement rule, this Court held that the general immigration detention statutes are insufficiently clear to authorize prolonged and indefinite detention. *See Nadarajah*, 443 F.3d at 1079. It therefore held that the general immigration detention statutes should be read to authorize detention for only a "brief and reasonable" period of time, presumptively six months. *Id.*

Prior to its more detailed treatment of the issue in *Nadarajah*, this Court considered the validity of prolonged immigration detention in *Tijani*. Recognizing the constitutional problems posed by prolonged and indefinite detention, this Court construed Section 1226, the general detention statute at issue, to apply only to "expeditious" removal proceedings, and ordered that the petitioner be released unless the government proved at a hearing before an immigration judge that he presented a sufficient flight risk or danger to

providing this authority. 543 U.S. at 385 (per Scalia, J.) ("we find nothing in this text that affirmatively authorizes detention, much less indefinite detention."). The Court relied on the existence of national security statutes that explicitly authorize prolonged detention to conclude that the general statutes governing detention of inadmissible aliens do not authorize indefinite detention. *Id.* at 379 n.4, 386 n.8.

the community to justify his detention. *Id.* at 1242.

In short, *Tijani*, *Nadarajah*, and *Zadvydas* considered all three of the general detention statutes, and found that each of the statutes fails to contain the clear statement necessary to authorize the prolonged and indefinite detention of non-citizens whose removal is not likely to occur in the reasonably foreseeable future.

B. None of the General Detention Statutes Should Be Read to Authorize the Prolonged and Indefinite Detention of Non-Citizens Who Have Been Detained for More than Six Months, Absent a Constitutionally Adequate Procedure to Assure that Such Detention Is Justified.

In *Nadarajah*, this Court found that the time limit for the brief and reasonable detention authorized by the general detention statutes is presumptively six months. *See Nadarajah*, 443 F.3d at 1079-80. *Nadarajah* tracks similar language in *Zadvydas*. There, when considering detention after the completion of removal proceedings, the Supreme Court observed that “Congress previously doubted the constitutionality of detention for more than six months.” *Zadvydas*, 533 U.S. at 701.

As *Nadarajah* recognized, the six-month presumption is grounded in the structure of the detention statutes. Shortly after the Supreme Court decided *Zadvydas*, Congress passed the Patriot Act, which authorized immigration detention for more than six months in certain specified cases

involving national security, and provided greater procedural protections in such cases. *See* 8 U.S.C. § 1226a. That Congress specifically legislated detention for longer than six months in a narrow set of cases implicating national security strongly suggests that the general immigration detention statutes do not authorize detention beyond six months for routine immigration cases governed by the general detention statutes. *See Nadarajah*, 443 F.3d at 1078-80.

Nadarajah further supported its holding that detention pending completion of removal proceedings was presumptively reasonable for only six months by relying on the Supreme Court’s decision in *Demore*, decided two years after the enactment of the Patriot Act. *See id.* at 1080-81. The Supreme Court upheld detention without hearings for periods averaging up to five months, while suggesting that detention for significantly longer time periods would not be so authorized. *Demore*, 538 U.S. at 528 (distinguishing *Zadvydas* because, *inter alia*, “the detention here is of a much shorter duration.”).

Accordingly, under this Court’s precedent, the general detention statutes do not authorize detention beyond a presumptively reasonable six-month period. To avoid the constitutional concerns explained in *Zadvydas*, *Tijani*, and *Nadarajah*, this Court should construe the general detention

statutes to require that, after six months, the government should either release a detainee or hold a hearing before an immigration judge where the government bears the burden of justifying continued detention, in light of the length of detention and the foreseeability of removal. *See Tijani*, 430 F.3d at 1242.

C. If a Detainee Files a Habeas Corpus Petition to Challenge His Detention, the District Court or This Court May Order Release In Lieu of an Immigration Court Hearing If the Facts Are Sufficiently Developed in the Record.

Irrespective of the six-month limit and the necessary procedures, a non-citizen detainee may always challenge his detention by filing a habeas corpus petition under 28 U.S.C. § 2241. *See generally INS v. St. Cyr*, 533 U.S. 289 (2001). In such cases (as in the instant case), where the record on habeas contains evidence regarding length of detention, foreseeability of removal, danger, and flight risk, an immigration court hearing may be unnecessary and this Court or a district court may simply order the detainee's release. *See Nadarajah*, 443 F.3d at 1080; *see also Martinez v. Gonzales*, 2007 WL 2402737 (C.D. Cal. Aug. 17, 2007) at *7 n.8 (*Nadarajah* authorizes release where hearing would serve “no useful purpose”).

However, the availability of habeas corpus does not render sufficient the current paper review procedures. The government bears an independent

obligation to ensure that prolonged detention remains justified, consistently with due process, irrespective of whether a detainee files a habeas petition or requests a hearing. *See supra* Section I.B. The habeas process is not sufficient to satisfy this obligation, particularly because the process requires detainees to affirmatively file habeas petitions. *See, e.g., Doe v. Gallinot*, 657 F.2d 1017, 1022 (9th Cir. 1982) (“conditioning a probable cause hearing on the request of the individual reverses the usual due process analysis in cases where potential deprivation is severe and the risk of error is great.”); *see also Hallstrom v. Garden City*, 991 F.2d 1473 (9th Cir. 1993); *Hayes v. Faulkner County*, 388 F.3d 669 (8th Cir. 2004).

CONCLUSION

For the foregoing reasons, Amici respectfully urge this Court to reverse the decision of the district court and remand with instructions that Petitioner should be released, or in the alternative, granted a hearing before an immigration judge where the government bears the burden of proving that

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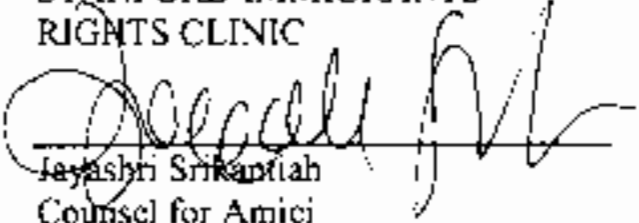
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continued detention is justified in light of the length of detention and the likelihood of removal in the reasonably foreseeable future.

Respectfully submitted,

Date: October 18, 2007

STANFORD IMMIGRANTS'
RIGHTS CLINIC

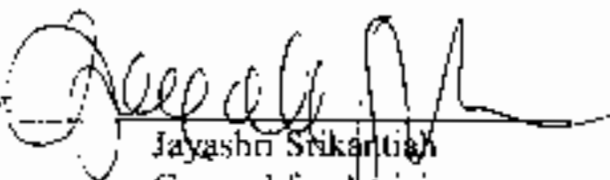


Jayashri Srikanth
Counsel for Amici

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a Times New Roman typeface of 14 points and contains 6,977 words.

DATED this 18th day of October, 2007.

By: 
Jayashri Srikantiah
Counsel for Amici

APPENDIX

ENTERED
CLERK, U.S. DISTRICT COURT
JUL 26 2007
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

FILED - WESTERN DIVISION
CLERK, U.S. DISTRICT COURT
JUL 24 2007
CENTRAL DISTRICT OF CALIFORNIA
BY

Priority
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CROSBY WILFREDO ORANTES-
HERNANDEZ, et al.,

Plaintiffs,

vs.

ALBERTO R. GONZALES, Attorney
General of the United States, et al.,

Defendants.

CASE NO. CV 82-01107 MMM (VBKx)

AMENDED ORDER GRANTING IN
PART AND DENYING IN PART
DEFENDANTS' MOTION TO DISSOLVE
THE ORANTES INJUNCTION

I. PROCEDURAL BACKGROUND

Plaintiffs filed this action in 1982, challenging practices and procedures allegedly employed by the Immigration and Naturalization Service ("INS") to detain, process and remove Salvadoran nationals who had entered the United States. Plaintiffs sued on their own behalf and on behalf of a class of "all citizens and nationals of El Salvador eligible to apply for political asylum . . . who . . . have been or will be taken into custody . . . by agents of the [Department of Homeland Security]." *Orantes-Hernandez v. Meese*, 685 F.Supp. 1488, 1491 (C.D. Cal. 1988) ("*Orantes II*"), *aff'd.*, 919 F.2d 549 (9th Cir. 1990). Judge David Kenyon certified the *Orantes* class on

844

1 April 30, 1982.¹

2 On April 29, 1988, Judge Kenyon entered a permanent injunction mandating that the INS
3 use specific procedures when detaining, processing and removing Salvadoran immigrants. See
4 *Orantes II*, 685 F.Supp. at 1511-13. On July 2, 1991, he modified the injunction to add four
5 conditions that applied solely to the Port Isabel Service Processing Center in Port Isabel, Texas
6 ("Orantes injunction"). On September 28, 2004, the court entered a stipulated order clarifying
7 the terms of the injunction to eliminate the possibility that the Office of Refugee Settlement could
8 be held to be in violation of its terms.²

9 On November 28, 2005, the government filed a motion to dissolve the injunction. It
10 asserted (1) that there had been a significant change in the factual circumstances that led to
11 issuance of the injunction - i.e., the end of the civil war and attendant human rights abuses in El
12 Salvador, and the adoption of a range of procedures by U.S. immigration authorities that insure
13 that aliens are advised of their right to apply for asylum and are not coerced into waiving that
14 right; and (2) that there had been an intervening change in law - i.e., the enactment of the Illegal
15 Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), which provides for
16 expedited removal of inadmissible aliens. As respects the intervening change in law, the
17 government argued that the injunction conflicted with IIRIRA and the regulations governing
18 expedited removal, and also that the injunction made it burdensome for immigration authorities
19 to place Salvadorans in expedited removal. The court bifurcated this issue, and heard the
20 government's argument regarding the purported facial conflict in September 2006. Following the
21 hearing, it issued an order modifying paragraphs two and eleven of the injunction. The parties
22

23 ¹The original class certified by Judge Kenyon encompassed not only Salvadorans who had
24 been or would be in custody and were eligible to apply for political asylum, but also Salvadorans
25 who, subsequent to June 2, 1980, requested, or would in the future request, political asylum, and
26 whose claims had not yet been presented or adjudicated. See *Orantes-Hernandez v. Smith*, 541
27 F.Supp. 351, 355 (C.D. Cal. 1982) ("*Orantes I*"). Plaintiffs later abandoned claims on behalf
28 of the second group of Salvadorans. *Orantes II*, 685 F.Supp. at 1491.

²The Office of Refugee Settlement is an agency responsible for the care of unaccompanied
alien children who are in federal custody due to their immigration status.

1 argued the balance of the government's reasons for seeking dissolution of the injunction on
2 December 20, 2006. This order addresses those arguments.

3 4 II. DISCUSSION

5 A. Legal Standard Governing Dissolution Of An Injunction

6 Until 1992, courts asked to dissolve existing injunctions applied a standard first articulated
7 in *United States v. Swift & Co.*, 286 U.S. 106 (1932). *Swift* was the culmination of a government
8 antitrust action against the meat-packing industry. The government alleged that defendants had
9 suppressed competition in the purchase of livestock and sale of dressed meats, and that, having
10 eliminated competition in meat products, they had also suppressed competition in the sale of other
11 products, such as fish, vegetables, fruit and groceries. *Id.* at 110. In 1920, defendants agreed
12 to a consent decree that banned them, *inter alia*, from owning retail meat markets or stockyards,
13 and from manufacturing, selling, or transporting 114 varieties of foodstuffs. *Id.* at 111. Ten
14 years later, five meat packers petitioned for modification of the decree, arguing that conditions
15 in the meat-packing and grocery industries had changed. *Id.* at 113. The lower court modified
16 the injunction to permit the meat packers to sell groceries and other commodities at wholesale,
17 but retained the ban on retail sales of such products. *Id.* at 113-14.

18 An appeal followed. The Supreme Court framed "the question [that had to be resolved as]
19 whether [a modification could] be made without prejudice to the interests of the classes whom
20 th[e] particular restraint was intended to protect." *Id.* at 117-18. It answered this inquiry in the
21 negative, noting that industry changes had reduced the likelihood that defendants would once again
22 monopolize the sale of meats, but that the changes had not substantially reduced the possibility
23 that there would be antitrust violations in the sale of other food products if the injunction were
24 dissolved. *Id.* at 117-18. The Court's conclusion was reinforced by evidence that there had been
25 sporadic instances of unfair practices by the meat packers even after the monopoly was broken
26 and the consent decree entered. *Id.* at 118. It cautioned: "Nothing less than a showing of
27 grievous wrong evoked by new and unforeseen conditions should lead us to change what was
28 decreed after years of litigation with the consent of all concerned." *Id.* at 119.

1 The "grievous wrong" language in *Swift* worked an "apparent hardening of the usual
2 standard for modifying decrees of injunctive relief." *New York States Ass'n for Retarded Children*
3 *Inc. v. Carey*, 706 F.2d 956, 968 (2d Cir. 1983). As a result, courts often held that modification
4 or dissolution of an injunction was not warranted unless the party requesting relief could show a
5 "grievous wrong" - a nearly insurmountable standard that "ward[ed] off virtually all efforts to
6 modify consent decrees." *Rufu v. Inmates of Suffolk County Jail*, 502 U.S. 367, 379 (1992); see
7 also *United States v. City of Chicago*, 663 F.2d 1354, 1359 (7th Cir. 1981) (noting that
8 "numerous cases have mechanically employed the *Swift* 'grievous wrong' test, thereby suggesting
9 that hardship to the defendant is the sole touchstone for modification of an injunction").

10 Under the "grievous wrong" standard, a party seeking modification or dissolution of an
11 injunction had to meet a heavy burden of proof that often exceeded the burden imposed on parties
12 seeking an injunction in the first instance. See *Swift*, 286 U.S. at 119 ("We are not framing a
13 decree. We are asking ourselves whether anything has happened that will justify us now in
14 changing a decree. . . . The inquiry . . . is whether the changes are so important that dangers,
15 once substantial, have become attenuated to a shadow"); *Ruiz v. Lynaugh*, 811 F.2d 856, 860-61
16 (5th Cir. 1987) (noting that "modification is only cautiously to be granted; that the dangers which
17 the decree was meant to foreclose must almost have disappeared; that hardship and oppression,
18 extreme and unexpected, are significant; and that the movant's task is to provide close to an
19 unanswerable case").

20 Subsequent Supreme Court cases, however, emphasized that courts had "misconceived the
21 thrust" of *Swift* by focusing rigidly on the "grievous wrong" language. See *Board of Ed. of*
22 *Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 246-48 (1991) (rejecting the rigid use
23 of *Swift*'s "grievous wrong" language as the basis for denying a motion to dissolve a
24 desegregation decree); *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 248 (1968)
25 (noting that the district court had misconceived the "thrust of this Court's decision in *Swift*," and
26 stating the "*Swift* teaches that a decree may be changed upon an appropriate showing, and it holds
27 that it may not be changed in the interests of the defendants if the purposes of the litigation as
28 incorporated in the decree (the elimination of monopoly and restrictive practices) have not been

1 fully achieved").

2 In *United Shoe Machinery*, the government sought modification of an injunction, claiming
3 that additional relief was needed to fulfill the "purposes of the litigation." The district court
4 denied the request, reading *Swift* as limiting modification to cases involving "(1) a clear showing
5 of (2) grievous wrong (3) evoked by new and unforeseen conditions." *United States v. United*
6 *Shoe Machinery Corp.*, 226 F.Supp. 328, 330 (D. Mass. 1967). The Supreme Court held that
7 this interpretation was too rigid, and noted that *Swift*'s reference to a "grievous wrong" had to
8 be read in context. Because the original injunction had resulted in little progress toward the
9 accomplishment of the decree's goals, the Court concluded that modification would promote, not
10 subvert, the "purposes of the litigation." *United Shoe Machinery*, 391 U.S. at 248-49.

11 In the 1980's, courts increasingly adopted a more flexible approach to requests for
12 modification or dissolution of injunctions, particularly in institutional reform cases. See *Carey*,
13 706 F.2d at 970 (stating that the "grievous wrong" language of *Swift* did "not provide the proper
14 standard to apply to injunctions entered in school desegregation cases [because s]uch decrees,
15 unlike the one in *Swift*, are not intended to operate in perpetuity"); *City of Chicago*, 663 F.2d at
16 1360 ("The standard for modification of injunctions that emerges from *Swift* and *United Shoe* is
17 . . . not based solely on hardship to the enjoined party. The standard also incorporates
18 consideration of whether there remains any need to continue the injunction, that is, whether 'the
19 purposes of the litigation as incorporated in the decree' have been achieved"); *Newman v.*
20 *Graddick*, 740 F.2d 1513, 1520-21 (11th Cir. 1984) (explaining that *Swift* involved "rights fully
21 accrued upon facts nearly impervious to change," and thus that the Court required a showing of
22 a "grievous wrong evoked by new and unforeseen conditions," and stating that "[w]here . . . a
23 consent decree involves the supervision of changing conduct or conditions . . . , modification may
24 be more freely granted"); *Nelson v. Collins*, 659 F.2d 420, 424 (4th Cir. 1981) (noting that the
25 Court in *Swift* distinguished between situations in which a "continuing decree [was] directed to
26 events to come . . . (involving) the supervision of changing conduct or conditions" and one in
27 which an "injunction [was] granted to protect rights 'fully accrued upon facts so nearly permanent
28 as to be substantially impervious to change,'" and observing that "[i]n the first case, modification

1 under appropriate circumstances is clearly permissible [while] in the second [the "grievous
2 wrong"] standard . . . applied"); see also *Philadelphia Welfare Rights Organization v. Shapp*, 602
3 F.2d 1114, 1120-21 (3d Cir. 1979) (noting that "[t]he modifications [sought did] not leave class
4 members open to the evils to which the lawsuit was first addressed"); *Benjamin v. Malcolm*, 564
5 F.Supp. 668, 686 (S.D.N.Y. 1983) (stating that "[t]he critical question on a motion to modify a
6 decree is whether the proposed modification is 'in derogation of the primary objective of the
7 decree,'" quoting *New York Association for Retarded Children*, 706 F.2d at 969 (Friendly, J.)).

8 In *Rufo*, the Court expressly approved this movement toward flexibility, noting that the
9 "grievous wrong" language in *Swift* did not represent "a hardening of the traditional flexible
10 standard for modification of [injunctions]." *Rufo*, 502 U.S. at 379. As evidence of this, the
11 Court cited the statement in *Swift* that entering into a consent decree "was not an abandonment
12 of the right to exact revision in the future, if revision should become necessary in adaptation to
13 events to be." *Id.* (quoting *Swift*, 286 U.S. at 114-15). As a result, the Court rejected the
14 argument that Rule 60(b)(5) - which permits courts to modify or dissolve injunctions when "it is
15 no longer equitable that the judgment should have prospective application" - codified *Swift*'s
16 grievous wrong standard. Rather, the Court stated, Rule 60(b)(5) embodies "a less stringent,
17 more flexible standard." *Id.* at 380.

18 Under *Rufo*, "a party seeking modification of an [injunction] may meet its initial burden
19 by showing a significant change either in factual conditions or in law." *Id.* at 384; see also *Sharp*
20 *v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000) ("A party seeking modification or dissolution
21 of an injunction bears the burden of establishing that a significant change in facts or law warrants
22 revision or dissolution of the injunction"). If the moving party meets this burden, "the court
23 should consider whether the proposed modification is suitably tailored to the changed
24 circumstance." *Rufo*, 502 U.S. at 383. Modification may be warranted "when changed factual
25 conditions ma[k]e compliance . . . substantially more onerous, . . . when an [injunction] proves
26 to be unworkable because of unforeseen obstacles, . . . or when enforcement of the decree without
27 modification would be detrimental to the public interest. *Id.* at 384.

28 Applying this "flexible" Rule 60(b)(5) standard, the Ninth Circuit has directed courts to

1 "take all the circumstances into account in determining whether to modify or vacate a prior
2 injunction or consent decree." *Bellevue Manor Associates v. United States*, 165 F.3d 1249, 1256
3 (9th Cir. 1999); but see *United States v. Asarco Inc.*, 430 F.3d 972, 982 (9th Cir. 2005) (noting
4 that *Bellevue* did not announce a "totality of the circumstances test" for modification under Rule
5 60(b)(5)). While the considerations identified in *Rufo* may be relevant or even determinative in
6 some cases, they do not define the universe of situations in which an injunction should be
7 modified or dissolved. See *Alexis Lichine & Cie v. Sacha A. Lichine Estate Selections, Ltd.*, 45
8 F.3d 582, 586 (1st Cir. 1995) ("In our view, Rule 60(b)(5) sets forth the umbrella concept of
9 'equitable' that both *Swift* and *Rufo* apply to particular, widely disparate fact situations," quoted
10 with approval in *Bellevue Manor*, 165 F.3d at 1256); *Building and Const. Trades Council of*
11 *Philadelphia and Vicinity, AFL-CIO v. N.L.R.B.*, 64 F.3d 880, 888 (3d Cir. 1995) ("It would be
12 a mistake to view either *Rufo* or *Swift* as encapsulating a universal formula for deciding when [a]
13 point has been reached [where modification or dissolution is appropriate]. Instead, each of those
14 cases represents a response to a particular set of circumstances. A court of equity cannot rely on
15 a simple formula but must evaluate a number of potentially competing considerations to determine
16 whether to modify or vacate an injunction entered by consent or otherwise").

17 In institutional reform litigation, courts must be particularly attuned to the "broader impact
18 of an sweeping public-litigation-type injunction in determining whether to modify or vacate prior
19 relief." *Bellevue Manor*, 165 F.3d at 1257. A sweeping injunction, which "reach[es] beyond the
20 parties involved . . . and impact[s] on the public's right to the sound and efficient operation of
21 its institutions" (*Rufo*, 502 U.S. at 381), remains equitable only so long as it effectively addresses
22 the problem it was designed to remedy. See *King-Seeley Thermos Co. v. Aladdin Indus., Inc.*,
23 417 F.2d 31, 35 (1969) (Friendly, J.) (a court's equitable powers to modify injunctions extends
24 to instances where "the decree is not properly adapted to accomplishing its purpose"). Where a
25 problem has been resolved or mooted by changed circumstances, then equity and the public's
26 interest in the "sound and efficient operation of its institutions" demands the injunction's
27 dissolution. The question in this case, therefore, is whether the *Orantes* injunction has outlived
28 its purpose and usefulness – in other words, whether evolving circumstances have resolved the

1 underlying problems, thereby rendering the injunction unnecessary. See *City of Chicago*, 663
2 F.2d at 1360 ("The standard for modification of injunctions that emerges from *Swift and United*
3 *Shoe* is . . . not based solely on hardship to the enjoined party. The standard also incorporates
4 consideration of whether there remains any need to continue the injunction, that is, whether 'the
5 purposes of the litigation as incorporated in the decree' have been achieved"); *United States v.*
6 *Swift & Co.*, 189 F.Supp. 885, 905 (N.D. Ill. 1960) ("[I]t is only change that reaches the
7 underlying reasons for the decree that is relevant. Conditions existing at the time of original entry
8 must be compared with conditions at the time of requested modification, and the significance of
9 the difference measured in the light of these original reasons"), *aff'd.*, 367 U.S. 909 (1961). To
10 answer that question, the court first considers the purpose of the *Orantes* injunction and the
11 injustice that it was designed to remedy.

12 B. The *Orantes* Injunction

13 Judge Kenyon entered a preliminary injunction in 1982, a permanent injunction in 1988,
14 and a modified permanent injunction in 1991. At the time, class members were coming to the
15 United States from a country that was embroiled in a twelve-year civil war that killed an estimated
16 75,000 people between 1980 and 1992,³ and gave rise to rampant human rights abuses and
17 political violence.⁴ By 1988, in a country with a population of approximately five million, some
18 45,000 innocent civilians had been murdered by soldiers, security forces, and death squads.
19 *Orantes II*, 685 F.Supp. at 1492. An additional 4,000 civilians had "disappeared." *Id.* Political
20 dissidents and prisoners were subjected to arbitrary detention, arrest, intimidation, torture, and
21 execution. *Id.* at 1492-93. Salvadoran civilians reported repeated bombings and ground attacks,
22 forced relocation, and harassment by the military. *Id.* at 1493. Judge Kenyon concluded that,
23 faced with these conditions, many Salvadorans made a decision "born of desperation" to enter the
24 United States. *Orantes I*, 541 F.Supp. at 358. He found, moreover, that class members would

26 ³Mot., Exh. F at 59 (U.S. Department of State, Background Note: El Salvador, Feb.
27 2005).

28 ⁴*Id.* at 60.

1 suffer "the most serious of deprivations" if they were deported to "a country overrun with civil
2 war, violence, and government-sanctioned terrorist organizations." *Id.* at 1504.

3 Given the civil war and human rights abuses in El Salvador, Judge Kenyon stated, many
4 Salvadorans who entered the United States had a "well-founded fear of persecution" and "good
5 faith claims to asylum." *Orantes II*, 685 F.Supp. at 1491. Despite this fact, he found, many
6 Salvadorans were misled or coerced into giving up their right to request asylum by INS officers
7 who "engaged in a pattern and practice of summarily removing Salvadorans from the country by
8 obtaining their signatures on . . . voluntary departure form[s] through intimidation, threats, and
9 misrepresentation." *Id.* at 1505. Once an individual consented to voluntary departure, he or she
10 was subject to removal from the country without a deportation hearing or an opportunity to
11 request asylum. *Id.* at 1494.

12 Judge Kenyon found that the INS' practices were the result of agents' misunderstanding
13 of Salvadorans' reasons for coming to the United States, and Salvadorans' reluctance to
14 communicate their traumatic experiences to INS officials. *Id.* at 1496-97. After hearing
15 extensive testimony, Judge Kenyon concluded that many INS agents felt Salvadorans entered the
16 U.S. "solely for economic gain" — an attitude that "reflect[ed] a lack of sensitivity . . . [born of]
17 ignorance on the part of INS agents [regarding] the complex motivations and situations of those
18 who ha[d] fled El Salvador." *Id.* at 1496. In addition, he found, Salvadorans who fled
19 persecution by soldiers and guerillas in El Salvador felt uncomfortable confiding in "a uniformed
20 officer of the United States . . . because [they were] aware that the United States support[ed] the
21 Salvadoran government, which tolerate[d] and participate[d] in [the] acts of terror." *Id.* at 1497.
22 Those Salvadorans who reached the United States often experienced psychological trauma or guilt
23 because they had abandoned their country and their families; this made them reluctant to
24 communicate their experiences to the INS agents who interviewed them. *Id.* Many also feared
25 that the information they revealed would endanger family and friends who remained in El
26 Salvador. *Id.* Judge Kenyon found that the INS knew of these problems and refused to
27 compensate for them. *Id.*

28 Instead, he concluded, INS officers routinely told class members that "if they appl[ied] for

1 asylum they [would] remain in detention for a long time" (*id.* at 1494-95); "that Salvadorans [did]
2 not get asylum" (*id.* at 1495); that the "information on the [asylum] application [would] be sent
3 to El Salvador" (*id.*; see also *Orantes I*, 541 F.Supp. at 360); that they would be transferred to
4 remote locations (*Orantes II*, 685 F. Supp. at 1495); and that women would be placed in a cell
5 with men, where they might be sexually molested (*Orantes I*, 541 F.Supp. at 360).

6 Judge Kenyon found that such threats and misrepresentations were typically combined with
7 deliberate withholding of information about the asylum process. He concluded that the INS
8 routinely distributed legal services lists to Salvadorans that contained inaccurate, incomplete, or
9 non-working telephone numbers for legal services agencies (*Orantes II*, 685 F.Supp. at 1497);
10 that the agency failed to provide legal services lists to Salvadorans altogether (*id.* at 1498); and
11 that it refused to advise Salvadorans of the availability of political asylum, even when they
12 requested the opportunity to apply for asylum or recounted experiences that suggested eligibility
13 for asylum (*id.*). He also found that Salvadorans were "frequently singled out for transfer to
14 distant facilities," where they were isolated from friends and relatives who could have assisted
15 them. *Id.* at 1500.

16 Judge Kenyon heard extensive evidence that led him to conclude that INS officials
17 regularly pressured Salvadorans to return to El Salvador (*id.* at 1501); severely limited
18 Salvadorans' visitation opportunities with attorneys and paralegals (*id.*); failed to ensure
19 Salvadorans' privacy during attorney-client interviews (*id.*); refused to provide legal materials,
20 legal forms, law libraries, and writing materials to Salvadorans (*id.* at 1501-02); restricted
21 Salvadorans' access to telephones (*id.* at 1502); and segregated Salvadorans in solitary
22 confinement without providing hearings (*id.*).

23 Judge Kenyon concluded that the INS' "practice and pattern" of mistreating, pressuring,
24 and intimidating Salvadorans into giving up their asylum claims was "widespread and pervasive"
25 (*id.* at 1505), and was "highly likely to result . . . in class members being deprived of their
26 right[] to a deportation hearing" (*id.* at 1496). This pattern and practice, he found, warranted
27 the entry of permanent injunctive relief. *Id.* at 1505. The injunction Judge Kenyon entered
28 required that the government give Salvadorans an advisal of rights, which came to be known as

1 the *Orantes* advisal, as well as a list of organizations that provided free legal services. It also
2 prohibited the INS from transferring unrepresented Salvadorans out of the district where they were
3 arrested for a period of seven days, so that they could more easily retain attorneys. In addition
4 to these measures, which were designed to ensure that Salvadorans received notice of their right
5 to apply for asylum and had the ability to pursue it effectively, the injunction prescribed certain
6 conditions of confinement for Salvadoran detainees, including hearings before they could be
7 placed in solitary confinement, and regular access to legal materials, telephones, and legal
8 professionals.⁵

9 Judge Kenyon based the advisal remedy on "three alternative and independent legal bases."
10 See *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 556 (9th Cir. 1990) ("*Orantes III*"). "One
11 [was] that notice [was] required as a matter of due process." *Id.* (citing *Orantes II*, 685 F.Supp.
12 at 1506-07, Conclusions of Law 24-25). The second "[was] that notice [was] required in order
13 to fully effectuate the intent of the Refugee Act." *Id.* (citing *Orantes II*, 685 F.Supp. at 1506,
14 Conclusions of Law 19-23). The third and final basis for the remedy was that "notice [was]
15 required . . . as a remedial measure to counteract the pattern of interference by the INS with the
16 plaintiff class members' ability to exercise their right[]" to apply for asylum. *Id.* (citing *Orantes*
17 *II*, 685 F.Supp. at 1507-08, Conclusions of Law 26-43). Judge Kenyon based the provisions of
18 the injunction governing detention center conditions and the transfer of Salvadoran detainees to
19 remote facilities on Salvadorans' rights to retain counsel at non-government expense and to access
20 the courts. *Orantes II*, 685 F.Supp. at 1510-11.

21 As respects the first basis for the advisal remedy, Judge Kenyon applied the familiar test
22 set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and found that Salvadorans had a due
23 process right to notice of their right to apply for asylum. Under *Mathews*, a court must balance
24 plaintiff's private interest and the risk of an erroneous deprivation of that interest due to
25 inadequate government procedures against the Government's interest, including the burden that
26 additional procedures will entail. *Id.* at 335. Judge Kenyon observed that one could not
27

28 ⁵See *Orantes Injunction*.

1 "overstate the dire consequences" that would attend an erroneous deprivation of Salvadorans'
2 right to apply for asylum. *Orantes II*, 685 F.Supp. at 1504. Citing conditions in El Salvador,
3 he observed that immigrants of other nationalities might not have the same due process right to
4 notification of their right to apply for asylum, as "[t]he calculation of the *Matthews* balancing test
5 could be quite different for other nationalities." *Id.* at 1508.

6 Judge Kenyon's second basis for the advisory remedy – that notification was necessary to
7 effectuate the intent of the Refugee Act – was similarly influenced by the horrific conditions
8 Salvadorans faced if erroneously returned to a country in the midst of a civil war. After noting
9 that the Refugee Act mandates "[n]otification of the right to apply for asylum and . . . relief from
10 deportation," Judge Kenyon distinguished the Eleventh Circuit's *en banc* decision in *Jean v.*
11 *Nelson*, 727 F.2d 957 (11th Cir. 1984). The *Jean* court had held that Congress did not include
12 a notice requirement in the Refugee Act, and that none could be implied because Congress
13 provides many rights without mandating that the government publicize their availability. Judge
14 Kenyon observed that "few of th[e] other [rights to which the *Jean* court made reference had]
15 arise[n] in circumstances so perilous as those in which class members [found] themselves," and
16 continued: "The situations of those who have fled El Salvador . . . are not typical of the various
17 opportunities which Congress has provided to others within the United States." *Orantes II*, 685
18 F.Supp. at 1506.

19 Judge Kenyon's third basis for the advisory remedy was his finding that the INS engaged
20 in a "practice and pattern of summarily removing Salvadorans from this country by obtaining their
21 signatures on voluntary departure forms through intimidation, threats, and misrepresentations"
22 about the availability of asylum. *Id.* at 1505. This "persistent pattern of misconduct" justified
23 mandating that the government provide an advisory "to counteract the pattern of interference by
24 the INS with the plaintiff class members' ability to exercise their rights." *Orantes III*, 919 F.2d
25 at 556, 558. The Ninth Circuit noted that such a remedy would have been inappropriate had there
26 been a showing of "relatively few instances of violations by [defendants], without any showing
27 of a deliberate policy on behalf of the named defendants." *Id.* at 557-58. It concluded, however,
28 that Judge Kenyon did not clearly err when he found "a pattern of interference with the class

1 members' right to apply for asylum." *Id.* at 561.⁶

2 The Ninth Circuit likewise affirmed the provisions of the injunction precluding transfer of
3 Salvadorans to remote detention facilities for seven days, and requiring detention centers to
4 facilitate Salvadorans' access to attorneys and/or legal materials, on the grounds that Judge
5 Kenyon did not err in finding "a pattern of [INS] practices which severely impeded class members
6 from communicating with counsel." *Id.* at 566-67.

7 C. Relevant Circumstances Today

8 At the hearing, the parties addressed whether, and to what extent, the court should consider
9 changed conditions in El Salvador and changed conditions in the United States in determining
10 whether to dissolve Judge Kenyon's injunction. Plaintiffs contend that the Ninth Circuit's opinion
11 in *Orantes III* renders it unnecessary - indeed inappropriate - to consider changed conditions in
12 El Salvador. The government counters that changed conditions in El Salvador constitute an
13 independent ground that alone justifies dissolution of the *Orantes* injunction. The court addresses
14 these contentions below, as well as the relevance of changed conditions in the United States.

15 In affirming Judge Kenyon's decision, the *Orantes III* court noted, as a threshold matter,
16 that it was undisputed that "all aliens possess . . . a right [to apply for asylum] under the
17 [Refugee] Act." *Id.* at 553. Because Judge Kenyon's injunction was designed to ensure that
18 plaintiff class members could exercise this right, the court stated, the dispute concerned "not
19 rights but remedies." *Id.* at 556. Although the Ninth Circuit identified the three bases on which
20 Judge Kenyon relied in mandating the advisal remedy (see *id.*), it concluded, as noted, there was
21 no need to reach the constitutional or statutory grounds he had cited. Rather, the court held that
22 imposition of an advisal remedy was justified by Judge Kenyon's finding that the INS had engaged
23 in a pattern of interfering with class members' ability to exercise their right to apply for asylum.

24
25 ⁶As a result, the Ninth Circuit did not need to reach the constitutional and statutory grounds
26 on which Judge Kenyon had relied in ordering that the government provide the *Orantes* advisal
27 to Salvadorans. See *Orantes III*, 919 F.2d at 557. Rather, it affirmed Judge Kenyon's entry of
28 the injunction solely on the basis that it was an appropriate remedy to counteract the INS' pattern
and practice of intimidating and threatening Salvadorans, and misrepresenting the availability of
asylum to them.

1 *Id.* at 556. Specifically, the court held (1) that there was ample evidence class members had
2 "experienced direct interference with their ability to apply for asylum" (*id.* at 563); and (2) that
3 the government had conceded that a pattern of coercion and interference with class members' right
4 to apply for asylum would violate the Refugee Act (*id.* at 557). The *Orantes III* court
5 acknowledged that Judge Kenyon had "made extensive findings of fact regarding the political
6 conditions in El Salvador" as the basis for concluding that class members had a due process right
7 to notice that they could apply for asylum. *Id.* at 557 n. 13. Because it concluded that it need
8 not reach the constitutional justification for the injunction, however, the Ninth Circuit declined
9 to address the government's argument that conditions in El Salvador were irrelevant in evaluating
10 class members' right to receive notice. *Id.*

11 Plaintiffs argue that *Orantes III* establishes "that the injunction stands based on the pattern
12 of conduct of the Immigration Service towards Salvadorans."⁵ By affirming the injunction
13 without reaching the government's objection to Judge Kenyon's consideration of conditions in El
14 Salvador, plaintiffs assert that the Ninth Circuit held – "as a matter of *res judicata* and finality"
15 – that country conditions were irrelevant.⁶ Consequently, they maintain, in considering the
16 government's motion to dissolve the injunction, the court must limit its inquiry solely to the
17 immigration practices and detention conditions on which the *Orantes III* court relied in affirming
18 Judge Kenyon's injunction. Neither the "law of the case" doctrine nor *res judicata* mandates use
19 of this approach.

20 To promote finality, the "law of the case" doctrine holds that "the decision of an appellate
21 court on a legal issue must be followed in all subsequent proceedings in the same case." *United*
22 *States v. Cote*, 51 F.3d 178, 1871 (9th Cir. 1995) (quoting *Herrington v. County of Sonoma*, 12
23 F.3d 901, 904 (9th Cir. 1993)). The doctrine acts as a bar only to issues that were "actually
24 considered and decided by the first court," however. *Id.* (citing *Moore v. Jas. H. Matthews &*
25 *Co.*, 682 F.2d 830, 834-35 (9th Cir. 1982)). Thus, while the doctrine "applies to a court's

27 ⁵Reporter's Transcript ("RT"), Dec. 20, 2006, at 7:5-9.

28 ⁶*Id.*

1 explicit decisions as well as those issues decided by necessary implication, . . . it clearly does not
2 extend to issues an appellate court did not address." *Id.* (quoting *Eichman v. Fotomat Corp.*, 880
3 F.2d 149, 157 (9th Cir. 1989); *Luckey v. Miller*, 929 F.2d 618, 621 (11th Cir. 1991)). The
4 doctrine is closely related to res judicata, or claim preclusion, which "ensures the finality of
5 decisions" by "har[ring] further claims by parties or their privies based on" a cause of action
6 previously decided by a final judgment on the merits. *Brown v. Felson*, 442 U.S. 127, 131
7 (1979).

8 The two concepts differ primarily in that res judicata is typically applied to bar relitigation
9 of a claim previously litigated in *another* suit, while the "law of the case" doctrine ensures the
10 finality of legal issues decided in an earlier proceeding in the *same* suit. See *Arizona v.*
11 *California*, 460 U.S. 605, 619 (1983) (explaining that res judicata and law of the case are related
12 concepts, but noting that "the technical rules of preclusion are not strictly applicable" to law of
13 the case); *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 148 (2d Cir. 1999) ("The doctrine of
14 law of the case is similar to the issue preclusion prong of *res judicata* in that it limits relitigation
15 of an issue once it has been decided. However, law of the case is concerned with the extent to
16 which law applied in a decision at one stage of litigation becomes the governing principle in later
17 stages of the same litigation. *Res judicata* does not speak to direct attacks in the same case, but
18 rather has application in subsequent actions"). Because plaintiffs' argument is directed to an issue
19 that they contend was implicitly decided and rejected by the Ninth Circuit in an earlier proceeding
20 in this action, the court analyzes the contention under the "law of the case" doctrine.

21 In *Orantes III*, the Ninth Circuit noted that Judge Kenyon had evaluated evidence of
22 country conditions "in determining that the class members had a due process right to notice of the
23 right to apply for asylum." *Orantes III*, 919 F.2d at 557 n. 13. Because it affirmed the
24 injunction on an alternate ground and declined to reach the constitutional due process basis for
25 Judge Kenyon's decision, the court concluded that it "need not address the government's argument
26 that conditions in El Salvador are irrelevant." *Id.* This express refusal to address the
27 government's argument belies plaintiffs' assertion that the appellate court necessarily, if
28 implicitly, decided that country conditions evidence was irrelevant. "An appellate court is not

1 presumed to have decided issues . . . that were not addressed in its opinion,” (*Rivera v. National*
2 *R.R. Passenger Corp.*, No. C 99-04003 SI, 2004 WL 603587, *5 (N.D. Cal. Mar. 22, 2004)),
3 much less issues it explicitly declined to decide. See also *id.* (“Essentially, plaintiff argues that
4 the Ninth Circuit implicitly decided in his favor defendants’ assertions regarding RLA preemption
5 and privilege simply because the arguments were made somewhere in the record before the
6 appellate court. This is not what the law of the case requires. . . . The law of the case doctrine
7 does not extend to issues the appellate court did not address. Accordingly, this Court is free to
8 address defendants’ arguments concerning RLA preemption and privilege”). Because the
9 government’s argument regarding the relevance of conditions in El Salvador was not addressed
10 in *Orantes III*, either explicitly or implicitly, the court cannot accept plaintiffs’ argument that
11 finality or the “law of the case” doctrine limits the court’s ability to consider the issue now.

12 Plaintiffs next argue that even if the court concludes that conditions in El Salvador are so
13 changed that the injunction is no longer warranted to redress the constitutional due process
14 violation Judge Kenyon found, it cannot grant the government’s dissolution motion unless it also
15 finds that the injunction is no longer required to address the pattern and practice of interference
16 with asylum rights on which the Ninth Circuit relied.⁴ This latter inquiry, plaintiffs assert, does
17 not implicate changed country conditions in any way. The court agrees that the Ninth Circuit’s
18 decision is relevant in assessing the weight to be given the various grounds on which Judge
19 Kenyon relied in entering the injunction; for this reason, the court has considered carefully
20 evidence regarding ICE’s practices at border patrol stations, at ports-of-entry, and at detention
21 centers. The fact that the Ninth Circuit elected to address only one of the three grounds on which
22 the injunction was entered does not mean, however, that the court may give *no* weight to changed
23 conditions in El Salvador.

24 Plaintiffs’ argument to the contrary confuses the legal basis on which the Ninth Circuit
25 affirmed the *Orantes* injunction with the equitable basis on which the injunction was entered in
26 the first place. Unlike the district court, the Ninth Circuit was not tasked with the responsibility

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28 ⁴RT, Dec. 20, 2006, at 36:5-9.

1 of determining whether the balance of equities favored issuance of an injunction. As framed by
2 the *Orantes III* court, the "key issue" on appeal was a narrow one: "whether the record
3 support[ed] the district court's decision to make . . . permanent [the preliminary *Orantes*
4 injunction]," which the government had not appealed. *Orantes III*, 919 F.2d at 561.

5 By contrast, the court today sits in Judge Kenyon's place, and does so as a court of equity.
6 Well-established equitable rules demand that the court take into account all of the circumstances
7 before it in determining whether "it is . . . equitable that the judgment . . . [continue to] have
8 prospective application." FED.R.CIV.P. 60(b)(5); see also *Bellevue*, 165 F.3d at 1256 (under
9 Rule 60(b)(5), a court should "take all the circumstances into account in determining whether to
10 modify or vacate a prior injunction or consent decree"). In doing so, it must look to the evidence
11 that Judge Kenyon had before him, and determine whether the circumstances reflected in that
12 evidence have changed to a sufficient degree that equity no longer favors continuance of the
13 injunction. It is clear from a review of *Orantes II* that Judge Kenyon's entry of an injunction was
14 heavily influenced by the conditions that existed in El Salvador at the time. See, e.g., *Orantes*
15 *II*, 685 F.Supp. at 1504 (observing that "[r]emoval to a country overrun with civil war, violence,
16 and government-sanctioned terrorist organizations" would potentially "lead to the most serious
17 of deprivations").

18 On appeal, the government conceded that "if the evidence in th[e] case support[ed] the
19 district court's findings of a pattern of coercion and interference with the plaintiff class members'
20 right to apply for asylum, then . . . remedial action would be justified." *Orantes III*, 919 F.2d
21 at 557. Given this concession, the Ninth Circuit reviewed Judge Kenyon's findings regarding a
22 pattern or practice of interference with the right to apply for asylum under the clearly erroneous
23 standard, and did not address the totality of evidence Judge Kenyon considered in determining that
24 injunctive relief was warranted.

25 The Ninth Circuit's holding that the injunction was legally justified whether or not class
26 members' due process rights had been violated does not mean that the injunction was equitably
27 justified absent such a finding. See *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) ("In shaping
28 equity decrees, the trial court is vested with broad discretionary power; appellate review is

1 correspondingly narrow. . . . Moreover, in constitutional adjudication as elsewhere, equitable
2 remedies are a special blend of what is necessary, what is fair, and what is workable. . . . In
3 equity as nowhere else courts eschew rigid absolutes and look to the practical realities and
4 necessities inescapably involved in reconciling competing interests, notwithstanding those interests
5 may have constitutional roots"). Consequently, the court concludes that it is appropriate to
6 consider present conditions in El Salvador, and contrast them with the conditions that obtained
7 at the time Judge Kenyon entered a permanent injunction, in evaluating whether all of the
8 circumstances that presently obtain warrants dissolution of the injunction.

9 For similar reasons, the court declines the government's invitation to limit the dissolution
10 inquiry to changed conditions in El Salvador. Judge Kenyon balanced all of the evidence before
11 him - conditions in El Salvador, INS practices in the United States, and detention center
12 conditions - in determining that an injunction was an appropriate equitable remedy. In the
13 absence of an appellate decision stating that it was inappropriate for him to consider one or more
14 of these factors, the court concludes that it must consider all of the circumstances Judge Kenyon
15 took into account in evaluating whether to dissolve the injunction. See *Bellevue*, 165 F.3d at 1256
16 (under Rule 60(b)(5), a court should "take all the circumstances into account in determining
17 whether to modify or vacate a prior injunction or consent decree").

18 D. Changed Country Conditions In El Salvador

19 In 1992, the United Nations brokered Peace Accords that ended the twelve-year civil war
20 in El Salvador and laid out an ambitious agenda to guarantee basic human rights.¹⁰ In keeping
21 with the Peace Accords, El Salvador amended its constitution to prohibit the military from playing
22 any internal security role in the country except in extraordinary circumstances.¹¹ The Treasury
23 Police, National Guard, and National Police - the primary human rights violators during the civil
24 war (*Orantes II*, 685 F.Supp. at 1492) - were abolished, and military intelligence functions were
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26 ¹⁰Declaration of Geoffrey Thale ("Thale Decl."), ¶ 11.

27 ¹¹Mot., Exh. F at 60 (U.S. Department of State, Background Note: El Salvador, Feb.
28 2005).

1 transferred to civilian control.¹² In 1994, the guerilla forces demobilized and became a political
2 party that competed in what were recognized as generally free and fair elections that year.¹³

3 The Peace Accords also established a Truth Commission to investigate "serious acts of
4 violence that ha[d] occurred since 1980." See Reed Brady, *The United Nations and Human*
5 *Rights in El Salvador's "Negotiated Revolution,"* 8 HARV. HUM. RTS. J. 153, 158 (1995). In
6 1993, the Truth Commission issued a report publicly identifying the individuals responsible for
7 the most egregious violations. *Id.* at 165. Although the Salvadoran government subsequently
8 granted amnesty for all political crimes committed during the war,¹⁴ it accepted the resignations
9 of all of the military officers identified by the Commission, effectively purging the individuals
10 most responsible for the abuses from the country's leadership structure. See Mark Vasallo, *Truth*
11 *and Reconciliation Commissions: General Considerations and a Critical Comparison of the*
12 *Commissions of Chile and El Salvador,* 33 U. MIAMI INTER-AM. L. REV. 153, 177 (2002).

13 El Salvador's economy, which is primarily agricultural, has grown "at a steady and
14 moderate pace" since 1992. The Department of State attributes much of the improvement to "free
15 market policy initiatives carried out by the . . . government]], including the privatization of the
16 banking system, telecommunications, public pensions, electrical distribution and some electrical
17 generation, reduction of import duties, elimination of price controls, and enhanc[ement of] the
18 investment climate through measures such as improved enforcement of intellectual property
19 rights."¹⁵ A land-transfer program that ended in 1997 deeded land to more than 35,000
20 individuals; many also received agricultural credits.¹⁶ In 1995, the United Nations Human Rights
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23 ¹²*Id.*

24 ¹³Thale Decl., ¶ 12.

25 ¹⁴Mot., Exh. F at 60 (U.S. Department of State, Background Note: El Salvador, Feb.
26 2005).

27 ¹⁵*Id.* at 61.

28 ¹⁶*Id.*

1 Commission removed El Salvador from its list of countries subject to permanent monitoring.¹⁷
2 That same year, the UN Secretary General declared the peace process in El Salvador
3 "irreversible."¹⁸

4 El Salvador today is recognized as "a constitutional, multiparty democracy with a
5 unicameral legislature, an independent judiciary, and an executive branch headed by a president."
6 The president is elected by universal suffrage in "generally free and fair" presidential elections
7 are is not marred by violence or "notable irregularities."¹⁹ The 2004 and 2005 Department of
8 State country reports for El Salvador document no politically motivated killings or disappearances.
9 There are no political prisoners, and no reports of kidnapping by governmental actors.
10 Salvadoran law prohibits torture and other cruel and inhumane treatment or punishment, although
11 there have been some reports of excessive force, misconduct, and detainee mistreatment by police
12 officers. The Department of State country reports conclude that the Salvadoran government
13 "generally respect[s] the human rights of its citizens." In addition, Salvadoran law safeguards
14 freedom of speech and of the press, "and the government generally respect[s] these rights in
15 practice."²⁰ According to the State Department's most recent Profile of Asylum Claims and
16 Country Conditions for El Salvador, "[s]ince the 1992 peace accords . . . recent mistreatment
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20 ¹⁷Mot., Exh. X at 246 (U.S. Department of State, *El Salvador - Profile of Asylum Claims
and Country Conditions*, Apr. 2003).

21 ¹⁸*Id.*

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23 ¹⁹Mot., Exh. E (U.S. Department of State, *Country Reports on Human Rights Practices,
El Salvador, 2004*); Mot., Exh. F (U.S. Department of State, *Background Note: El Salvador,
Feb. 2005*).

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25 ²⁰Mot., Exh. E (U.S. Department of State, *Country Reports on Human Rights Practices,
El Salvador, 2004*); Pls.' Exh. 46 (U.S. Department of State, *Country Reports on Human Rights
Practices, El Salvador, 2005*). See generally Thomas C. Wright, *Human Rights in Latin America:
26 History and Projections for the Twenty-First Century*, 30 CAL. W. INT'L L.J. 203, 318 (2000)
27 (explaining that "respect for human rights in Latin America - understood as individual liberties
28 - has vastly improved").

1 with political motivation would seem unlikely in most cases.²¹

2 Neither party seriously disputes that conditions in El Salvador are drastically different than
3 they were in the 1980s when Judge Kenyon entered the *Orantes* injunction. The civil war is over,
4 as is the widespread brutality that led the court to conclude in 1982 and 1988 that "a substantial
5 number" of Salvadorans who fled the country had good faith asylum claims and well-founded
6 fears of persecution. *Orantes II*, 685 F.Supp. at 1491. Thus, the conditions in El Salvador that
7 led Judge Kenyon to conclude that the consequences attending deprivation of Salvadorans' right
8 to apply for asylum were "most serious" disappeared with the end of the Salvadoran civil war and
9 concomitant improvements in political, economic, and social conditions in the country.

10 Tacitly acknowledging this sea change in factual circumstances, plaintiffs do not argue that
11 Salvadorans today face unique risks from an erroneous deprivation of their right to apply for
12 asylum. Instead, they argue that Judge Kenyon "never purported to decide that Salvadorans were
13 a group warranting special treatment not afforded to other asylum seekers."²² This argument is
14 directly contradicted, however, by Judge Kenyon's statement that "[t]he calculation of the
15 *Mathews* balancing test could be quite different for other nationalities," and that "[i]njunctive
16 relief requiring the administration of an advisal of rights to detained Salvadorans does not mandate
17 the provision of the same advisal to any other nationalities." *Id.* at 1508.

18 At oral argument, plaintiffs conceded that not all nationalities are entitled to a court-
19 mandated advisal of their right to apply for asylum.²³ They argued, however, that the *Orantes*
20 injunction remains necessary to protect the rights of Salvadorans because even today, El Salvador
21 is "a country in significant chaos." For this reason, plaintiffs contended, some Salvadorans
22 continue to have good faith claims to asylum in the United States.²⁴ Plaintiffs rely on evidence

24 ²¹Mot., Exh. X at 243 (U.S. Department of State, Bureau of Democracy, Human Rights
25 and Labor, *El Salvador - Profile of Asylum Claims and Country Conditions*, Apr. 2003).

26 ²²Opp. at 40:20-22.

27 ²³RT, Dec. 20, 2006, at 12:14-13:2.

28 ²⁴*Id.* at 12:11-13; Opp. at 41:5-14.

1 of domestic violence and gender-based persecution in El Salvador,²⁵ as well as violence against
2 persons who are homosexual, transgender, transvestite, or HIV-positive.²⁶ In addition, they have
3 proffered evidence of widespread gang-related problems in the country.²⁷ El Salvador's two
4 major gangs, "Mara Salvatrucha" and "Barrio 18," now claim to have approximately 10,000
5 members.²⁸ It is common for gangs to extort "protection money" from local businesses – a
6 practice the police have failed to address in any significant way.²⁹ Additionally, judges, police
7 officers, and witnesses in criminal cases against gang members are often threatened.³⁰

8 In response to the sharp rise in gang violence, the Salvadoran government has implemented
9 harsh anti-gang measures; these have resulted in the unlawful arrest and detention of young people
10 who are perceived to be gang members. Under the country's new "Mano Dura" ("Iron Fist")
11 and "Super Mano Dura" ("Super Iron Fist") laws, for example, police can arrest youth whose
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15 ²⁵Pls.' Exh. 48 (U.N. Economic and Security Council, *Integration of the Human Rights*
16 *of Women and a Gender Perspective: Violence Against Women* (Feb. 2004)) (reporting that
17 "[i]mpunity for crimes, the socio-economic disparities and the *machista* culture foster a
18 generalized state of violence, subjecting women to a continuum of multiple violent acts, including
19 murder, rape, domestic violence, sexual harassment and commercial sexual exploitation").

19 ²⁶Pls.' Exh. 63 (UNHCR, *El Salvador: Treatment of Homosexuals by the Authorities and*
20 *the General Public, 2002-2004* (Mar. 2004)); Pls.' Exh. 64 (UNHCR, *El Salvador: Follow-up*
21 *to SLV39432.FE of 26 June 2002 on the Treatment of Homosexuals by the Public and the*
22 *Authorities* (Sept. 2002)).

22 ²⁷Pls.' Exh. 49 (Sam Logan et al., *Deportation Feeds a Cycle of Violence in Central*
23 *America*, (Mar. 2006)).

24 ²⁸Thales Decl., ¶ 23. The State Department does not consider gang violence to be a major
25 security concern in El Salvador. (Mot., Exh. X at 235 (U.S. Department of State, Bureau of
26 Democracy, Human Rights and Labor, *El Salvador – Profile of Asylum Claims and Country*
27 *Conditions*, Apr. 2003)) ("Violent crimes (including crimes perpetrated by organized criminal
28 gangs, sometimes called *maras*) is not the major security concern in El Salvador").

27 ²⁹Thales Decl., ¶ 29.

28 ³⁰*Id.*, ¶ 28.

1 dress or tattoos resemble those of gang members.³¹ Suspected gang members are treated severely
2 by the judicial system and are the targets of anti-gang vigilante groups that commit extrajudicial
3 killings. The killers are rarely prosecuted although they are informally sanctioned on occasion.³²
4 In short, the government's measures have led to prosecution of and reprisals against non-gang
5 members, and have aggravated rather than improved gang violence in El Salvador.³³

6 All of these conditions have contributed to an atmosphere of social insecurity. Between
7 January and December 2005, criminal violence increased by 34 percent; murders of women and
8 girls increased sharply, as did the incidence of domestic violence.³⁴ Many of these acts go
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12 ³¹*Id.*, ¶ 22; Pls.' Exh. 50 (Amnesty International, *Americas: Regional Overview 2003*)
13 ("An anti-gang law was adopted in El Salvador with apparent disregard for the requirements of
14 national law and international standards").

15 ³²Thales Decl., ¶ 29.

16 ³³*Id.*, ¶ 24 ("Since the implementation of the *Mano Dura* laws, El Salvador has seen
17 increasing organization of the gangs, increasing murder rates, and a consolidation of the prison
18 system as a breeding ground for gangs. The State and the media continue to blame the gangs as
19 a scapegoat for all of the violence in the Salvadoran society, and the police continue to implement
20 laws that have been proven to strengthen the gangs rather than intervene on the increasing
21 violence").

22 ³⁴Pls.' Exh. 51 (Amnesty International, *El Salvador*, covering events from January to
23 December 2005) (citing statistics by the National Civil Police). According to the Amnesty
24 International report, there were 3,761 murders between January and December 2005, including
25 323 murders of women and girls between January and November 2005. In addition, the National
26 Civil Police received nearly 12,000 calls reporting incidents of domestic violence; 24 women were
27 killed by partners or family members. The UN Special Rapporteur recommended, in a report
28 published in February 2005, that "the government prevent, investigate and punish acts of violence
against women." By the end of 2005, however, authorities had taken no steps to comply with the
recommendation, or made any progress in investigating the cases of women who had been killed
and/or raped in prior years. (*Id.*). In April 1999, for example, nine-year-old Katya Miranda was
raped and killed in her family home. Despite the Attorney General's public commitment to
reopen the investigation, "[n]o progress was known to have been made in bringing to justice those
responsible." (Pls.' Exh. 52 (Amnesty International, *El Salvador*, covering events from January
to December 2003)).

1 unpunished by the police, who are not equipped to deal with the problems.³⁵ In addition,
2 widespread corruption in the police forces, as well as ties between police officers and organized
3 crime, ensure that many crimes are not investigated; as a result, criminals can operate with
4 impunity.³⁶ Plaintiffs assert that the existence of these social conditions in El Salvador provide
5 a basis for asylum claims³⁷ by some Salvadorans.³⁸

7 ³⁵Pls.' Exh. 53 (Letter from Amnesty International to H E Elias Antonio Saca, President
8 of El Salvador, Oct. 13, 2005); Pls.' Exh. 54 (UNHCR, *El Salvador: Domestic Violence,
9 Including Resources, Remedies, and Services for Victims* (Apr. 2004)).

10 ³⁶Pls.' Exh. 66 (Hector Tobar, *Human Rights Defender Hardly Looks the Part*, L.A.
11 TIMES, Apr. 10, 2006).

12 ³⁷Such asylum claims typically assert that the applicant has a "well-founded fear of future
13 persecution 'on account of . . . membership in a particular social group.'" INA § 101(a)(42)(A),
14 8 U.S.C. § 1101(a)(42)(A). In the Ninth Circuit, a "'particular social group' is one united by a
15 voluntary association, including a former association, or by an innate characteristic that is so
16 fundamental to the identities or consciences of its members that members either cannot or should
17 not be required to change it." *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093 (9th Cir.
18 2000). Applying this standard, courts considering asylum claims have held that sexual orientation
19 can be the basis for membership in a "particular social group." *Id.* at 1094 (holding that the
20 appropriate "particular social group" in that case was composed of "gay men with female sexual
21 identities in Mexico"). Similarly, courts have recognized "particular social groups" who share
22 a likelihood of gender-based harm. See, e.g., *Gao v. Gonzales*, 440 F.3d 62, 80 (2d Cir. 2006)
23 (recognizing a "particular social group" of "women who have been sold into marriage . . . and
24 who live in a part of China where forced marriages are considered valid and enforceable");
25 *Mohammed v. Gonzales*, 400 F.3d 785, 796 (9th Cir. 2005) ("Although we have not previously
26 expressly recognized females as a social group, the recognition that girls or women of a particular
27 clan or nationality . . . may constitute a social group is simply a logical application of our law").
28 In a brief submitted in 2004, the DHS took the position that "married women in Guatemala who
are unable to leave the relationship" were a "particular social group" for asylum purposes. (Pls'
Exh. 45 (DHS Position on Respondent's Eligibility for Relief, *Matter of R-A-*, File No. A 73
753922 (Feb. 19, 2004) at 25-31). In certain cases, immigration judges and the BIA have also
recognized that retaliation against persons opposing gang activities, including persons who refuse
to join or attempt to leave a gang, may constitute persecution based on political opinion or
membership in a particular social group. (Pls.' Exhs. 41-44 (IJ cases); Pls.' Exh. 59 (N.C.
Aizenman, *More Immigrants Seeking Asylum Cite Gang Violence*, WASH. POST, Nov. 15, 2006)
(describing lawyers and immigration advocates' efforts to obtain asylum for individuals targeted
by gang violence in Central America, but noting that "[i]mmigration judges have frequently ruled
against applicants who were victims of gangs because of bad luck or who have faced conscription
by a gang simply because they were young and male"). These precedents do not establish that

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2 the social ills in Salvador today necessarily support asylum claims. They suggest, however, that
3 similar claims have in the past been recognized by courts.

4 ³⁶Plaintiffs submit the following data, which shows the number of asylum applications by
5 Salvadorans in 1987, 1988, 2004, and 2005:

6

Asylum Applications By Salvadorans			
	Received	Granted	Denied
7 1987 ^a	2,684	39	776
8 1988 ^b	27,048	149	3,822
9 2004 ^c	2,758	160	1,022
10 2005 ^d	3,630	64	696

11
12 ^a Asylum cases filed with the INS district director.

13 ^b Applications received, granted, and denied by the immigration courts.

14 ^c Applications received, granted, and denied by the USCIS Asylum Offices and the
15 immigration courts.

16 See Pls.' Exh. 35 (EOIR FY 2005 Statistical Year Book); Pls.' Exh. 37 (INS 1987 Statistical
17 Yearbook); Pls.' Exh. 38 (INS 1988 Statistical Year Book); Pls.' Exh. 39 (DHS 2004
18 Yearbook of Immigration Statistics; Pls.' Exh. 40 (EOIR FY 2004 Asylum Statistics). The
number of granted and denied applications does not equal the number of applications received.
Some applications are not adjudicated within a year of submission, however, and many are
abandoned, withdrawn, or classified as "other."

19 The court finds this data only minimally probative. First, it is unclear why only 39 and
20 160 individuals were granted asylum in 1987 and 1988. The Salvadoran civil war was ongoing,
21 as were the human rights abuses that led Judge Kenyon to enter the *Orantes* injunction. As a
22 result, it is difficult to conclude that the relatively low number of successful asylum applications
23 in these years shows that asylum claims filed by Salvadorans during this period lacked merit.
24 (Indeed, this would contradict the very basis upon which plaintiffs sought to have Judge Kenyon
25 issue an injunction.) Rather, the low rate of success may reflect poor advocacy, biased asylum
26 determinations, pressure on Salvadorans to withdraw their applications, or any number of other
27 factors. See *Orantes II*, 685 F.Supp. at 1503 ("INS discriminates against Salvadoran asylum
28 applicants by imposing a higher burden of proof, and the low approval rate of Salvadoran asylum
claims is the direct result of this discrimination"). Consequently, it is not possible to interpret the
data in the manner plaintiffs suggest - i.e., to conclude that because the percentage of applicants
granted asylum in 2004 and 2005 is greater than the percentage of successful applicants in 1987
and 1988, when the injunction was entered, country conditions are as bad, if not worse, than they
were twenty years ago. Additionally, it appears that the data for earlier years may not be
comparable with the more recent data. The data for 1987 and 1988 reflect applications to the INS

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2 This evidence, while indicative of a country experiencing social difficulties, is not relevant
3 to the court's inquiry regarding changed circumstances in El Salvador. Plaintiffs would have the
4 court conduct the *Mathews* balancing test anew, and conclude that the risks faced by Salvadorans
5 who may be erroneously removed from the United States today outweigh the burden on the
6 government involved in giving the *Orantes* injunction. As the court tasked with determining
7 whether changed circumstances have rendered the *Orantes* injunction unnecessary, however, the
8 court must consider the conditions that led Judge Kenyon to enter the injunction in the first
9 instance, not a new set of conditions that might warrant the entry of an injunction were they
10 presented to a court today.

11 *Dowell* is instructive in this regard. In 1972, the district court ordered the Board of
12 Education of Oklahoma City to adopt a school busing plan in order to remedy *de jure* segregation
13 in its public schools. *Dowell*, 498 U.S. at 240-41. Five years later, the court granted the Board's
14 petition to terminate the case, finding that the school board had been "sensitized to the
15 constitutional implications of its conduct" and that it was "entitled to pursue in good faith its
16 legitimate policies without the continuing constitutional supervision of" the court. *Id.* at 241. In
17 subsequent years, the growth of the suburbs and "white flight" required that black children be
18 bused further and further away from their homes to maintain an integrated school district. *Id.* at
19 242. As a result, the school board adopted a neighborhood assignment plan, under which 11 of
20 64 elementary schools in the district would be 90 percent black; 22 would be 90 percent white;
21 and 31 would be racially mixed. *Id.* at 242.

22 Plaintiffs petitioned to reopen the case. When the district court refused, they appealed.
23 The Tenth Circuit reversed, holding that the desegregation decree had never been terminated. *Id.*
24 at 243. On remand, the district court vacated the decree, finding that the new neighborhood
25 assignment plan was not designed with discriminatory intent and that any resulting racial

26
27 district director, while the data for 2004 and 2005 reflect cases heard in immigration courts (2005)
28 or applications heard by immigration courts or by asylum officers (2004). In short, the statistics
plaintiffs provide are inconclusive at best.

1 segregation was "the result of private decisionmaking and economics," which was too attenuated
2 to be a vestige of the earlier segregation that justified entry of the busing decree in 1972. *Id.* The
3 Tenth Circuit reversed again, concluding that the "number of schools [that] would [be] return[ed]
4 to being primarily one-race schools . . . [showed that] circumstances in Oklahoma City had not
5 changed enough to justify modification of the decree." *Id.* at 244. The Supreme Court disagreed,
6 and remanded to the district court to determine whether the Board had made good faith efforts to
7 comply with the injunction, and "whether the vestiges of past discrimination had been eliminated
8 to the extent practicable." *Id.* That the old school board once acted with discriminatory intent
9 did not justify "judicial tutelage for the indefinite future," the Court stated, particularly when the
10 new school board had not acted with discriminatory animus. *Id.* at 249. The Court noted that,
11 if the district court determined that it was appropriate to dissolve the injunction, it could then
12 consider, as a separate question, whether the neighborhood assignment plan comported with due
13 process. *Id.* at 249-50.

14 The *Dowell* Court's reasoning is clear: because the desegregation decree was plainly
15 intended to remedy intentional discrimination, the elimination of such discrimination rendered it
16 inequitable to maintain the injunction in force. The fact that the board's neighborhood assignment
17 plan might constitute a new Fourteenth Amendment violation, moreover, did not justify
18 continuing the injunction once the problem it was designed to remedy had been eradicated. Like
19 plaintiffs in *Dowell*, plaintiffs here ask the court to adjudicate a new due process claim - this one
20 based on the risks Salvadorans face if erroneously removed to a country where they face gender-,
21 sexual orientation-, youth-, or gang-based persecution. As *Dowell* makes clear, this exceeds the
22 permissible scope of the court's inquiry in deciding the government's motion to dissolve the 1988
23 injunction.

24 The dramatic nature of the changed conditions in El Salvador convinces the court that,
25 were he reviewing the matter today, Judge Kenyon would not find that the *Orantes* advisal is
26 necessary "as a matter of due process." *Orantes III*, 919 F.2d at 556. As the Supreme Court has
27 noted, due process "is not a technical conception with a fixed content unrelated to time, place,
28 and circumstances." *Mathews*, 424 U.S. at 334 (quoting *Cafeteria Workers v. McElroy*, 367 U.S.

1 886, 895 (1961)). It follows that the due process right is not a fixed one, but one that must be
2 tethered to the "time, place, and circumstances" that gave rise to it. Were Judge Kenyon's
3 conclusion that an injunction was necessary to protect the due process rights of Salvadorans the
4 only basis on which he granted relief, the court would find that changed circumstances had
5 extinguished the right that necessitated the remedy, and thus that the injunction should be vacated.

6 Judge Kenyon, however, entered the injunction for another reason as well – to remedy the
7 INS' "persistent pattern of misconduct violative of plaintiffs' rights" to apply for asylum.
8 *Orantes III*, 919 F.2d at 558. Weighing the equities between the parties, Judge Kenyon
9 considered not only the grievous risks faced by Salvadorans erroneously returned to a country in
10 the midst of a civil war, but also the INS' deliberate pattern and policy of withholding
11 information, misrepresenting facts, and coercing Salvadorans to waive their right to apply for
12 asylum. Consequently, the court must examine the evidence the parties have proffered regarding
13 changed detainee processing practices and detention center conditions before determining whether
14 the injunction can be dissolved.

15 E. Government Interference With Class Members' Right To Apply For Asylum

16 1. Compliance With The *Orantes* Injunction

17 Plaintiffs argue that, irrespective of any good faith effort by the government to reform its
18 practices, the motion for dissolution must be denied because it has not complied with the
19 injunction's requirements. Because plaintiffs assert that compliance is a "threshold" requirement
20 for dissolution, the court reviews the case law regarding compliance and its role in the dissolution
21 inquiry before turning to the evidence.

22 Although good-faith compliance is often a factor considered by courts in evaluating
23 whether to dissolve an injunction, it is neither a threshold inquiry (as plaintiffs contend) nor a
24 factor that must be taken into account in every case. "[T]he power of a court of equity to modify
25 a decree of injunctive relief is long-established, broad, and flexible." *Carey*, 706 F.2d at 967.
26 Under the flexible standard established by Rule 60(b)(5) and *Rufo*, courts must tailor their inquiry
27 to the circumstances of the case before them. See *Building & Const. Trades Council*, 64 F.3d at
28 888 ("Different considerations may have greater or lesser prominence in difference cases, not

1 because the cases are characterized one way rather than another but because equity demands a
2 flexible response to the unique conditions of each case"). Like others factors, therefore,
3 compliance can be determinative in one case, and irrelevant in another.

4 In many cases, an enjoined party's good-faith compliance with a decree figures
5 prominently in the court's dissolution inquiry, because it is a proxy for determining whether the
6 underlying problem has been remedied. See *Dowell*, 498 U.S. at 249 ("A district court need not
7 accept at face value the profession of a school board which has intentionally discriminated that
8 it will cease to do so in the future. But in deciding whether to modify or dissolve a desegregation
9 decree, a school board's compliance with previous court orders is obviously relevant"); *NLRB v.*
10 *Harris Teeter Supermarkets*, 215 F.3d 32, 36-37 (D.C. Cir. 2000) (indications that defendants
11 had continued their unfair labor practices, even after entry of a consent decree, counseled against
12 dissolution, since "the reduction in violation frequency might be a reflection of the effectiveness
13 of the prospective fine schedule contained in the consent order rather than a result of good
14 intentions on the company's part"); see also *SEC v. Coldicutt*, 258 F.3d 939, 942-43 (9th Cir.
15 2001) (examining defendant's record of compliance with an injunction restraining her from
16 violating §§ 5(a) and 5(b) of the Securities Act to determine whether she might violate the statutes
17 if the injunction were dissolved).

18 Indeed, compliance over time is often the *only* type of "changed circumstance" that a
19 defendant *can* show in support of a request for dissolution of an injunction. See *SEC v.*
20 *Thermodynamics, Inc.*, 464 F.2d 457, 461 (10th Cir. 1972) ("[I]n instances where the defendant
21 concerned is an individual, and where the alleged violation leading to the injunction was an
22 incident of limited scope or duration, the passage of a substantial period of time with full
23 compliance and with no other violations may be regarded as a significant factor showing a
24 'change' for these purposes. In reality this is about all an individual can show under these
25 circumstances"); 11A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *FEDERAL*
26 *PRACTICE & PROCEDURE: CIVIL* 2d § 2961, at p. 405 (2007) ("Nonetheless, in many cases the
27 critical motivation for the court's lifting of an equitable order does not really seem to be a change
28 in the operative facts of a case as much as a change in the attitude of the enjoined party. A

1 significant period of compliance probably is good evidence of a proper frame of mind and in
2 many cases it is the only showing that a party seeking vacation is able to make to the court³⁵.

3 Here, in contrast, compliance is not the only measure by which the court can determine
4 whether or not the conditions that justified entry of the injunction remains extant today. The
5 government has submitted evidence that it has made overarching, structural changes in the manner
6 in which it processes immigration detainees, including the adoption of new forms and procedures
7 to ensure that aliens are advised of their right to apply for asylum, the promulgation of of
8 detention standards, and the creation of a detention facility review unit dedicated to ensuring that
9 each of the 201 facilities housing aliens for more than 72 hours meets the new standards. In
10 addition, the government has presented compelling evidence that changed country conditions in
11 El Salvador have mooted one of the injunction's goals, i.e. to prevent the return of Salvadorans
12 to a country embroiled in a violent civil war without an opportunity to apply for asylum. In this
13 context, the government's compliance or non-compliance with the terms of the injunction is only
14 one of several relevant factors in assessing whether the injunction should remain in place.

15 **a. Lack Of Enforcement Proceedings**

16 Plaintiffs concede that no enforcement or contempt proceedings have been brought for 18
17 years. The most recent enforcement action was filed in 1989 and concluded in 1991, a year
18 before the end of the Salvadoran civil war.³⁶ In other cases, courts have recognized that a record
19 of compliance – which can be evidenced by the lack of enforcement or contempt actions – is a
20 factor that supports dissolution of an injunction. See *Coldicutt*, 258 F.3d at 943 (“Consistent with
21 our decision in [*SEC v. Worthen*, 98 F.3d 480 (9th Cir. 1996)], and with the views expressed
22 by the Third and D.C. Circuits [in *Building and Constr. Trades Council*, 64 F.3d at 880, and
23 *Harris Teeter Supermarkets*, 215 F.3d at 32], we hold that an extended period of compliance is
24

25 ³⁵At the hearing, plaintiffs’ counsel asserted that he “included a claim of violation of the
26 *Orantes* injunction in litigation around the San Pedro detention center which was settled in 1998.”
27 (RT, Dec. 20, 2006, at 101:13-16). The court has no information before it regarding the nature
28 of this litigation, the alleged violation, the settlement, or whether the settlement addressed
violations of the *Orantes* injunction. It therefore has no context that permits assessment of the
alleged violation, or counsel’s attempt to redress it.

1 a factor supporting termination of an injunction, but more is required"). Cf. *Building & Constr.*
2 *Trades Council*, 64 F.3d at 889 ("The entry of four consent contempt adjudications against BCTC
3 in a period of seven years reflects, at the very least, repeated violations by BCTC. . . . BCTC's
4 history of compliance for the last six years does not erase its history of noncompliance, as
5 evidenced by the contempt adjudications"); *Harris Teeter Supermarkets*, 215 F.3d at 36 (stating,
6 in an appeal decided in 2000, that "Harris Teeter has failed to establish a 'clean' time frame of
7 compliance given the company's post-1986 violations of the NLRA, its failure to adequately
8 explain the numerous charges filed against it, and its failure to adequately explain the settlements
9 it reached between 1986 and 1995").

10 The lack of enforcement proceedings is particularly persuasive in the context of an
11 injunction mandating that the government take specific action with respect to as many as 40,000
12 individuals each year.⁴⁰ Given the number of Salvadorans the government detains, there are many
13 opportunities for violation, and thus for the initiation of contempt proceedings. That no
14 enforcement actions have been filed gives rise to a strong inference of compliance.⁴¹ Compare
15 *Building & Constr. Trades Council*, 64 F.3d at 890 (stating that the court could not infer
16 compliance from the fact that no contempt proceedings had been brought against the unions in six
17 years because the unions had not engaged in any picketing for a large portion of those six years;

18
19 ⁴⁰Declaration of Jonathan Mardo ("Mardo Decl."), ¶ 13; Declaration of Paul E. Morris
20 ("Morris Decl."), ¶ 6. According to the government's statistics, the Border Patrol has
21 apprehended more than 130,000 Salvadorans since 1999. The number of Salvadorans
22 apprehended has risen steadily, increasing from 5,095 in 1999 to 41,406 in 2006. (Mardo Decl.,
23 ¶¶ 6-13).

24 ⁴¹Plaintiffs contend that the government bears the burden of proof on the motion to dissolve
25 (see, e.g., *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000)), and that its failure to submit
26 affirmative evidence of compliance weighs against dissolution. While such evidence, if
27 obtainable, would assuredly weigh in favor of dissolution, the lack of such evidence does not
28 require that the court infer non-compliance. This is especially true given the nature of the
injunctive provision at issue, which necessitates the provision of an advisal to as many as 40,000
individuals each year. The government has shown that no contempt or enforcement proceedings
have been filed for 18 years and has submitted evidence rebutting plaintiffs' proffered proof of
noncompliance. This suffices to meet the government's initial burden in the context of the
injunction under consideration here.

1 "[t]here is therefore no background upon which any findings could be made that would show that
2 [the unions] ha[ve] in fact learned how to picket without treading on the prohibitions against
3 secondary boycott contained both in the law and the various negotiated consent decrees").

4 **b. Declarations By Salvadorans Alleging Violations**

5 Plaintiffs have proffered the affidavits of 37 Salvadorans who were recently apprehended
6 and detained by the Border Patrol as evidence that the government has not been complying with
7 the *Orantes* injunction. The government countered with the declarations of the 37 Border Patrol
8 agents who processed each of the affiants. Each agent's declaration is accompanied by a Form
9 I-213, a contemporaneous record of interview, in which the agent describes the conditions under
10 which the affiant was found and detained, lists the forms that were given to the affiant, and
11 summarizes the affiant's description of his or her entry into the United States. The forms also
12 indicate the affiant's responses to questions regarding claims of legal residence or citizenship in
13 the United States. In some cases, the agent noted that the affiant "stated she did not fear being
14 returned to her home country of El Salvador."⁴²

15 Neither set of declarations is entirely credible. Although 27 of the 37 Salvadoran affiants
16 state that they did not receive advisals or that they received no notice of the right to apply for
17 asylum, the Border Patrol files submitted by the government indicate that all 27 signed and dated
18 advisal forms. While this may suggest, as plaintiffs contend, that the affiants were pressured to
19 sign the forms before they had an adequate opportunity to review them, it also raises questions
20 about the Salvadoran affiants' credibility. These credibility concerns are reinforced by other
21 evidence. First, the government has submitted excerpts from the affiants' A-files; in some
22 instances, the files contain Spanish-language forms signed by affiants who assert that they received
23 only English-language forms. The A-files also include legal service lists signed or initialed by
24 at least three of the seven affiants who state that they never received such a list,⁴³ raising questions
25

26 ⁴²See, e.g., Declaration of Renee Luna ("Luna Decl.") at 5.

27 ⁴³See Declaration of Gregory E. Mayer ("Mayer Decl.") at 220; Declaration of Jaime Leija
28 ("Leija Decl.") at 211; Declaration of David B. Sumpter ("Sumpter Decl.") at 125.

1 as to whether these individuals habitually sign documents – such as declarations – without reading
2 or understanding what they are signing. Second, many of the affiants' assertions are directly
3 refuted, either by contemporaneous processing records or by a border patrol agent's declaration.
4 The agents assert that they read the forms to the Salvadoran affiants, and deny that they rushed
5 or pressured the affiants to sign anything.

6 There are similar weaknesses in the declarations submitted by the border patrol agents.
7 Most of these declarations are written in nearly identical boilerplate language. While the agents'
8 assertions are corroborated to some extent by contemporaneously-completed Forms I-213, it is
9 clear that the forms use standard, rote phrases to describe the agents' encounters with aliens.
10 While the use of such phrases does not necessarily render a report suspect, in this case it raises
11 questions given the Salvadoran affiants' contrary assertions.

12 In short, the court has reviewed the parties' declarations, taken note of the evidentiary
13 limitations and credibility concerns relative to both sets of affidavits, and weighed the evidence
14 accordingly.⁴⁴ The Salvadoran declarations indicate that some Border Patrol agents appear to treat
15 the *Orantes* advisal as a formality, and that they rush through it with the detainees they are
16 processing. The sample size, however, is too limited to support an inference that there is a
17 widespread pattern of non-compliance, particularly given the credibility limitations already noted.
18 According to the government's fiscal year 2006 statistics, the Border Patrol apprehended 41,406

19
20 ⁴⁴Both parties have requested an opportunity to depose the declarants offered by their
21 adversary. This appears impossible, as Salvadorans removed following § 240 proceedings are
22 typically deported within 90 days. See *Clark v. Martinez*, 543 U.S. 371, 373 (2005) ("If, at the
23 conclusion of removal proceedings, the alien is determined to be inadmissible and ordered
24 removed, the law provides that the Secretary of Homeland Security 'shall remove the alien from
25 the United States within a period of 90 days.'" quoting 8 U.S.C. § 1231(a)(1)(A)). The
26 Salvadorans signed their affidavits on June 28, August 23-24, and October 3-6, 2006. Since all
27 indicate that they were subject to a final order of removal issued following § 240 proceedings, it
28 is highly unlikely that any presently remains in the country. Moreover, this motion has been
pending for nearly a year while plaintiffs engaged in substantial discovery. The court sees no
reason to permit further depositions at this stage. As for the border patrol agents, the court doubts
that any has a specific recollection of the Salvadorans they processed. It presumes, therefore, that
their declarations mirror the information contained in the A-files that are already part of the
record.

1 Salvadorans between ports-of-entry.⁴⁵ The 37 Salvadorans who have submitted declarations,
2 therefore, represent about one percent of those detained by the government in 2006.⁴⁶ While the
3 court understands the difficulties plaintiffs faced obtaining relevant testimony, it nonetheless
4 concludes that the evidence is not sufficient to show that there has been a meaningful level of non-
5 compliance with the *Orantes* injunction.⁴⁷

6 **c. Refusal To Provide Advisals To Salvadorans Detained At Ports**
7 **Of Entry**

8 In an October 2006 *ex parte* application for clarification of an earlier order by the court,
9 the government explained that “[e]ver since the inception of the injunction,” it has construed the
10

11 ⁴⁵Mardo Decl., ¶ 13.

12 ⁴⁶Plaintiffs argue that one may infer a larger pattern of non-compliance from the 37
13 declarations they submitted, as the affiants were among Salvadorans detained during a two week
14 period at two Border Patrol stations. While this might be a fair inference were the court to credit
15 the declarations fully, the credibility concerns inherent in the declarations counsels against the
16 type of generalization plaintiffs urge.

17 Plaintiffs note that 15 of the 37 declarations were served on the government on September
18 12, 2006, in connection with plaintiffs’ brief regarding the alleged facial conflict between the
19 injunction and the expedited removal statute. The remaining declarations were obtained
20 approximately three weeks later. Plaintiffs assert that the fact that more than half of the alleged
21 violations occurred after the government had some of the declarations in hand gives rise to an
22 inference that the government has not been complying with the injunction in good faith. Had the
23 government been truly committed to rectifying the problems that underlie the *Orantes* injunction,
24 plaintiffs reason, it would surely have taken steps to solve the problem reflected in the
25 declarations immediately after receiving them on September 12, 2006. Having reviewed the
26 evidence, the court concludes that such an inference does not arise. Even though plaintiffs
27 obtained additional declarations on October 3-4, 2006, the A-files show that the affiants who
28 provided declarations on those dates were processed between September 8 and 22, 2006. Thus,
the conduct that the October affiants address occurred before the government received the first
set of declarations on September 12, or within a few days of receipt, and in no event more than
10 days after receiving the declarations. The government’s inability to address non-compliance
issues within this limited time frame does not give rise to a general inference that it has not
attempted in good faith to comply with the *Orantes* injunction.

⁴⁷The parties’ evidence regarding the government’s compliance with ICE detention
standards is also relevant in assessing the government’s compliance with the *Orantes* injunction.
This evidence is discussed *infra*.

1 order to apply only “*between ports of entry, not at ports of entry.*”⁴³ At the court’s request, the
2 parties addressed the propriety of the government’s interpretation of the injunction and whether
3 its refusal to provide advisals at ports of entry constituted a violation of the injunction’s terms.

4 Plaintiffs argue that Salvadorans at ports of entry fall within the class definition, i.e. “all
5 citizens and nationals of El Salvador eligible to apply for political asylum . . . who . . . have been
6 or will be taken into custody . . . by agents of the [Department of Homeland Security],” (*Orantes*
7 *II*, 685 F.Supp. at 1491), and therefore that such individuals were entitled to receive the advisals
8 mandated by the injunction. Plaintiffs concede that certain portions of the injunction refer
9 specifically to deportation proceedings and voluntary departure – terms that pertained only to
10 aliens between ports-of-entry at the time the injunction was entered. They assert, however, that
11 the government had a duty to seek clarification from the court before it interpreted the injunction
12 to deny advisals to Salvadorans detained at ports of entry.⁴⁴ The government acknowledges that
13 the class definition is sufficiently broad to include Salvadorans at ports of entry, but cites the
14 repeated references in the injunction and the *Orantes* opinions to deportation and voluntary
15 departure.

16 Having reviewed the *Orantes* opinions, the injunction, and the court’s files regarding
17 earlier proceedings before Judge Kenyon, the court agrees that Judge Kenyon was concerned
18 primarily with abuses visited upon Salvadorans apprehended within the United States and detained
19 for processing between ports of entry. Judge Kenyon heard evidence that INS agents had a
20 pattern and practice of coercing Salvadorans to sign voluntary departure forms – forms that were
21 used only when the INS processed aliens between ports of entry. This focus was consistent with
22 the statistics available regarding the apprehension of Salvadorans in the United States. In 2006,
23 over 40,000 Salvadorans were processed between ports of entry, compared with 1,343 at ports
24

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26 ⁴³*Ex Parte* Application for Reconsideration and Clarification at 3:24-26 (emphasis
27 original).

28 ⁴⁴RT, Dec. 20, 2006, at 29:8-30:9.

1 of entry.⁵⁰ The government represents that these numbers were even more heavily weighted
2 toward apprehension between ports of entry in the 1980s.⁵¹ As a result, paragraph two of the
3 *Orantes* injunction required the government to "inform the class member of his or her rights
4 to request a deportation hearing. . . . For those class members who [were] informed of the
5 availability of voluntary departure pursuant to 8 U.S.C. § 1252(b), such notice [was to] be given
6 before voluntary departure [was] discussed."⁵²

7 Before 1996, the government could not have advised Salvadorans at ports of entry of their
8 right "to request a deportation hearing," because class members at ports of entry had no such
9 right. Instead, Salvadorans at ports of entry were placed in exclusion proceedings. It is clear,
10 therefore, that the government's interpretation was consistent with letter of the injunction, at least
11 until 1996, when Congress erased the distinction between deportation and exclusion proceedings.
12 See FED.R.CIV.PROC. 65(d) (an injunction "shall be specific in terms [and] shall describe in
13 reasonable detail, and not by reference to the complaint or other document, the act or acts sought
14 to be restrained").

15 The fact that the evidence Judge Kenyon heard focused primarily on Salvadorans
16 apprehended between ports of entry does not mean that, had he been asked, Judge Kenyon *would*
17 have excluded Salvadorans detained at ports of entry from its scope. The purpose of the
18 injunction was to prevent the "dire consequences" likely to result if Salvadorans were erroneously
19 deprived of their right to apply for asylum. These dire consequences existed whether class
20 members were apprehended at or between ports of entry. By unilaterally refusing to provide
21 *Orantes* advisals to class members at ports of entry, and failing to seek clarification from Judge
22 Kenyon as to whether this was consistent with the intent of his order, the government arguably
23 violated the spirit of the injunction. This casts some doubt on the government's assertion that it
24 has complied with the injunction in good faith and that it is committed to ensuring that aliens are

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26 ⁵⁰Mardo Decl., ¶ 13; Morris Decl., ¶ 6.

27 ⁵¹RT, Dec. 20, 2006, at 57:9-14.

28 ⁵²*Orantes* Injunction, ¶ 2.

1 not removed without adequate notice of their rights. See, e.g., *St. John v. McElroy*, No. 95 CIV.
2 9810 (KMW), 1996 WL 49956, *3-4 (S.D.N.Y. Feb. 6, 1996) (INS' failure to comply with the
3 spirit of the court's injunction, even if it was technically in compliance with the strict letter of the
4 injunction, was "some evidence, although not dispositive evidence, that the INS [was] not
5 complying with [the] court's directives in good faith").

6 The court's doubts regarding the government's good faith compliance with the advisal are
7 compounded by its failure to seek clarification of the scope of the injunction following Congress'
8 enactment of IIRIRA, which eliminated the distinction between deportation and exclusion
9 proceedings. The government acknowledges it could have sought clarification when the statute
10 was passed. It contends, however, that its failure to do so does not evidence bad faith. As
11 enacted by Congress, the expedited removal statute applies to all nationalities except Cubans.
12 When the expedited removal program went into effect, the INS proceeded to place all nationalities
13 other than Cubans in expedited removal, "and it wasn't until later that there was really an
14 observation that . . . putting Salvadorans in expedited removal [might be inconsistent with the
15 *Orantes* injunction."⁵³ At that time, the government asserts that it "in good faith . . . interpreted
16 the injunction to say no, there's nothing inconsistent about it."⁵⁴ This interpretation, of course,
17 was based on a narrow construction of the injunction, not one consistent with its spirit or remedial
18 purpose.

19 The government's interpretation of the injunction was not so unreasonable, however, as
20 to have justified contempt sanctions, had plaintiffs sought them. Rather, the fact that the
21 injunction used terms that related only to proceedings between ports of entry compels the
22 conclusion that, at least initially, the government did not violate the letter of the order by failing
23 to give advisals to Salvadorans at ports of entry. Once IIRIRA passed, however, the injunction
24 used terms that no longer had legal meaning, and the government should have sought clarification
25 from the court. The government's narrow interpretation of the injunction in the first instance, and

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27 ⁵³RT, Dec. 20, 2006, at 62:7-24.

28 ⁵⁴*Id.*

1 its failure to obtain clarification once the distinction between deportation and exclusion
2 proceedings was eliminated, cast doubt on the government's assertion that it has complied with
3 the injunction in good faith and reformed its practices to ensure that all aliens receive notice of
4 their rights.

5 **d. Conclusion Regarding The Government's Compliance With The**
6 ***Orantes* Injunction**

7 Under *Rufo*, the government's compliance with the *Orantes* injunction is a relevant, but
8 not dispositive, factor in the dissolution inquiry. That there have been no enforcement actions for
9 18 years weighs in favor of dissolution. This is offset, however, by anecdotal evidence that the
10 government has failed to provide advisals to Salvadorans between ports of entry, and by the
11 government's unilateral decision not to provide advisals to Salvadorans at ports of entry. Viewing
12 the entire record, it appears evidence of the government's compliance with the advisal requirement
13 is mixed. Because the court considers compliance merely one factor to be weighed in determining
14 whether changed circumstances warrant dissolution of the injunction, this is not fatal to the
15 government's case. It does, however, demonstrate that the remaining evidence regarding the
16 continued need for the advisal must be carefully reviewed, as the court cannot presume that the
17 government has made consistent good faith efforts to comply with the requirement that it provide
18 an advisal of rights to Salvadorans who are detained.

19 **2. Advisal Of Rights**

20 The *Orantes* injunction requires that the government give Salvadoran aliens detained by
21 immigration authorities an advisal of rights. Until recently, this advisal informed Salvadoran
22 detainees that they had the right to apply for asylum, to be represented by an attorney, and to
23 request a removal hearing before an immigration judge. In November 2006, the court issued an
24 order modifying the advisal for Salvadorans placed in expedited removal proceedings. The
25 revised advisal informs Salvadorans that they have the right to apply for asylum; it also notifies
26 them that they have contingent rights – to be represented by an attorney and to request a removal
27 hearing before the immigration judge – if, and only if, they establish a credible fear of
28 persecution.

1 According to the government, Form I-826 (given to aliens in § 240 proceedings) and Form
2 I-867 (given to aliens in expedited removal proceedings) obviate the need for the *Orantes* advisal.
3 The court examines each form in turn.

4 a. Section 240 Proceedings

5 Form I-826, given to aliens placed in § 240 proceedings, contains three sections: "notice
6 of rights," "request for disposition," and "certification of service." The "notice of rights"
7 advises aliens of their right to attorney representation and to request a hearing before an
8 immigration judge:

9 "You have been arrested because immigration officers believe that you are illegally
10 in the United States. You have the right to a hearing before the Immigration Court
11 to determine whether you may remain in the United States. If you request a
12 hearing, you may be detained in custody or you may be eligible to be released on
13 bond, until your hearing date. In the alternative, you may request to return to your
14 country as soon as possible, without a hearing.

15 [§] You have the right to contact an attorney or other legal representative to
16 represent you at your hearing, or to answer any questions regarding your legal
17 rights in the United States. Upon your request, the officer who gave you this
18 notice will provide you with a list of legal organizations that may represent you for
19 free or for a small fee. You have the right to communicate with the consular or
20 diplomatic officers from your country. You may use a telephone to call a lawyer,
21 other legal representative, or consular officer at any time prior to your departure
22 from the United States."⁵⁹

23 This notice is followed by a "request for disposition," which requires that the alien check
24 and initial one of three options: (1) "I request a hearing before the Immigration Court to
25 determine whether or not I may remain in the United States"; (2) "I believe I face harm if I return
26 to my country. My case will be referred to the Immigration Court for a hearing"; (3) "I admit

27 _____
28 ⁵⁹Mot., Exh. G (Form I-826).

1 that I am in the United States illegally, and I believe I do not face harm if I return to my country.
2 I give up my right to a hearing before the Immigration Court. I wish to return to my country as
3 soon as arrangements can be made to effect my departure. I understand that I may be held in
4 detention until my departure.”⁵⁶

5 A third section, the “certification of service,” requires that the immigration officer indicate
6 whether the notice was (a) read by the alien or (b) read to the alien in English or another
7 language.⁵⁷ Plaintiffs argue that the form is inadequate because it does not advise aliens of their
8 right to apply for asylum. The government acknowledges that Form I-826 does not use the word
9 “asylum.” It contends, however, that the form communicates the substance of the right to asylum
10 by making clear, in simple and easy-to-understand language, that an alien who “face[s] harm” in
11 his or her home country may exercise his or her right to “request a hearing . . . to determine
12 whether or not [he or she] may remain in the United States.”

13 The court agrees with the government that the word “asylum” need not appear in an
14 advisal in order adequately to inform aliens of their right to apply for asylum. See *Orantes II*,
15 685 F.Supp. at 1499 (“The language used in the current [pre-*Orantes*] advisal is too complicated
16 for many Salvadorans to comprehend”). It notes, however, that Form I-826 is potentially
17 confusing in that it does not directly state that an alien who fears return to his or her country is
18 entitled to a hearing before a judge who will determine whether the alien can remain in the United
19 States. An individual reading the form will understand that there is a right to a hearing on fear
20 of persecution only if he is able to link two concepts. The first of these, which appears in the
21 “notice of rights,” is that he has a right to a hearing before the Immigration Court to determine
22 whether he may remain in the United States. The second, which is found in the “request for
23 disposition,” is that his case will be referred to the Immigration Court if he fears harm in his
24 home country. Compare *Orantes II*, 685 F.Supp. at 1505-06 (finding that Form I-274 was
25 inadequate because it “communicates no information regarding [the] availability of asylum or that

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27 ⁵⁶*Id.*

28 ⁵⁷*Id.*

1 having a well-founded fear or persecution entitles the individual to reside in the United States to
2 pursue an asylum claim. Nor does the I-274 inform class members that they can raise asylum as
3 a defense in a deportation hearing. In stating that a deportation hearing is for the purpose of
4 determining whether the alien is illegally in the country, without ever suggesting the possibility
5 of raising political asylum in such a hearing, the I-274 suggests to the class members who know
6 they are in the United States illegally that the outcome of such a hearing is a foregone conclusion.
7 But for the injunction in this case, agents would provide no information about raising asylum in
8 a deportation hearing. . .”).

9 The court need not decide whether this deficiency is so substantial that it renders Form I-
10 826 inadequate to advise aliens of their right to apply for asylum, however, because the
11 government has failed to meet its burden of showing that the form is properly administered at
12 ports-of-entry and border patrol stations. The government has submitted no evidence to show
13 that Form I-826 is actually given to aliens; nor has it submitted evidence that the form is
14 translated and read to aliens if they cannot read it themselves. As plaintiffs argued at the
15 December 20, 2006 hearing, “this case was never about the forms used It was about on-
16 the-ground practices.”⁵⁸ Without proof that the form is effective *in practice*, the court cannot
17 conclude that “on-the-ground” practices have changed so much that the *Orantes* advisal is no
18 longer necessary to ensure that aliens in § 240 proceedings understand they have the right to apply
19 for asylum. See *Augustin v. Sava*, 735 F.2d 32, 38 (2d Cir. 1984) (holding that an alien was
20 denied procedural rights “where the translation of the asylum application was nonsensical, the
21 accuracy and scope of the hearing translation are subject to grave doubt,” and the alien
22 “misunderstood the nature and finality of the proceeding”); *American Immigration Lawyers Ass’n*
23 *v. Reno*, 18 F.Supp.2d 38, 55 (D.D.C. 1998) (“a system that provides information that the
24 recipient does not understand cannot be considered to be providing adequate notice”), *aff’d.*, 199

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28 ⁵⁸RT, Dec. 20, 2006, at 38:11-13.

1 F.3d 1352 (D.C. Cir. 2000).⁵⁶

2 **b. Expedited Removal Proceedings**

3 Form I-867A/B, given to aliens in expedited removal proceedings, is read verbatim to
4 aliens.⁶⁰ The first portion, Form I-867A, states in part:

5 "This may be your only opportunity to present information to me and the
6 Immigration and Naturalization Service to make a decision. It is very important
7 that you tell me the truth. If you lie or give misinformation, you may be subject
8 to criminal or civil penalties, or barred from receiving immigration benefits or
9 relief now or in the future.

10 * * *

11 U.S. law provides protection to certain persons who face persecution, harm or
12 torture upon return to their home country. If you fear or have a concern about
13 being removed from the United States or about being sent home, you should tell me
14 so during this interview because you may not have another chance. You will have
15 the opportunity to speak privately and confidentially to another officer about your
16 fear or concern. That officer will determine if you should remain in the United

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18 ⁵⁹Plaintiffs in *American Immigration Lawyers Ass'n v. Reno* challenged the expedited
19 removal program in part on the grounds that the statute did not ensure that aliens received
20 competent translation services and thus were forced to sign forms they did not fully understand.
21 *American Immigration Lawyers Ass'n*, 18 F.Supp.2d at 55. Noting that the Interim Regulations
22 required interpreters during secondary inspection, the court characterized plaintiffs' claim as an
23 a challenge to the agency's unwritten policies and practices. *Id.* Because IIRIRA expressly limits
24 systemic challenges to written policy directives, guidelines, and procedures, the court concluded
25 that it did not have jurisdiction to hear plaintiffs' attack on the agency's unwritten policies
26 regarding use of translation services. *Id.* at 57-58 (citing INA, § 242(a)(3)(A)(ii)). No similar
27 jurisdictional issue is presented here, as the court does not review the adequacy of the
28 government's forms in response to a systemic attack on the procedures and protections afforded
aliens. Rather, it assesses only whether the protections constitute changed circumstances
demonstrating that the *Orantes* advisal is no longer necessary to remedy practices identified by
Judge Kenyon in *Orantes I* and *II*.

⁶⁰Pursuant to ICE regulations, "[t]he examining immigration officer shall read (or have
read) to the alien all information contained on Form I-867A." 8 C.F.R. § 235.3(b)(2)(i).

1 States and not be removed because of that fear.”⁶¹

2 Following these statements is a question-and-answer section, Form I-867B, which requires that
3 the officer ask the alien a series of questions and record the answers. Among the questions asked
4 are the following: “Why did you leave your home country or country of last residence?”; “Do
5 you have any fear or concern about being returned to your home country or being removed from
6 the United States?”; “Would you be harmed if you are returned to your home country or country
7 of last residence?”; and “Do you have any questions or is there anything else you would like to
8 add?”⁶²

9 When aliens in expedited removal are referred for a credible fear interview, they are given
10 Form M-444, which explains that they have the right to consult with other people before the
11 interview, and that a “person of [the alien’s] choosing” may be present during the interview. The
12 form also advises the aliens that “[t]he purpose of the credible fear interview is to determine
13 whether [they] might be eligible to apply for asylum.” It also states that “[i]f the asylum officer
14 determines that you do not have a credible fear of persecution or torture you may request to have
15 that decision reviewed by an immigration judge.”⁶³

16 The evidence shows that Form I-867A/B, at least, is a highly effective instrument when
17 properly administered. A February 2005 study conducted by the United States Commission of
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20 ⁶¹Mot., Exh. R (Form I-867A).

21 ⁶²*Id.*

22 ⁶³Mot., Exh. T (Form M-444). The primary difference between the *Orantes* advisal and
23 the combination of Forms I-867 and M-444 is the fact that Form M-444 is not given to the alien
24 until he or she is referred for a credible fear interview. Unlike Salvadorans who receive the
25 *Orantes* advisal, therefore, aliens who receive Form I-867 must decide whether or not to apply
26 for asylum not knowing that they have the right to a hearing and to representation if they are able
27 to establish that they have a credible fear of persecution. Plaintiffs argue that this difference
28 makes Forms I-867 and M-444 inadequate substitutes for the *Orantes* advisal. The court need not
address this argument, as it concludes that the government has failed to meet its burden of
showing that the forms are actually provided to Salvadorans in a way that ensures they are
understood.

1 International Religious Freedom ("USCIRF")⁶⁴ found that the likelihood of referral for a credible
2 fear interview increased sevenfold when paragraph four of I-867A was read to an alien.⁶⁵ The
3 likelihood of referral roughly doubled for each fear question asked; thus, the likelihood of referral
4 was four times greater for individuals who were asked both fear questions than for those who
5 were asked neither question.⁶⁶ These findings suggest that, properly used, the forms effectively
6 advise aliens in expedited removal of their right to apply for asylum.

7 Even the most effective form is useless if it is not administered, however. Citing the
8 USCIRF study, plaintiffs argue that "[o]fficers conducting expedited removal often violate the
9 governing regulations and routinely short-cut procedures."⁶⁷ In particular, they allege that officers
10 frequently neglect to read Form I-867's advisal regarding the availability of asylum.

11 The USCIRF study involved personal and video observations of secondary inspection
12 interviews at seven sites - Atlanta Hartsfield International Airport, Houston International Airport,
13 John F. Kennedy International Airport, Los Angeles International Airport, Miami International
14 Airport, Newark Liberty International Airport, and the San Ysidro Border Station - as well as
15 follow-up interviews with aliens after they completed secondary inspection but before they learned
16 of the final disposition of their case.⁶⁸ In all, researchers reviewed 443 secondary inspections.⁶⁹
17 Because the study does not identify the nationalities of the aliens who were interviewed, the court
18

19 ⁶⁴Declaration of Ranjana Natarajan in Support of Plaintiffs' Memorandum of Points and
20 Authorities Regarding the Court's Jurisdiction over Expedited Removals ("Natarajan Decl."),
21 Exhs. 5-6.

22 ⁶⁵*Id.*, Exh. 6 at 162. When cases from San Ysidro are excluded, the "associations between
23 reading [this] paragraph[] and referral showed a similar pattern of results, although the
24 associations were no longer statistically significant because of the reduced sample size." (*Id.* at
25 162).

26 ⁶⁶*Id.* at 162-63.

27 ⁶⁷*Opp.* at 13:4-5.

28 ⁶⁸Natarajan Decl., Exh. 6 at 150.

⁶⁹*Id.*, Exh. 6 at 151 (tbl. 1.1).

1 cannot determine whether, or to what extent, its findings apply to Salvadoran class members.

2 The USCIRF researchers found that the length of secondary inspection interviews varied.
3 On average, officers spent 18 minutes interviewing aliens at the San Ysidro office, although
4 observers recorded interviews that ranged from a low of 3 to a high of 150 minutes. By
5 comparison, officers at the Houston port of entry spent an average of 2 hours and 53 minutes with
6 each alien; interviews there ranged from 79 to 380 minutes.²⁰ Based on their observations, the
7 researchers found the following:²¹

8 Item Read or 9 Paraphrased	Atlanta	Houston	Los Angeles	Miami	Newark	San Ysidro	Total
10 1-867A: ¶ 4 (asylum)	35 (89.5%)	23 (95.8%)	11 (68.8%)	86 (96.6%)	13 (46.4%)	17 (9.7%)	164 (44.1%)
12 1-867B: Why did you 13 leave...?	34 (91.4%)	20 (87.0%)	17 (85.0%)	71 (98.6%)	25 (83.3%)	157 (88.2%)	325 (89.8%)
14 1-867B: Do you have 15 any fear...?	34 (89.5%)	20 (87.0%)	17 (85.0%)	71 (98.6%)	25 (83.3%)	157 (88.2%)	336 (94.1%)
16 1-867B: Would you be 17 harmed...?	34 (89.2%)	20 (83.3%)	17 (85.0%)	70 (98.6%)	26 (86.7%)	144 (82.8%)	311 (87.1%)
18 1-867B: At least one 19 fear question asked	34 (91.4%)	22 (91.6%)	18 (90.0%)	95 (96.7%)	29 (96.7%)	159 (94.4%)	362 (95.0%)

20 As can be seen, DHS officers varied in their adherence to the regulations' requirement that
21 they read Form I-867 to aliens in expedited removal proceedings. At all six sites, INS officers
22 asked the two "fear" questions most or nearly all of the time. Researchers, however, observed
23 far greater variation in the frequency with which DHS officers read paragraph four of Form I-

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27 ²⁰*Id.* at 151.

28 ²¹*Id.* at 159 tbl. 2.2.

1 867A, which informs aliens of the availability of political asylum.⁷²

2
3 ⁷²Plaintiffs also cite the USCIRF study's finding that A-files sometimes indicated an alien's
4 response to the "fear" questions even though observers reported that the questions had not been
5 asked:

	Observation		A-File Review	
	Question Read	Question Not Read	Response In A-File	No Response In A-File
6 1-867B: Do you have any fear...?	336 (94.1%)	21 (5.9%)	379 (95.2%)	19 (4.8%)
7 1-867B: Would you be harmed...?	311 (87.1%)	46 (12.9%)	379 (95.2%)	19 (4.8%)
8 1-867B: At least one fear question asked	362 (95.0%)	19 (5.0%)	379 (94.8%)	21 (5.3%)

9 (Natarajan Decl., Exh. 5 at 159 tbl. 2.1). Plaintiffs contend that these inaccuracies are
10 particularly troubling because first-line supervisors often rely exclusively on "paper reviews."
11 (See, e.g., Deposition of Matthew J. Calmes, Supervisory Border Patrol Agent, Imperial Beach
12 Border Patrol Station, San Diego Section ("Calmes Depo.") at 54:20-55:4 ("I review the
13 casework to make sure it's complete, all the I's are dotted and the T's are crossed, to make sure
14 all the casework is done up to par. Use the checklist to ensure that everything is done properly.
15 And I - once everything is done properly, I sign the case in my place, and then I sign the
16 checklist, and it's referred to my supervisor for review and signature")).

17 Plaintiffs appear to argue that DHS safeguards do not work so well in practice as in theory.
18 Although both a first-line and second-line supervisor must review and sign off on every file before
19 an expedited removal order can be issued, plaintiffs imply that the utility of these reviews is
20 necessarily limited by the quality of the paperwork prepared by the secondary inspector. This
21 inference is rebutted to some extent by the testimony of John McLaughlin, a first-line supervisor.
22 McLaughlin confirmed that he typically limits his review to the "paperwork" prepared by the
23 inspector, but added that he sometimes interviews aliens directly "where something . . . doesn't
24 make sense or [where he] just wanted to get clarification . . . or sometimes the agent is having
25 a difficult time either understanding or getting [an alien] to understand." (Deposition of John
26 McLaughlin ("McLaughlin Depo.") at 75:8-16). It appears uncontested, however, that
27 supervisors' primary duties are to review the paperwork for errors, not to conduct a new
28 secondary inspection.

Evidence regarding the review process is only tangentially related to the court's inquiry.
It would, of course, be problematic if the statistics showed that CBP agents routinely
misrepresented or falsified aliens' answers to the fear questions. The statistics, however, do not
lend themselves to this interpretation. It is possible, for example, that CBP agents simply assume
that the answer to the second fear question is "yes" if the answer to the first is "yes," and record
such an answer even though they do not ask the second question. Without further information
regarding the specific responses recorded, it is not possible to infer from the small percentage

1 Particularly striking are the study's findings regarding practices at the San Ysidro port-of-
2 entry. Although 94.4 percent of aliens at San Ysidro were asked at least one of the two "fear"
3 questions, and the overwhelming majority were asked both questions, only 9.7 percent were read
4 paragraph four, which advises aliens of their right to apply for asylum. The study does not reveal
5 whether the "fear" questions are equally effective when asked without the context provided by
6 paragraph four; the court can infer, however, that an alien who understands that he may obtain
7 asylum in the United States if he has a fear of returning to his home country will more readily
8 comprehend the purpose of the "fear" questions.

9 Although the government suggested at the hearing on this motion that San Ysidro's
10 compliance rates reflected the practices of one, isolated port-of-entry, the evidence supports a
11 different conclusion. San Ysidro personnel reported to USCIRF researchers that CBP staff
12 "periodically show[ed] an information video that contain[ed] I-867A content (in both Spanish and
13 English) to aliens awaiting Secondary Inspection in lieu of reading the information."⁷³ Officers
14 were expected to read the I-867A to aliens whenever the video was not shown, the staff members
15 said.⁷⁴ Were this true, the court might conclude that San Ysidro personnel had adopted the video
16 as a as a creative, albeit improper, solution to the time pressures of processing large numbers of
17 aliens through the port-of-entry. The facts are not so benign, however.

18 In response to the court's request for a copy of the video, the government submitted two
19 informational videos: the video shown during the USCIRF study in 2004 and the one shown
20 today. An accompanying declaration by Paul Cannon, a Watch Commander at the San Ysidro

21 _____
22 differentials found that CBP agents are falsifying responses to the detriment of aliens who might
23 otherwise have good faith asylum claims. While the statistics tend to suggest that the effectiveness
24 of the first- and second-line reviews is limited by the accuracy of the answers recorded by the
25 secondary inspector, the primary focus of the present inquiry is whether the form is appropriately
26 administered. The statistics show that in the vast majority of cases, it is. The fact that the DHS
has implemented two layers of additional review suggests that it has made substantial efforts – if
imperfect efforts – to ensure that aliens are not removed erroneously.

27 ⁷³*Id.* at 160.

28 ⁷⁴*Id.*

1 port of entry, asserts that "it has never been the policy at the San Ysidro port of entry to show an
2 informational video in lieu of having Form I-867A/B read aloud during administration of the
3 sworn statement."⁷⁵ Indeed, Cannon states, he "ha[s] never observed and do[es] not know of any
4 instances where an alien was shown the . . . videos in lieu of having Form I-867A/B read
5 aloud."⁷⁶ Rather, the informational video "describ[es] the inspection process and provid[es] safety
6 information regarding the dangers associated with crossing the border illegally."⁷⁷ It is meant to
7 "supplement, and not to supplant, existing immigration inspections processing."⁷⁸ As can be
8 seen, Cannon represents, contrary to the representations that San Ysidro personnel made to
9 USCIRF researchers, that the video has never been used to advise aliens awaiting expedited
10 removal of their right to apply for asylum.

11 The evidence regarding the video suggests that the San Ysidro personnel interviewed by
12 USCIRF researchers may have mischaracterized the video, so that they would not have to admit
13 that their practices were deficient and take steps to remedy the problem. As Cannon states that
14 the video was never meant to substitute for an oral advisement of the right to apply for asylum,
15 the evidence confirms the USCIRF's finding that only one in ten aliens processed through San
16 Ysidro was properly informed of his or her right to apply for asylum.⁷⁹

17
18 ⁷⁵Declaration of Paul Cannon re Videos Used at San Ysidro ("Cannon Decl."), ¶ 7.

19 ⁷⁶*Id.*, ¶ 8.

20 ⁷⁷*Id.*, ¶ 6.

21 ⁷⁸*Id.*, ¶ 10.

22
23 ⁷⁹In support of its motion for amendment and reconsideration under Rule 59(e) of the
24 Federal Rules of Civil Procedure and Local Rule 7-18, the government provided, on June 20,
25 2007, an English translation of the video used at San Ysidro. Approximately 2:30 minutes into
26 the 8:15 minute video, there is a 45-second segment informing viewers that "United States law
27 provides that any person facing persecution, harm, or torture in his or her country of origin shall
28 be protected. By virtue of the above, if you fear returning to your country for these reasons, you
should notify the official handling your case, given that it will be the only opportunity that you
will have to lay out the problem. In such a case as this, you will have the opportunity to speak
confidentially to an official. After hearing from you, the same official shall determine whether
sufficient grounds exist for you to remain in the country." (Rule 59(e) Mot., Becker Decl., Exh.

1 This statistic is particularly important given the large numbers of aliens who are processed
2 through the San Ysidro port-of-entry. Between 2000 and 2003, San Ysidro alone processed 38
3 percent of all aliens placed in expedited removal proceedings;⁶⁰ this makes it the single busiest
4 port-of-entry in terms of numbers of aliens removed through the expedited removal program. In
5 this context, the low compliance rates at San Ysidro are quite significant, and belie any suggestion
6 that the USCIRF's findings should be dismissed as reflecting the isolated practice of a single,
7 renegade port-of-entry.

8 This conclusion is not affected by the government's assertion that it took "immediate steps"
9 to address the concerns raised by the USCIRF study.⁶¹ The USCIRF's lead recommendation was
10 that the DHS "create an office - headed by a high-level official - authorized to address . . . issues
11
12

13
14 1 at 11). For several reasons, this 45-second segment is an inadequate substitute for paragraph
15 four of Form I-867A. First, it is buried in the middle of a video that addresses a variety of
16 unrelated issues, and that devotes almost three minutes to a graphic presentation of the physical
17 dangers of entering the United States illegally. Second, like Form I-274, it fails to make clear
18 that an individual who fears persecution may be able to remain in the United States based on that
19 fear. Instead, the video advises aliens only that they "shall be protected" if they fear persecution.
20 (Compare also Form I-867A ("That officer will determine whether you should remain in the
21 United States and not be removed because of that fear") with Rule 59(e) Mot., Becker Decl.,
22 Exh. 1 at 11 ("After hearing from you, the same official shall determine whether sufficient
23 grounds exist for you to remain in the country"). Finally, as plaintiffs note, it is reasonable to
24 infer that the video, which plays on a continuous loop in a waiting room and conveys numerous
25 messages designed to discourage undocumented migrants from entering the United States illegally,
26 quickly becomes "background noise" for many people, and is far less effective than the one-on-
27 one oral advisal contemplated by Form I-867A.

28
⁶⁰The court calculated this figure based on two statistics reported in the USCIRF study: (1)
San Ysidro accounted for 43.8 percent of all expedited removals at land/sea (i.e., non-airport)
ports-of-entry between 2000 and 2003 and (2) airport arrivals made up only 12 percent of aliens
placed in expedited removal proceedings. (Natarajan Decl., Exh. 5 at 94).

⁶¹Reply at 27:11-12. See also Reply, Exh. AA (Letter from Michael J. Hrinayak to Mark
Hetfield, Feb. 2, 2005) (commenting on aspects of the USCIRF study); Reply, Exh. Z (Letter
from Michael J. Hrinayak to Mark Hetfield, Jan. 21, 2005) (same); Reply, Exh. Y (Letter from
Michael J. Hrinayak to Mark Hetfield, Jan. 7, 2005) (same).

1 relating to asylum and expedited removal.⁸² Secretary Chertoff implemented this
2 recommendation in July 2005, when he appointed a Senior Refugee and Asylum Advisor.⁸³ The
3 government submits no evidence, however, that any of the study's other recommendations were
4 implemented. Nor does it assert that the recommendations are under study for possible
5 adoption.⁸⁴

6 Instead, the government offers evidence that, in response to the USCIRF's findings, DHS'
7 Management Inspections Division ("MID") accelerated its review of the expedited removal
8 procedures used by the Office of Field Operations ("OFO") and the Office of Border Patrol
9 ("Border Patrol").⁸⁵ The MID's multi-stage review is described in a declaration submitted by its
10 Director, John J. Rooney. Rooney reports that, in Spring 2006, the division reviewed alien files
11 ("A-files") for each Border Patrol station placing relatively large numbers of aliens in expedited
12 removal proceedings. After reviewing the A-files, four MID inspectors traveled to Border Patrol
13 Stations in four Texas and Arizona locations, where they interviewed Border Patrol agents and
14

15
16 ⁸²Natarajan Decl., Exh. 5 at 70.

17 ⁸³USCIRF Welcomes Secretary Chertoff's Creation of a Senior Refugee and Asylum
18 Advisor, July 19, 2005, available at [www.uscirf.gov/mediaroom/press/2005/july/07192005_](http://www.uscirf.gov/mediaroom/press/2005/july/07192005_uscirf.html)
19 [uscirf.html](http://www.uscirf.gov/mediaroom/press/2005/july/07192005_uscirf.html).

20 ⁸⁴The study made five overarching recommendations: (1) create an office headed by a high-
21 level official to address issues relating to asylum and expedited removal; (2) give asylum officers
22 authority to grant asylum claims during credible fear interviews; (3) establish detention standards
23 and conditions appropriate for asylum seekers, including regulations that will ensure effective
24 implementation of existing parole criteria governing the release of asylum seekers pending final
25 adjudication of their claims; (4) expand existing private-public partnerships to facilitate legal
26 assistance for asylum seekers and improve administrative review and quality assurance
27 procedures; and (5) implement and monitor quality assurance procedures, e.g., a computerized
28 system to track real-time data on aliens and use of videotaping to record all secondary interviews.
(Natarajan Decl., Exh. 5 at 126-38).

26 ⁸⁵Declaration of John J. Rooney ("Rooney Decl."), ¶ 2, 5. The OFO is responsible for
27 processing individuals seeking entry into the United States through ports of entry, while the
28 Border Patrol is charged with detecting and preventing the illegal entry of aliens into the United
States between ports of entry. (*Id.*, ¶ 2).

1 observed 31 Border Patrol agents process 40 expedited removal cases.⁸⁶ After reviewing 181 A-
2 files, interviewing the 31 Border Patrol agents, and observing 40 expedited removal cases, the
3 MID inspectors "found no evidence that Border Patrol agents improperly encouraged or coerced
4 asylum seekers to withdraw their application[s] for admission," or that they otherwise "failed to
5 refer aliens who expressed fear of persecution to an asylum officer for a credible fear
6 interview."⁸⁷ The inspectors also "identified no substantive violations of US Customs and Border
7 Protection ("CBP") procedures by Border Patrol agents that affected the due process rights of
8 aliens apprehended by Border Patrol."⁸⁸ Inspectors reached identical conclusions in a separate
9 review of OFO procedures; this review involved studying 223 A-files, interviewing 10 CBP
10 officers, and observing the processing of 27 aliens through expedited removal at five ports-of-
11 entry, including San Ysidro, California.⁸⁹

12 These generalized statements provide little information concerning the concrete findings
13 of the review. Rooney does not identify the deficiencies that were found; he offers only the
14 conclusory assertion that there were no "substantive violations" that "affected the due process
15 rights of aliens apprehended by the Border Patrol."⁹⁰ Rooney does not indicate whether the
16 review determined that paragraph four of Form I-867A had been read to most aliens whose files
17 were reviewed. Nor does he address whether it is the regular practice of Border Patrol and CBP
18 officers to read the entire Form I-867A/B to the aliens they process. The fact that the government
19 has implemented regular reviews and automated inspection programs is a positive development.⁹¹

21 ⁸⁶*Id.*, ¶¶ 10-16.

22 ⁸⁷*Id.*, ¶¶ 17-18.

23 ⁸⁸*Id.*, ¶ 19.

24 ⁸⁹*Id.*, ¶¶ 26, 28. As of December 7, 2006, the MID was in the process of completing its
25 review; Rooney anticipates future reviews on a regular basis. (*Id.*, ¶¶ 6-7).

26 ⁹⁰*Id.*

27 ⁹¹The MID has instituted a "self inspection program," which requires Border Patrol Agents
28 in Charge to complete annual worksheets regarding operation of the expedited removal program

1 Without further evidence of the results of the inspections, however, the court simply has no basis
 2 upon which to conclude that the adoption of Forms I-826, I-867A/B, and M-444 has changed the
 3 circumstances surrounding the processing of aliens so significantly that the *Orantes* advisal is no
 4 longer necessary to ensure that Salvadorans are routinely notified of their right to apply for
 5 asylum.⁹²

6
 7 at their Border Patrol Stations. Each Agent in Charge must also review a random sample of five
 8 expedited removal cases processed during the review period. If the Agent in Charge identifies
 9 any deficiencies, including deficiencies in proper completion of the relevant forms, he or she must
 10 flag the procedural deficiency and take corrective action. An automated system tracks further
 11 deficiencies in agents' handling of the flagged procedures until the problems are corrected. (*Id.*,
 12 ¶¶ 30-39).

13 ⁹²As evidence that the advisal remains necessary, plaintiffs cite instances of "aggressive
 14 or intimidating" behavior by CBP officers during secondary inspection. UNCIRF researchers
 15 noted several types of behavior while observing agents. Some were aggressive or intimidating,
 16 others helpful or soothing.

Aggressive or Intimidating Behaviors Observed During Secondary Inspection		
Behavior	All cases	Cases referred for credible fear
Raising voice	41 (10.4%)	13 (19.7%)
Interrupting	40 (10.1%)	10 (15.2%)
Grabbing/threatening touches	1 (0.3%)	0
Accusations	28 (7.1%)	4 (6.1%)
Verbal threats	20 (5.1%)	2 (3.0%)
Sarcasm/Ridicule	37 (9.4%)	7 (10.6%)
Being demanding	36 (9.1%)	5 (7.6%)
Standing over alien	9 (2.3%)	1 (1.5%)
Leaving room without explanation	63 (15.9%)	9 (13.6%)
Helpful Behaviors Observed During Secondary Inspection Interviews		
Offering comforting words	41 (10.4%)	8 (12.1%)
Friendly joking	61 (15.4%)	14 (21.2%)
Small talk	44 (11.2%)	3 (4.6%)

1 c. **Conclusion Regarding Advisal Of Rights**

2 Having reviewed the parties' evidence, the court concludes that the government has not
3 met its burden of establishing changed circumstances respecting its practice of advising aliens of
4 their right to apply for asylum. Although the government has adopted new forms and regulations
5 to ensure that aliens are not removed unless they understand their right to apply for asylum, it has
6 submitted no evidence that the forms are actually used in practice. The government has proffered
7 no evidence whatsoever from which the court can infer that Form I-826 is actually administered
8 to aliens placed in § 240 proceedings, or that aliens who sign the forms are actually given an
9 opportunity to understand what it is they are signing. The only evidence regarding Forms I-867
10 and M-444, which are used in expedited removal, was placed in the record by plaintiffs. This
11 evidence shows that Form I-867, in particular, represents a thoughtful effort to ensure that aliens
12 are not subject to expedited removal orders without understanding that they have a right to apply
13 for asylum. The evidence regarding use of the form, however, raises substantial concerns. While
14 these concerns focus primarily on the San Ysidro port-of-entry, the heavy traffic of aliens through
15 that entry point magnifies the deficiencies there. As a result, the court cannot conclude that the
16 low rates of compliance at San Ysidro are examples of sporadic or isolated practice. Finally, the
17 court notes that the government's unilateral interpretation of the injunction as exempting
18 Salvadorans at ports-of-entry from the advisal requirement raises doubts regarding its commitment
19 to ensuring that Salvadorans are notified of their right to apply for asylum. Although the country
20 conditions that created such a strong need for the advisal in 1988 have changed, plaintiffs'

21 _____

22 Explaining actions	96 (24.3%)	16 (24.2%)
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23 (Natarajan Decl., Exh. 6 at 171 tbls. 5.1 and 5.2). The court accords only minimal weight to this
24 evidence. Although it may seem logical to infer that "aggressive" behavior by CBP agents has
25 the effect of discouraging some aliens from applying for asylum, the statistics do not bear this out.
26 CBP officers "raised their voices" when dealing with almost 20 percent of aliens referred for
27 credible fear interviews, for example. This percentage dropped to 10 percent for "all aliens."
28 It appears, therefore, that "raised voices" may correlate *positively* with referral for a credible fear
interview, however illogical that may be. As this example demonstrates, without further context,
the court cannot reasonably draw any inferences from the statistics: they are, moreover, not
sufficiently robust to be statistically significant.

1 evidence demonstrates that some Salvadorans continue to have valid claims for asylum today. As
2 earlier noted, while the conditions Salvadorans face if they are denied the right to apply for
3 asylum and are returned to El Salvador are not as severe as those Salvadorans faced in 1988,
4 Judge Kenyon entered the injunction not only to protect Salvadorans from being returned to a
5 country torn apart by civil war, but also to remedy coercive practices by the INS. Because the
6 government has not adduced adequate evidence that the practices that were of concern to Judge
7 Kenyon have been rectified by its promulgation and use of new advisal forms, the court concludes
8 it has not demonstrated that the purposes of the injunction have been fully satisfied. The court
9 accordingly denies the government's motion to dissolve paragraphs 1-3 and 5 of the injunction,
10 which set forth the advisal requirement.

11 3. ICE Detention Standards⁹³

12 The government contends that the injunction is no longer necessary to ensure that coercive
13 conditions and practices at detention centers do not discourage Salvadorans from applying for
14 asylum. It states:

15 "[T]he concerns of INS abuse that gave rise to the injunction are no longer well-
16 founded. Since the entry of the injunction almost two decades ago, the INS and
17 DHS have reviewed and reevaluated their immigration policies, and have reformed
18 the way that they process, detain, and remove illegal aliens. . . . For most
19 provisions of the injunction that once applied only to Salvadorans, INS and DHS,
20 on their own accord, made the safeguards and protections available to aliens of all
21 nationalities."⁹⁴

22 The safeguards to which the government refers are set forth in ICE's national detention standards,
23 which were drafted and implemented by defendants many years after the injunction was entered.⁹⁵

25 ⁹³ICE is the Bureau of Immigration and Customs Enforcement, which is a division of the
26 Department of Homeland Security.

27 ⁹⁴Mot. at 2, 35.

28 ⁹⁵*Id.* at 14.

1 The detention standards were developed in November 2000 by the former Immigration and
2 Naturalization Service ("INS") in conjunction with the American Bar Association ("ABA"), the
3 Department of Justice, and various organizations involved in advocacy for and pro bono
4 representation of immigration detainees. Thirty-eight standards govern the operation of detention
5 facilities for aliens who are apprehended for entering the United States illegally; ICE periodically
6 measures detention facility compliance with them. The government argues that seven of
7 the standards parallel provisions of the *Orantes* injunction, and that their implementation, coupled
8 with compliance monitoring by ICE, obviates the need for court supervision through the
9 injunction.⁶⁶

10 a. Enforceability

11 Plaintiffs argue that implementation of the standards cannot displace the injunction because
12 the standards are not judicially enforceable. Taken to its logical conclusion, plaintiffs' argument
13 would mean that the *Orantes* injunction could not be dissolved unless the legislature or the courts
14 created a privately-enforceable right to the safeguards provided by the injunction. Nothing in
15 Rule 60(b)(5) or the case law suggests that an injunction cannot be dissolved unless its terms are
16 codified or otherwise made judicially enforceable. In *Dowell*, the Supreme Court held that the
17 court of appeals erred in concluding that "compliance alone cannot become a basis for modifying
18 or dissolving an injunction." *Dowell*, 498 U.S. at 246, 248-49. Were this the case, the Court
19 observed, then "a school district, once governed by a board which intentionally discriminated,
20 [would be condemned] to judicial tutelage for the indefinite future." *Id.* at 249. The Court
21 concluded that such a "Draconian result" was not required by "the principles governing the entry
22 and dissolution of injunctive decrees." *Id.* As *Dowell* instructs, dissolution is sometimes
23 warranted because the enjoined party has complied in good faith with an injunction's provisions.
24 This belies the notion that dissolution is never warranted unless the enjoined party is bound by

25
26 ⁶⁶*Id.* at 15-20. The seven standards at issue govern (1) visitation; (2) telephone access;
27 (3) access to legal materials; (4) special management unit (administrative segregation); (5) special
28 management unit (disciplinary segregation); (6) group presentations on legal rights; and (7) staff-
detainee communication.

1 judicially-enforceable provisions to meet standards identical to those in the injunction. See also
2 *Building & Constr. Trades Council*, 64 F.3d at 888 (“[T]he fact that the party is not subject to
3 a contempt sanction for violation of the decree in addition to the statutory punishment is not
4 generally a factor to be considered [in determining whether an injunction should be dissolved]”).

5 **h. Adequacy Of The Detention Standards**

6 The parties submitted some 3,000 pages of exhibits that document conditions in ICE
7 detention facilities today. The government contends these documents show that “the concerns of
8 INS abuse that gave rise to the injunction are no longer well-founded. The Government has
9 reformed its practices and has, on its own initiative, voluntarily extended aspects of the injunction
10 that were once imposed on it for Salvadorans, and applied them to all nationalities.”⁹⁷ The court
11 gives substantial weight to the government’s voluntary adoption of detention standards, which are
12 wide-ranging in scope and reflect a good-faith effort to develop a comprehensive system of
13 regulating and reviewing detention facilities.⁹⁸ As with the government’s forms, however, the
14 mere fact that detention standards exist is, by itself, insufficient to show changed circumstances.
15 The more pertinent question is whether the detention standards have been followed in practice,
16 and have eradicated the detention conditions that caused Judge Kenyon to enter the injunction.
17 To determine the answer to this question, the court has examined in detail the parties’ evidence
18 regarding detainee conditions to in an attempt to discern whether the practices that prompted
19 Judge Kenyon to enter the *Orantes* injunction remain extant today. In particular, the court has
20 focused on detention facilities’ compliance with standards that duplicate requirements in the
21 *Orantes* injunction.

22 There are 201 detention centers subject to the ICE detention standards: 8 Service
23 Processing Centers (SPCs), 6 Contract Detention Facilities (CDFs), and 187 state or local

24
25 ⁹⁷*Id.* at 30:3-8.

26 ⁹⁸Plaintiffs take issue with the government’s characterization of the detention standards as
27 guidelines that go “far above and beyond the requirements set forth in the injunction” (Reply at
28 35:7-12), and note that they are merely minimal standards established by the American
Correctional Association (RT. Dec. 20, 2006, at 47:17-20).

1 facilities, which house ICE detainees for longer than 72 hours and which have entered into
2 Intergovernmental Service Agreements (IGSAs) with the government.⁹⁹ To ensure that conditions
3 in these detention centers meet the standards set forth by ICE, ICE instituted the Detention
4 Management Control Program (DMCP) in January 2002 and created the Detention Standards
5 Compliance Unit (DSCU) to conduct annual inspections of the facilities.¹⁰⁰

6 The on-site portion of these reviews usually occurs over a period of two to three days,
7 during which inspectors observe facility conditions, interview staff members and detainees, and
8 review documentary evidence such as facility files, records, and invoices.¹⁰¹ Results are reported
9 on a "conditions of confinement review worksheet" (Form G-324A) and in a written summary
10 prepared by the officer in charge of the review.¹⁰² Form G-324A is an 85-page questionnaire
11 divided into 38 sections that correspond to the 38 detention standards.¹⁰³ For each detention
12 standard, the DSCU has developed specific questions to ascertain the facility's compliance with
13 the standard.¹⁰⁴ The questionnaire for the standard governing special management units, or
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15 ⁹⁹Leroy Decl., ¶ 7. There are an additional 144 IGSAs that house ICE detainees for less
16 than 72 hours. (*Id.*). The detention standards do not apply to these IGSAs, which are subject
17 instead to "abbreviated inspection." (*Id.*, ¶ 9). According to Yvonne Evans, former chief of the
18 DSCU, a small percentage of detainees are also held in Bureau of Prisons facilities. (Pls.' Exh.
19 9 (Deposition of M. Yvonne Evans ("Evans Depo.") at 24:15-16).

20 ¹⁰⁰Leroy Decl., ¶ 9.

21 ¹⁰¹*Id.*, ¶¶ 9, 12, 15.

22 ¹⁰²*Id.*, ¶¶ 12, 20.

23 ¹⁰³*Id.*

24 ¹⁰⁴*Id.* Yvonne Evans reports that a facility may be rated "acceptable" on a particular
25 detention standard even if some of its practices are out of compliance with one or more of the
26 standard's components. (Pls.' Exh. 9 (Evans Depo. at 108:4-7)). Thus, a reviewer may mark
27 "acceptable" at the end of the questionnaire for the detention standard on "Access to Legal
28 Materials" even though the reviewer has found that the facility's law library does not maintain
all of the legal materials listed on Attachment A to the standard, and/or that it does not offer
Lexis/Nexis access to detainees. (See Pls.' Exh. 19 at D013280, 013284-85 (Field Office
Detention Review Worksheet for the Erie County Prison, Erie, Pennsylvania, March 2005)).
Evans asserts that reviewers have discretion to determine whether or not a facility is "acceptable."

1 solitary confinement, for example, includes 24 questions. These include whether all cells are
2 equipped with beds, whether detainees receive three nutritious meals a day, and whether the
3 conditions of confinement are proportional to the amount of control necessary to protect the
4 detainees.¹⁰⁵ At the end of each of the 38 sections corresponding to the 38 detention standards,
5 the reviewer selects one of three conclusions: "acceptable," "deficient," or "at risk."¹⁰⁶ The
6 reviewers are then required to rate the facility overall as "superior," "good," "acceptable," or
7 "at risk."¹⁰⁷ Completed reports are reviewed by staff officers at DSCU headquarters.¹⁰⁸ Facilities
8 rated "deficient" or "at risk" are evaluated again within six months; continued noncompliance
9 results in discontinuation of the facility's use.¹⁰⁹ Where reviewers find particularly egregious
10 violations of the detention standards, they may contact the DSCU to discuss immediate remedial
11 measures, including the removal of immigration detainees from a facility altogether.¹¹⁰

12
13 as there are no written rules requiring reviewers to rate a facility "deficient" or "at-risk" if the
14 facility is out of compliance with a certain number of a detention standard's components. (Pls.'
15 Exh. 9 (Evans Depo. at 108:22-109:6); see also Pls.' Exh. 14 (Deposition of Adam Garcia
16 ("Garcia Depo.") at 142:20-25 ("Q: So how do you figure out - if there are a couple of
17 deficiencies in a particular standard, how do you figure out if you're going to mark the standard
18 as acceptable, deficient or at risk? A: Depending on the severity"))). Likewise, individual
19 reviewers must exercise discretion in assessing whether to recommend an overall facility rating
20 of "superior," "good," "acceptable," or "at risk." (*Id.* at 108:7-12). A facility need not be rated
21 "acceptable" on all 38 standards to receive an overall facility rating of "acceptable." (See Pls.'
22 Exh. 14 (Garcia Depo. at 140:9-12 ("Q: So as far as you know, there can be some deficient
23 standards individually and the facility could still be acceptable, right? A: Absolutely"))). All
24 reports and recommendations are reviewed by DSCU staff. (Pls.' Exh. 9 (Evans Depo. at 46-
25 47)).

26 ¹⁰⁵Pls.' Exh. 29.

27 ¹⁰⁶Leroy Decl., ¶ 13.

28 ¹⁰⁷*Id.*, ¶ 16.

¹⁰⁸*Id.*, ¶¶ 16-17.

¹⁰⁹*Id.*, ¶ 19.

¹¹⁰Pls.' Exh. 9 (Evans Depo. at 98:14-25 (recounting an instance in which detainees were removed from a facility in Oklahoma after a reviewer contacted the DSCU regarding "very

1 Representatives from the United Nations High Commissioner for Refugees ("UNHCR")
2 and the ABA also regularly visit detention facilities, observe conditions, interview detainees and
3 staff members, and provide unsolicited reports to ICE concerning their findings.¹¹ The ABA
4 focuses on legal issues, while the UNHCR examines compliance with international guidelines.¹²
5

6 serious problem[s] in detention standards compliance"); see also Leroy Decl. at 373 (Letter from
7 ICE to UNHCR, July 27, 2004 ("This letter is to confirm receipt of your correspondence dated
8 May 21, 2004, regarding the conditions of confinement at Avoyelles and Tangipahoa Parish
9 Prisons in Louisiana. After a thorough review of our records regarding the issues you raised, a
10 Headquarters review of the facilities was conducted. We concur with your concerns and have
11 taken immediate action to relocate Immigration and Customs Enforcement (ICE) detainees to
12 acceptable facilities"); Office of the Inspector General, DHS, *Treatment of Immigration Detainees
Housed at Immigration and Customs Enforcement Facilities* ("OIG Report"), Dec. 2006, at 38
(noting that ICE removed all immigration detainees housed at Passaic County Jail, Paterson, New
Jersey and transferred them to other facilities after the OIG completed its review of the facility).

13 ¹¹Leroy Decl., ¶¶ 21-22; Plaintiffs' Motion to Compel Additional Discovery, Exh. 1
14 (Declaration of Irena Lieberman ("Lieberman Decl.")); Pls.' Exh. 11 (UNHCR letter, Nov. 22,
2006).

15 ¹²Opp. at 18:9-10. The government notes that the UNHCR and ABA visits "are not
16 equivalent to the in-depth inspections conducted by ICE." (Leroy Decl., ¶ 21). The ABA, for
17 example, arranges for visits by delegations that "generally consist[] of summer associates and/or
18 attorneys from pro-bono law firms, who have little or no knowledge of the detention industry."
19 (*Id.*, ¶ 23). The visits are relatively short, lasting no more than four hours, and result in reports
20 that "typically lack the details necessary to properly investigate the matter." (*Id.*).

21 Plaintiffs counter that ICE's facility reviews are flawed because (1) the deposition
22 testimony of two facility reviewers revealed disparities in the way they evaluate facilities; and
23 (2) facilities are given thirty days notice before annual inspections, which permits them to correct
24 deficiencies before the review commences. To demonstrate that reviewers use different standards
25 in evaluating facilities, plaintiffs cite the deposition testimony of Adam Garcia and Kristine
26 Brisson, both ICE officers tasked with conducting field reviews of detention facilities. Asked
27 about the difference between a "deficient" and an "at-risk" rating, Brisson explained that a facility
28 is deficient "if it definitely does not meet a particular standard," while "at-risk" facilities are "in
danger or close to . . . not meeting a particular standard." (Pls.' Exh. 17 (Deposition of Kristine
Brisson ("Brisson Depo.") at 49:19-25). Asked whether "deficient indicate[d] a more severe
violation of a standard than at-risk," Brisson clarified that she was "not really sure because [she
has] never had to mark a facility as being at-risk or repeat finding . . . [so she] would have to
refer to [her] materials or [her] guide if [she] ever had to mark either one of those boxes." (*Id.*
at 50:1-9). Garcia, by contrast, explained that an "at risk" facility is "a little more than deficient,
[i.e.,] at risk of failing," while a "deficient" facility is "[a] little behind, the problem can be

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2 Plaintiffs assert that reviews by the ABA, UNHCR, and ICE show that “the government

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4 corrected in a timely manner.” (Pls.’ Exh. 14 (Garcia Depo. at 136:9-17)).

5 The DMCP guidelines indicate that a “deficient” rating describes a facility where “[o]ne
6 or more detention functions are not being performed at an acceptable level. Internal controls are
7 weak, thus allowing for serious deficiencies in one or more program areas.” (Leroy Decl. at 393
8 (DMCP Policy and Procedure)). Despite this guideline, the testimony of the ICE reviewers
9 demonstrates they implement the standards in very different ways. The inconsistencies in practice
10 suggest that there may be merit to plaintiffs’ assertion that the reviews “may severely under-report
11 non-compliance with the detention standards.” (Opp. at 19:12-19).

12 The inconsistencies extend to reviewers’ decisions as to whether particular conditions
13 constitute violations of a standard. At his deposition, Adam Garcia explained that he had marked
14 “Yes” next to a detention standard component that read, “The official authorizing censorship or
15 rejection of outgoing mail provides the detainee with signed written notice,” even though his notes
16 indicated that detainees were *not* always provided with written notice. (Pls.’ Exh. 14 (Garcia
17 Depo. at 163:1-11)). In the review sheet’s “remarks” section, he wrote: “Detainee will be
18 notified if outgoing mail is rejected, not always with a written notice.” (*Id.* at 163:7-11). Garcia
19 marked the answer “yes” and not “no” because he felt that the facility had met the spirit of the
20 standard by notifying the detainee, even though the notification was sometimes oral. (*Id.* at
21 164:3-17). He marked “no” next to the component, “Mail is returned. No written notice is given
22 to either the addressee or sender,” because he felt lack of notice regarding incoming mail was a
23 more serious problem. (*Id.* at 164:18-23 (“Whereas, [compared with the detention standard
24 component requiring officials rejecting outgoing mail to provide detainees with signed written
25 notice,] . . . you thought, well, that’s pretty important when [incoming] mail is returned and
26 there’s no written notice given to anybody and so, therefore, I think that’s serious enough that I’m
27 going to put a no? A: Yes”). Brisson explained that she marked “N/A” next to the “Access to
28 Legal Materials” component that states “The facility supplements Attachment A materials with
Lexis Nexis law library,” because “the facility had a similar electronic database that they were
using called Westlaw and it complied with the intent of the standard.” (Pls.’ Exh. 17 (Brisson
Depo. at 51:22-52:7)). Brisson also noted that the facility agreed to provide any additional
immigration law materials that ICE supplied to them. (*Id.* at 53:4-7). She said she assigned an
overall rating of “acceptable” at the end of the checklist to “Access to Legal Materials” because
“(t)he facility was . . . complying with the intent of the standards and [was] willing to make any
changes . . . necessary in order to fully comply with our standards.” (*Id.* at 54:21-24).

Having reviewed the evidence submitted by both parties, the court concludes that the
methodologies employed by all of ICE, the ABA, and the UNHCR have limitations; these
limitations are inherent, however, in any review process that relies on myriad individual reviewers
to observe and evaluate conditions at more than two hundred facilities. All of the reviews – by
ICE, the ABA, or the UNHCR – provide some insight into conditions at the detention facilities.
Although cognizant of the limitations on their accuracy, the court concludes that, in combination,
they provide the best evidence available regarding the government’s compliance with the detention
standards that are relevant to the *Orantes* injunction.

1 has not achieved anything even approaching substantial compliance with the Detention Standards.”
2 They contend that unless the government can show that it substantially complies with the
3 standards, their promulgation does not constitute a changed circumstance that warrants dissolution
4 of the injunction.

5 **c. Law Libraries And Access To Legal Materials**

6 The *Orantes* injunction states: “Defendants shall provide detained class members with
7 those legal materials regarding immigration matters which are currently available in English and
8 Spanish, and should work in conjunction with counsel for plaintiffs to produce additional materials
9 in Spanish. Detention center law libraries should be sufficiently accessible to detainees.”¹¹³ This
10 provision was framed to address Judge Kenyon’s findings that the INS “acted in bad faith by
11 failing to respond to offers to provide . . . legal rights materials in Spanish to be placed in the
12 libraries at several detention centers”; that detention facilities lacked comprehensive law libraries;
13 and that writing materials and implements were not always readily available to detainees. *Orantes*
14 *II*, 685 F.Supp. at 1501-02.

15 ICE facility reviews, ABA reports, and UNHCR reports document the following problems,
16 representing 20 violations at 16 different detention facilities:

- 17 • There was no law library at one detention facility. Detainees at the facility were
18 required to request information from the legal department, which forwarded the
19 requested material.¹¹⁴
- 20 • Four detention facilities did not maintain the full compendium of law books listed
21 in the detention standard’s Supplement A, i.e., statutes, regulations, treatises, and
22 practice guidelines related to immigration, habeas petitions, civil procedure, asylum
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25 ¹¹³*Orantes Injunction*, ¶ 9.

26 ¹¹⁴Pls.’ Exh. 19 at D07267-68. Plaintiffs also identified one facility where detainees in
27 administrative and/or disciplinary segregation were denied access to law libraries. (Pls.’ Exh. at
28 D07412-13). In two other facilities, segregated detainees must request law materials, which are
then delivered to them. (Pls.’ Exh. at D05278-81; D04714).

1 claims, criminal procedure, and legal research.¹¹⁵ Of the four facilities, one did not
2 house any detainees.¹¹⁶

- 3 • Two facilities failed to supplement legal materials with Lexis Nexis electronic
4 databases;¹¹⁷ six others had outdated, missing, or defaced legal materials.¹¹⁸
- 5 • Three facilities permitted detainees to spend less than five hours in the law library
6 per week.¹¹⁹
- 7 • Two law libraries lacked typewriters and computers.¹²⁰ A third did not have
8 typewriters, writing implements, or paper.¹²¹ Another law library had no
9 computers and only one typewriter, which was often nonfunctional.¹²²

11
12 ¹¹⁵Pls.' Exh. 19 at D04240-41; D04518-19; D05649, 05659; D06437-40. See also Mot.
13 at Exh. I. (Supplement A).

14 ¹¹⁶Pls.' Exh. 19 at D5659.

15 ¹¹⁷Pls.' Exh. 19 at D02034; D02753.

16 ¹¹⁸Pls.' Exh. 19 at D04095-96; D04365-74; D05327-30; D07268; D017402-16.

17 ¹¹⁹Pls.' Exh. 19 at D04002; D04518-19; D05830. Plaintiffs also note that there are two
18 facilities where detainees must forego recreation time in order to use the law library. (Pls.' Exh.
19 at D008348-49; D008566).

20 ¹²⁰Pls.' Exh. 19 at D02348; D04177-78.

21 ¹²¹Pls.' Exh. 19 at D004368.

22 ¹²²Pls.' Exh. 19 at D009144. Plaintiffs identified one facility where detainees were charged
23 for photocopies (Pls.' Exh. 19 at D018814) and a second where the librarian made one free copy
24 of any document requested by a detainee, but charged \$.10 for each additional copy (Pls.' Exh.
25 at D017522-32). A detainee at another facility reported that he did not have access to a
26 typewriter, pens, paper, or other supplies without paying for them, "although he sometimes
27 ask[ed] to borrow a pen." (Pls.' Exh. 19 at D008593). A detainee at another facility reported
28 that "in order to get photocopies for his case, he sent a letter to a friend on the 'outside' with the
relevant citations and had the cases and statutes sent to him." Apparently, detainees at this facility
must ask the librarian to make photocopies for them. Because the photocopier is located outside
the library and because the librarian may not leave detainees unattended while they are in the
library, detainees are effectively denied use of the photocopier. (Pls.' Exh. 19 at D017392).

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d. Group Legal Presentations

In 1991, Judge Kenyon modified the *Orantes* injunction to add four conditions that apply solely to the Port Isabel Service Processing Center in Port Isabel, Texas. Among these is one that requires group legal presentations: "The group legal rights presentations currently taking place [at Port Isabel] should continue in order to remedy the difficulties [detainees experience] contacting counsel and the problems with receipt of legal rights materials. These presentations may be replaced by a video approved by counsel for plaintiffs or by the Court. Once again, the Court wishes to reiterate its hope that all parties can cooperate in the creation of a complete, yet comprehensible video."¹²³

The ICE detention standard on "Group Presentations on Legal Rights" permits and encourages facilities to host presentations on U.S. immigration law and procedures when they receive requests from attorneys or legal representatives interested in providing such presentations. Although plaintiffs note that a number of facilities do not host presentations, and three prohibit presentations altogether,¹²⁴ the Port Isabel facility is not among them. Consequently, plaintiffs' evidence does not show non-compliance with this aspect of the injunction.

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e. Telephone Access

Judge Kenyon found that detainees' access to telephones was severely restricted by time limitations, lack of functioning telephones, and/or restrictive INS practices. *Orantes II*, 685 F.Supp. at 1502. He also found that detained Salvadorans had difficulty reaching attorneys and relatives using "collect only" telephones. *Id.* To remedy these problems, the *Orantes* injunction mandates that the government "provide class members with access to telephones during proceedings."¹²⁵ It also requires that the government "provide at least one telephone per twenty-five (25) detainees at detention centers," and "ensure the privacy of attorney-client communications, through the use of privacy panels between telephones or other effective

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¹²³*Orantes* Injunction, ¶ 12.

¹²⁴Opp. at 24:20-25:5.

¹²⁵*Orantes* Injunction, ¶ 4.

1 means.¹²⁶

2 The ICE detention standard on "Telephone Access" requires that facilities provide
3 detainees with "reasonable and equitable" telephone access.¹²⁷ As evidence that detainees
4 continue to have difficulty accessing telephones despite the injunction's directives, plaintiffs cite
5 the following from the ICE reviews, ABA reports, and UNHCR findings:¹²⁸

- 6 • Two facilities did not provide at least one telephone per 25 detainees.¹²⁹
- 7 • Telephones at one facility were not regularly inspected by staff to ensure that they
8 were in good working order. Telephones at one facility were out of service for
9 extended periods of time. Detainees at another facility complained that telephones
10 often did not work. Phone access codes did not work at one facility. The phone
11 system at another facility went down for as much as 24 hours at a time, and calls
12 were sometimes abruptly cut off.¹³⁰
- 13 • At one facility, detainees (or their attorneys) must make a special request for
14 privacy during telephone calls.¹³¹ There was no privacy altogether at four
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17 ¹²⁶*Id.*, ¶ 7(e).

18 ¹²⁷Mot., Exh. K.

19 ¹²⁸Plaintiff's opposition referenced additional violations, but plaintiffs did not include the
20 referenced Bates-numbered pages in their exhibits. As a result, the court cannot consider them
21 in its analysis.

22 ¹²⁹Pls.' Exh. 21 at D011420, 11456; D010338. Plaintiffs also identified several facilities
23 where telephone access policies were not posted in housing areas and/or not fully explained in
24 detainee handbooks. (See Opp. at 25-26). Although posting access policies and explaining them
25 in handbooks are required by the detention standard on telephone access, they are not addressed
26 in the *Orantes* injunction. Failure to post the access policies is therefore not directly relevant to
27 the court's inquiry.

28 ¹³⁰Pls.' Exh. 21 at D011346; D013848; D008678; D017665.

¹³¹Pls.' Exh. 21 at D08641-42. At one facility, telephone calls are private if they are
arranged through a case worker. (Pls.' Exh. 21 at D07023).

1 facilities.¹³²

2 These statistics represent violations at 11 detention centers, only 6 of which were identified
3 in ICE facility reviews. The reviews documented related problems as well, including time
4 restrictions on telephone use, lack of free calls to legal service providers, and telephones that
5 permit collect calls only.¹³³ Although Judge Kenyon heard evidence regarding similar problems
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8 ¹³²Pls.' Exh. 21 at D08484; D12166; D08565; D017408. In addition, various ABA and
9 UNHCR reports noted the following complaints regarding telephone privacy: One facility did not
10 maintain privacy barriers between telephones located in housing areas (Pls.' Exh. 21 at D04241).
11 An ABA report opined that "privacy may be compromised" because telephones are located close
12 to the television and sitting area for detainees. (Pls.' Exh. 21 at D08260). At another facility,
13 ABA reviewers observed that there were privacy partitions between telephones, but expressed
14 concern that guards could potentially overhear telephone conversations because the telephones
15 were located just 10 feet away from the guard area. (Pls.' Exh. 21 at D08437). Staff members
16 at one facility told ABA reviewers that detainees had privacy during telephone conversations;
17 some detainees, however, expressed concern about the lack of privacy and reported that fights had
18 erupted among detainees who tried to silence one another so they could converse on the telephone.
19 (Pls.' Exh. 21 at D08417, 8530). Still another ABA report found that telephone conversations
20 were "not particularly private" because detainees could be overheard by other detainees and by
21 staff members. (Pls.' Exh. 21 at D08588). One delegation reported that telephone conversations
22 were private so long as no one else was around. (Pls.' Exh. 21 at D05072). At another facility,
23 ABA reviewers concluded that telephone conversations were not private given the telephones'
24 proximity to other detainees. (Pls.' Exh. 21 at D018822-23). Women detainees at yet another
25 facility complained about lack of privacy during telephone calls. (Pls.' Exh. 21 at D18819).

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27 ¹³³Plaintiffs cite the following problems as examples: facilities in which inmates were
28 permitted to make only collect calls (Pls.' Exh. 21 at D17558; D08239; D08395-96; D17377);
in which staff members placed a 15-minute time limit on telephone calls (Pls.' Exh. 21 at
D08640; D08368; D16139); in which detainees were permitted to make only one free call during
their first four days at the facility (Pls.' Exh. 21 at D15871); in which detainees were not allowed
to make free calls to consulates, immigration courts, and/or legal service providers (Pls.' Exh.
21 at D17408; D17383; D11700; D16010; D08491; D08588; D16289; D05952; D13905;
D17408; D18818-19); in which indigent detainees were limited to one legal call per day (Pls.'
Exh. 21 at D08223-24, 08226); and in which detainees were limited to two 30-minute attorney
calls per month (Pls.' Exh. 21 at D08347). Detainees at one facility reported that requests to
make free calls to immigration courts, consulates, and/or pro bono legal services providers took
up to one month to process. (Pls.' Exh. 21 at D18807-08). ABA and UNHCR delegations also
reported isolated complaints by detainees who could not receive telephone calls or messages from
their attorneys (Pls.' Exh. 21 at D17361), and by detainees who reported problems contacting
their attorneys or consulates (Pls.' Exh. 21 at D16137-42; D08696).

1 during the *Orantes* trial, he did not mandate specific changes to address these issues in the
2 injunction.

3 F. Visitation

4 The *Orantes* injunction includes two provisions regarding visitation, both of which address
5 Judge Kenyon's concern that restricted visitation hours "severely limit the ability of attorneys and
6 paralegals to conduct interviews with their clients." *Orantes II*, 685 F.Supp. at 1501. Paragraph
7 7(c) of the injunction states: "Defendants shall allow paralegal assistants working under the
8 supervision of counsel to have access to class members even though the paralegals are
9 unaccompanied by counsel." Paragraph 7(d) provides that "[d]efendants shall allow counsel or
10 paralegals working under the supervision of counsel reasonable access to class members between
11 the hours of 9:00 a.m. and 9:30 p.m., excluding such time as is necessary for reasonable security
12 procedures. Detainees should be given the option to meet with their legal representatives during
13 meal hours."

14 The ICE detention standard on "Visitation" requires that facilities permit legal visits seven
15 days a week for at least eight hours a day on weekdays and four hours a day on weekends and
16 holidays. To ensure that attorney consultations are private, facilities must provide private rooms
17 for legal visits; no auditory supervision is allowed during the visits.¹³⁴

18 Plaintiffs reviewed the ABA reports and ICE facility reviews related to this detention
19 standard and identified various deficiencies at several facilities, including restrictions on visitation
20 by family members and health care professionals, failure to post visitation hours, and failure to
21 include attorney visitation hours in detainee handbooks.¹³⁵ The only relevant deficiencies,
22 however, are these 10 violations:

- 23 ♦ Two facilities permitted legal visitation on weekdays, but required approval before

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25 ¹³⁴Mot., Exh. J.

26 ¹³⁵Pls.' Exh. 22 at D004949; D006448; D007716; D009203; D009409; D009456;
27 D010101; D010372; D011313, 11348; D005440; D007117; D008491; D006189, 6222;
28 D001502; D004512, 5440, 13773; D13947; D004321; D007276, 7288, 7472, 7484; D009421;
D010772; D008237-38; D010123; D005424.

1 legal visits could occur on weekends.¹³⁶

- 2 • An ABA delegation reported “potentially problematic attorney visitation hours” at
3 one facility.¹³⁷
- 4 • One facility in Puerto Rico lacked a private attorney visitation area. This
5 deficiency was reported on two separate visits in March 2004 and May 2005.¹³⁸
- 6 • Four facilities did not permit detainees to continue attorney meetings through
7 scheduled meal periods.¹³⁹ A fifth facility required prior approval before a detainee
8 could meet with an attorney during meal periods.¹⁴⁰

9 **g. Correspondence, Mail, Funds And Personal Property**

10 The detention standards on “Correspondence and Mail” and “Funds and Personal
11 Property” encompass areas addressed in two separate provisions of the *Orantes* injunction.
12 Paragraph 2(a) requires that the government permit class members to retain copies of the *Orantes*
13 advisals and the free legal services list they received when processed. Paragraph 8 states:
14 “Defendants shall permit detained class members to receive and possess legal materials explaining
15 United States immigration law and procedure, and any other written materials unless possession
16 of such materials would conflict with the maintenance of institutional security.” These provisions
17 were based on Judge Kenyon’s finding that INS officials sometimes confiscated legal materials
18 and legal forms that detainees received from their lawyers or from organizations that represented
19 detainees. *Orantes II*, 685 F.Supp. at 1501.

20 Plaintiffs cite a number of violations of the detention standards on “Mail and
21 Correspondence” and “Personal Property.” ABA and ICE facility reviews documented instances
22 in which staff members opened and inspected incoming general correspondence without the

23 ¹³⁶Pls.’ Exh. 22 at D004023; D015864-73.

24 ¹³⁷Pls.’ Exh. 22 at D017383.

25 ¹³⁸Pls.’ Exh. 22 at D008662, D10746, D010772, D012579, D012609.

26 ¹³⁹Pls.’ Exh. 22 at D02890; D04447; D08364; D08321.

27 ¹⁴⁰Pls.’ Exh. 22 at D14010.

1 detainee present, failed to notify senders and/or addressees when they rejected or censored
2 incoming or outgoing mail, and failed to inform detainees of their mail and correspondence
3 policies.¹⁴¹ They also identified isolated facilities that prohibited visitors from leaving personal
4 property for detainees, failed to inform detainees of policies regarding personal property, or
5 lacked policies for managing detainees' claims of lost, damaged, or forgotten property.¹⁴² Of the
6 violations reported, three – all of which were identified by ICE facility reviews – tend to show
7 non-compliance with the provisions of the *Orantes* injunction and/or the existence of conditions
8 resembling those that led Judge Kenyon to enter the injunction: (1) one facility did not permit
9 visitors to leave personal property for detainees; (2) a second did not permit detainees to retain
10 personal property "per policy"; and (3) a third did not permit detainees in administrative
11 segregation to retain personal property.¹⁴³ None of the identified violations pertains to the
12 withholding or confiscation of legal materials, however.

13 h. Hold Rooms

14 Hold rooms at detention facilities are used for "temporary detention of individuals awaiting
15 removal, transfer, EOIR hearings, medical treatment, intra-facility movement, or other processing
16 into or out of the facility."¹⁴⁴ Plaintiffs argue that the facility reviews reflect "numerous
17 deficiencies that might persuade class members to relinquish their claims for relief and depart."¹⁴⁵
18 The government counters that conditions in hold rooms are irrelevant to the *Orantes* directive that
19 the government not use "threats, misrepresentation, subterfuge or other forms of coercion, or in
20 any other way attempt to persuade or dissuade class members when informing them of the
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23 ¹⁴¹Opp. at 32-33.

24 ¹⁴²*Id.* at 33-34.

25 ¹⁴³Pls.' Exh. 26 at D01831; D06026; D07687.

26 ¹⁴⁴Pls.' Exh. 27.

27 ¹⁴⁵Opp. at 34:13-14.

1 availability of voluntary departure.¹⁴⁶ This is because the government asserts that detention
2 facility hold rooms are not used to process aliens, and it is during processing that aliens are told
3 about the option of voluntary departure.¹⁴⁷ Plaintiffs present no contrary evidence, and the court
4 has no reason to doubt the government's representation.

5 As the court explained in its order granting plaintiffs discovery concerning the hold room
6 standard, however, compliance with the hold room standard is relevant in determining whether
7 DHS practices related to the transfer of detainees from point of arrest to remote detention facilities
8 serve to isolate the detainees and increase the coercive nature of the atmosphere they confront.
9 Judge Kenyon cited such practices in his opinion; whether they continue today is relevant in
10 assessing whether detention conditions have improved appreciably since the injunction was entered
11 in 1988. See *Orantes II*, 685 F.Supp. at 1500 ("Class members, when transferred, have been
12 deprived of food and kept incommunicado for extended periods of time. It is common that INS
13 deprives class members of address books and telephone numbers in the course of transfer, such
14 that transfer serves to place them completely out of touch with friends and relatives who could
15 assist them"); see also *id.* at 1501 ("Pressure by individual IDOs upon Salvadorans to return to
16 El Salvador is augmented by the orientation presentation made by DSOs to newly arrived
17 Salvadoran and Guatemalan detainees at Port Isabel, who are isolated and quarantined until they
18 have had a medical examination. They are segregated from the regular detainee population in
19 Building 39 where they receive an orientation").

20 Plaintiffs' review of the ABA, UNHCR and ICE reports identified the following issues that
21 were reported at 12 different detention centers:

- 22 • Records at one facility showed that detainees in hold rooms were not given food
23 during stays of six or more hours, although the reviewer believed these incidences
24 reflected poor record keeping rather than a failure to provide meals, i.e., that the

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27 ¹⁴⁶*Orantes Injunction*, ¶ 1.

28 ¹⁴⁷Reply at 45:20-22.

1 meals were provided but not logged.¹⁴⁸

- 2 • Detainees at five facilities were placed in hold rooms for more than the 12 hours
3 permitted by the detention standard. There was no enforcement of the time
4 restriction at a sixth facility.¹⁴⁹
- 5 • Males and females were not adequately segregated in three facilities.¹⁵⁰
- 6 • Hygiene deficiencies were recorded at two facilities. In the first, the reviewer
7 reported that “conditions were terrible. There was no toilet paper, no facilities for
8 a detainee to wash [his] hands, and feces were smeared on the walls of the
9 room.”¹⁵¹ The facility’s hold room did not have soap, cups, or toilet paper; due to
10 lack of seating, inmates were lying on the floor at the time of inspection.¹⁵² At the
11 other facility, UNHRC visitors found a hold room that was “completely bare, with
12 only a small grate on the floor that detainees [had to] use as a toilet.”¹⁵³

13 i. Administrative Segregation And Disciplinary Segregation

14 Judge Kenyon found that class members were often placed in administrative segregation,
15 or solitary confinement without a hearing. See *Orantes II*, 685 F.Supp. at 1502 (“detainees facing
16 solitary confinement for disciplinary purposes in the El Centro and El Paso Service Processing
17 Centers did not receive advance notice of the charges, the opportunity to present oral testimony
18 at a hearing, the opportunity to confront and cross-examine adverse witnesses, or the opportunity
19 to be represented by counsel or counsel substitute”). He concluded that the government used
20 administrative segregation “to circumvent the portion of the preliminary injunction that provide[d]

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22 ¹⁴⁸Pls.’ Exh. 28 at D21998-22001.

23 ¹⁴⁹Pls.’ Exh. 28 at D021243-47; D021787-93; D021745-49; D021735-40; D021528-34;
24 D021228-33.

25 ¹⁵⁰Pls.’ Exh. 28 at D021759-63; D021722-24; D021686-88.

26 ¹⁵¹Pls.’ Exh. 28 at D021264.

27 ¹⁵²Pls.’ Exh. 28 at D021263-67.

28 ¹⁵³Pls.’ Exh. 28 at D21860.

1 procedural protections for class members placed in solitary confinement for punitive reasons.”

2 *Id.* The corresponding remedy is found in paragraph 10 of the injunction, which states:

3 “Defendants shall not place any class member in solitary confinement for a period
4 of more than 24 hours except upon good cause shown and unless said class member
5 has been provided:

6 (a) Written notice of the charges in advance of the hearing;

7 (b) An opportunity to appear at a hearing before impartial fact-finders and
8 to present witnesses and documentary evidence at the hearing prior to
9 placement in solitary confinement; and

10 (c) A written statement of the reasons for any decision to discipline the class
11 members.

12 These procedural protections shall apply whether the confinement is referred to as
13 ‘disciplinary’ or ‘administrative’ segregation or by any other name.”

14 To support its argument that the problems Judge Kenyon identified concerning solitary
15 confinement no longer exist, the government cites the detention standards on “Special
16 Management Unit (Administrative Segregation)” and “Special Management Unit (Disciplinary
17 Segregation).” Plaintiffs reviewed facility reports regarding both standards, and identified one
18 violation relevant to the injunction’s prohibitions and Judge Kenyon’s concerns. This violation
19 occurred at the Bannock County Jail in Pocatello, Idaho, where detainees were given a copy of
20 the initial written decision and justification for placing them in administrative segregation, but not
21 of the determination following review of the decision by a supervisory officer.¹⁵⁴ Plaintiffs also
22 identified situations in which detainees in administrative segregation were not provided the same
23 level of visitation, telephone access, and law library access as detainees in the general
24 population.¹⁵⁵

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26 ¹⁵⁴Pls.’ Exh. 29 at D009042.

27 ¹⁵⁵Opp. at 36-37. At seven facilities, detainees in administrative and/or disciplinary
28 segregation were given limited or no access to telephones. (Pls.’ Exh. 21 at D13531; D13675;
D08641; D07400; D07680; D01457; D07341). In addition, seven facilities denied visitation

1 reviews that the government produced relate to only a portion of these 201 detention centers. As
2 the foregoing summary of the evidence reveals, the ABA, the UNHCR and ICE have documented
3 a significant number of violations relevant to the provisions of the *Orantes* injunction and/or the
4 concerns that led to its issuance at detention centers for which reviews were produced.¹⁵⁷ Most
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6 the reasons for the deficient ratings, is not of assistance in determining whether the *Orantes*
7 injunction ought to stay in place.

8 ¹⁵⁷A month after the hearing on this motion, plaintiffs submitted a copy of a newly-released
9 report by the DHS Office of Inspector General. This report sets forth conclusions and
10 recommendations by the OIG based on its audit of compliance with selected detention standards
11 at five detention facilities: (1) Berks County Prison (BCP), Leesport, Pennsylvania; (2) Corrections Corporation of America (CCA) Facility, San Diego, California; (3) Hudson
12 County Correction Center (HCCC), Kearny, New Jersey; (4) Krume Service Processing Center
13 (KSPC), Miami, Florida; and (5) Passaic County Jail (PCJ), Paterson, New Jersey. (OIG Report
14 at 1). The court has reviewed the report and identified the following findings that are relevant
15 to the inquiry at hand:

- 16 • Detainees at HCCC lacked Lexis Nexis access until January 2005, when officials
17 installed two computers with Lexis Nexis software. At BCP, detainees did not
18 have Lexis Nexis access during the entire month of March 2005 because officials
19 did not realize that the software license had expired. At PCJ, detainees did not
20 have access to any legal materials during November 2005 because the facility's
21 license for the materials had expired. Legal materials were restored on December
22 1, 2005 after ICE provided the facility with an updated version of the *Immigration
23 Case Law* library on disks. (OIG Report at 16-17).
- 24 • Two detainees at HCCC were placed in disciplinary segregation without a hearing
25 in July 2005. They were subsequently found not guilty. The OIG's audit at PCJ
26 revealed six instances in which detainees were placed in disciplinary segregation
27 before a hearing was held. These detainees too were later found not guilty. (OIG
28 Report at 16).
- On October 21, 2005, 4 of 11 telephones in the male visitation room at PCJ were
not operational. A month later, 1 of the 11 telephones did not work. At CCA San
Diego, 13 of 60 phones in the detainee visitor area were nonfunctional on April 19,
2005. (OIG Report at 24).
- Auditors noted privacy concerns with regard to the placement of telephones at
BCP, HCCC, CCA San Diego, and PCJ. (OIG Report at 24). They also
encountered substantial problems placing free telephone calls to consulates and pro
bono legal services at PCJ. (OIG Report at 25).

Following completion of the review, ICE removed all immigration detainees from PCJ
(OIG Report at 38), where a majority of the violations (both those relevant and not relevant to the
Orantes injunction) occurred. The OIG noted that ICE took "immediate action to address many

1 notably, violations of the provisions regarding law libraries and access to legal materials were
2 reported at 16 facilities. In addition, 11 detention centers reported violations of provisions
3 regarding telephone access, while another 9 reported violations of provisions requiring adequate
4 access to attorneys. In concluding that the number of violations is significant, the court gives
5 considerable weight to evidence suggesting that the facility reviews have understated – perhaps
6 severely – violations of the standards at the various detention centers. The ABA and UNHCR
7 reports, for example, routinely identify deficiencies that are not captured by ICE facility reviewers
8 in their annual inspections. Indeed, in a December 2006 report, the DHS Office of Inspector
9 General (“OIG”) publicly questioned the “thoroughness” of the periodic facility reviews. The
10 OIG noted that its own review of five detention centers – all of which were rated “acceptable”
11 by ICE reviewers – revealed “instances of non-compliance . . . that were not identified during
12 the ICE annual inspection of the detention facilities.”¹⁵⁸ The OIG’s findings regarding the Passaic
13 County Jail were sufficiently serious that they caused ICE to move *all* immigration detainees
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17 of [its] concerns.” (OIG Report at 1). It stated: “We made 13 recommendations addressing the
18 areas of non-compliance identified. ICE partially or fully concurred with 9 of the 13
19 recommendations and the proposed actions to implement the 9 recommendations are adequate.”
(OIG Report at 1).

20 It appears that some of the deficiencies reported by the OIG duplicate the problems noted
21 in the facility reviews submitted to the court. While the court has not systematically catalogued
22 the detention facility reviews in its possession to determine the level of duplication, it is aware that
23 deficiencies at PCJ figure prominently in the facility reviews on which plaintiffs rely. The most
24 troubling aspect of the OIG report lies not in its report of specific deficiencies, however, but in
25 its observation that the review “identified instances of non-compliance regarding health care and
26 general conditions of confinement that were not identified during the ICE annual inspection of the
27 detention facilities.” (OIG Report at 36). The court understands that ICE manages 201 detention
28 facilities, some 300 field reviewers, and 18,000 to 20,000 detainees. (Evans Depo. at 23:10-11,
55:24-25). The scope of the DSCU’s task necessarily prevents perfection. Nonetheless, in
reaching a conclusion regarding current detention conditions, the court takes OIG’s conclusion
into account in assessing the comprehensiveness of the facility reviews that form a significant part
of the evidence in the record.

¹⁵⁸OIG Report at 36.

1 housed at that facility.¹⁵⁹ Yet, the Passaic County Jail received an “acceptable” rating during its
2 annual ICE review.¹⁶¹ The totality of the evidence thus suggests that the incidence of non-
3 compliance is higher, perhaps substantially higher, than that reported by ICE facility reviewers.

4 To obtain relief from the sweeping type of injunction Judge Kenyon issued, of course, the
5 case law does not require that the government show not only that it has implemented standards
6 to address the problems that led to issuance of the injunction, but also that it has a 100 percent
7 record of complying with those standards. Rather, the Supreme Court has stated that, coupled
8 with the elimination, “to the extent practicable,” of the underlying problem the injunction sought
9 to address, good faith efforts to comply are sufficient to justify dissolution of a reform decree that
10 imposes judicial oversight on an institution properly governed by a branch of government other
11 than the federal judiciary. See *Dowell*, 498 U.S. at 249 (on remand, “[t]he District Court should
12 address itself to whether the Board has complied in good faith with the desegregation decree since
13 it was entered, and whether the vestiges of past discrimination had been eliminated to the extent
14 practicable”).

15 Nonetheless, the court cannot conclude that the problems addressed by the injunction have
16 been eliminated “to the extent practicable,” given evidence that at detention facilities for which
17 reports were produced there have been a significant number of violations of critical provisions of
18 the injunction dealing with detainees’ access to legal materials, telephone use, and attorney
19 visits.¹⁶² This substantial evidence of non-compliance persuades the court that detention center
20 conditions are not so changed as to warrant dissolution of paragraphs 1, 3-9¹⁶² and 13-15¹⁶³ of the
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22 ¹⁵⁹*Id.* at 38.

23 ¹⁶⁰*Id.* at 36.

24 ¹⁶¹See *Orantes* Injunction, ¶¶ 3-9, 14-15.

25 ¹⁶²Paragraph 1 enjoins defendants from “employ[ing] threats, misrepresentation, subterfuge
26 or other forms of coercion, or in any other way attempt[ing] to persuade or dissuade class
27 members when informing them of the availability of voluntary departure. . . .” (*Orantes*
28 Injunction, ¶ 1.) Paragraph 3 of the injunction restrains defendants from “advise[ing],
encourag[ing], or persuad[ing] [a] class member to change his or her decision” to apply for

1 *Orantes* injunction. By contrast, the evidence shows only isolated (or no) violations of paragraphs
2 10 and 12 of the injunction, i.e., provisions regarding administrative segregation and legal
3 presentations. Accordingly, the court finds it appropriate to dissolve paragraphs 10 and 12 of the
4 *Orantes* injunction.¹⁶⁴

5 The court is cognizant of the principle that the legislative and executive branches possess
6 plenary authority over immigration. See *Matthews v. Diaz*, 426 U.S. 67, 81 (1976) ("For reasons
7 long recognized as valid, the responsibility for regulating the relationship between the United
8 States and our alien visitors has been committed to the political branches of the Federal
9 Government"); see also *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895) ("The power
10 of Congress to exclude aliens altogether from the United States, or to prescribe the terms and
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12 asylum. None of the evidence before the court demonstrates that the detention standards
13 promulgated by the government have obviated the need for these provisions of the injunction.
14 Consequently, the court declines to dissolve them. It notes, in fact, that evidence of non-
15 compliance with the Hold Room standard suggests that various forms of coercion that concerned
16 Judge Kenyon remain potentially extant today. See, e.g., *Orantes II*, 685 F.Supp. at 1500
17 ("Class members, where transferred, have been deprived of food and kept incommunicado for
18 extended periods of time. It is common that INS deprives class members of address books and
19 telephone numbers in the course of transfer, such that transfer serves to place them completely
20 out of touch with friends and relatives who could assist them"); see also *id.* at 1501 ("Pressure
21 by individual IDOs upon Salvadorans to return to El Salvador is augmented by the orientation
22 presentation made by DSOs to newly arrived Salvadoran and Guatemalan detainees at Port Isabel,
23 who are isolated and quarantined until they have had a medical examination. They are segregated
24 from the regular detainee population in Building 39 where they receive an orientation").

25 ¹⁶³Paragraph 13 requires that ICE officers and Burns or other private security guards
26 working at the Port Isabel processing center receive training regarding the requirements of the
27 injunction. Since certain provisions of the injunction remain in force, this provision too must
28 remain in force.

29 ¹⁶⁴Paragraph 11 of the injunction (the "transfer provision") prohibits the government from
30 transferring class members who are unrepresented by counsel from the district of apprehension
31 for at least seven days. In an order issued October 11, 2006, the court added language to
32 paragraph 11 to clarify that it does not prevent the transfer of individuals subject to final orders
33 of removal entered as a result of expedited removal proceedings. (See Docket No. 783). In doing
34 so, the court addressed the government's primary objection to paragraph 11. As the parties have
35 adduced no evidence that warrants dissolution of paragraph 11, as modified, the court declines
36 to enter such an order at this time.

1 conditions upon which they may come into this country, and to have its declared policy in that
2 regard enforced exclusively through executive officers, without judicial intervention, is settled by
3 our previous adjudications"); *Ventura-Escamilla v. Immigration and Naturalization Service*, 647
4 F.2d 28, 30 (9th Cir. 1981) (noting that Justice Harlan's statement "still clearly expresses the
5 Court's position"). This does not immunize the DHS from injunctions or judicial oversight,
6 however, as Judge Kenyon's order and the Ninth Circuit decision affirming it demonstrate. See
7 also *LaDuke*, 762 F.2d at 1324 (entering an injunction against the INS while noting that
8 "[e]nforcement of the nation's immigration laws has been delegated by Congress to the Executive
9 Branch. Nonetheless, the federal judiciary has been vested with the ultimate authority to
10 determine the constitutionality of the actions of the other branches of the federal government.
11 While the co-equal branches of the federal government are entitled to the widest latitude in the
12 dispatch of [their] own internal affairs, the executive branch has no discretion with which to
13 violate constitutional rights" (citations omitted, alterations original)); *International Molders' &
14 Allied Workers' Local Union No. 164 v. Nelson*, 799 F.2d 547, 551-52 (9th Cir. 1986) ("INS
15 is correct that courts are reluctant to enjoin law enforcement agencies entitled to 'the widest
16 latitude in the "dispatch of [their] own internal affairs.'" . . . However, the INS has 'no discretion
17 with which to violate constitutional rights'").

18 Had the record revealed that maintenance of the injunction was no longer required to fulfill
19 the purposes for which it was entered, the court would not have hesitated to dissolve it. For the
20 reasons stated, however, the court concludes the government has not established that promulgation
21 of the ICE detention standards and the end of the Salvadoran civil war constitute sufficiently
22 changed circumstances that all provisions of the *Orantes* injunction related to detention conditions
23 should be dissolved. Documented levels of non-compliance with relevant standards indicate that
24 the injunction remains necessary to ensure that Salvadorans are able to exercise their right to apply
25 for asylum freely and intelligently.

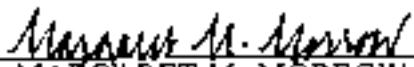
26 27 III. CONCLUSION

28 For the reasons stated, the court grants the government's motion to dissolve paragraphs

1 10 and 12 of the *Orantes* injunction. It denies the motion in all other respects.

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DATED: July 23, 2007



MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

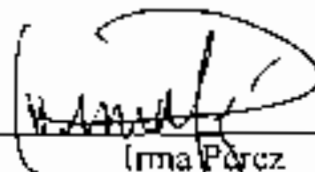
CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of October, 2007, I served two true and correct copies of the foregoing Amici Curiae Brief of American Civil Liberties Union Foundation and American Civil Liberties Union Foundation of Southern California in Support of Petitioner-Appellant (with Appendix) on the following parties, by Federal Express Overnight Service, postage prepaid, addressed as follows:

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