

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

SUYING MARIA CALDERON-WONG,
On her own behalf and through her next friend,
her sister, Ana Yulen Calderon;

PLAINTIFF/PETITIONER

v.

KEVIN K. MCALEENAN,
Acting Secretary, U.S. Department of Homeland Security and
Commissioner, United States Customs & Border Protection,
JOHN P. SANDERS ,
Acting Commissioner of CBP,
CARLA PROVOST,
Acting Commissioner of CBP,
RODOLFO KARISCH,
Chief Patrol Agent- Rio Grande Valley Sector, and
MICHAEL J. PITTS,
Field Office Director, ICE/ERO

RESPONDENTS/DEFENDANTS

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

I. INTRODUCTION

1. On information and belief, Petitioner Suying Maria Calderon-Wong herein is an asylum seeker who was apprehended in the United States near McAllen, Texas on or about August 23rd of 2019 and is most likely being detained in U.S. Customs and Border Protection (“CBP”) facilities in the Rio Grande Valley Sector of the U.S. Boarder Patrol (“Border Patrol”), a division of CBP. On information and belief, during her confinement, Petitioner has been subjected to inhumane treatment and harsh conditions. She has been packed into overcrowded facilities and detained for days without adequate food and water, sanitation facilities, or access to counsel. Attorneys are not allowed to visit individuals detained at these facilities, so counsel has been unable to communicate directly with Petitioner, or

obtain her signature on G-28s, the forms required for counsel to be recognized as attorneys by DHS. Therefore, Petitioner brings this action through her “next friend.” On her own behalf, she challenges the lack of proper facilities and unbearable conditions in the holding cells where she is detained and the lack of access to counsel and legal materials. Petitioner is imprisoned by the federal government under color of the immigration laws. On information and belief, it is alleged that the named Petitioner Suyendo Maria Calderon-Wong has been detained for over forty days.

This petition seeks the immediate release of the named Petitioner from her incarceration. Her imprisonment is unlawful because of the confluence of three unlawful government practices: first, she is being held virtually incommunicado. She has almost no contact with the outside world, and most particularly, she is being held in a facility that does not allow access by attorneys, and extremely limited access to telephones. Second, although Respondent ostensibly is acting under color of immigration law, on information and belief, Respondents have incarcerated the named Petitioner for more than forty days, without issuing charging documents. Third, Respondents are imprisoning her in Border Patrol temporary holding facilities, facilities that are not appropriate for overnight stays — let alone for multiple-week incarceration.

2. On information and belief, Petitioner Suyendo Maria Calderon-Wong was apprehended on or about August 23rd of 2019, near McAllen, Texas and subsequently detained. Once apprehended, such persons are often detained for extended periods in overcrowded holding cells, with inadequate food, water, and sanitation facilities, where attorneys are not allowed to visit. The conditions in these holding cells are dangerous and inhumane, particularly if CBP detains in the same cells individuals whom they know or have reason to believe have committed crimes other than 8 U.S.C. §1325.

3. Detaining the Petitioner in facilities which do not allow access to counsel or legal materials violates *Nunez v. Boldin*, 537 F.Supp. 578 (S.D.Tex), appeal dismissed, *Nunez v. Boldin*. 692 F.2d 755 (Table) (5th Cir. 1982), holding that immigration officials must not only refrain from placing obstacles in way

of communications between detainees and their attorneys, but are obligated to affirmatively provide them with legal assistance, and that besides providing reasonable access to attorneys, such legal assistance may take the form of access to attorney agents and other such legal resources as law libraries, legal forms, and writing materials.

II. JURISDICTION AND VENUE

4. Jurisdiction lies in 28 USC §2241 (habeas corpus) and §1331 (federal question).

5. Venue is proper in this District since the events giving rise to the action occurred in this judicial District. Respondents are sued only in their official capacities.

III. THE PARTIES

6. Suing Maria Calderon-Wong is a native and citizen of Ecuador, who upon information and belief, has been detained by Respondents since approximately August 23rd of 2019. She is currently detained at an unknown detention center in the Rio Grande Valley Sector of CBP.

7. Kevin K. McAleenan is the duly appointed acting Secretary of the U.S. Department of Homeland Security and duly appointed Commissioner of the United States Customs and Border Protection. He is sued in his official capacity only.

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

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

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

11. Michael J. Pitts is the duly appointed Field Office Director –ICE/ERO and is being sued in his official capacity.

IV. THE FACTS

12. Petitioner is a civil detainee detained in U.S. Customs and Border Protection (“CBP”) facilities within the Rio Grande Valley Sector of the U.S. Border Patrol (“Border Patrol”), a division of CBP.

13. On information and belief, during her detention, Petitioner has been subjected to inhumane treatment and harsh conditions. She has been packed into overcrowded cells for days, and denied adequate food, water and sanitation facilities. On information and belief, she alleges that the food provided is grossly inadequate, that the toilets are unsanitary, non-existent showering facilities, and that she must sleep on the floor. She is also denied access to legal counsel. Petitioner brings this action to seek relief from the unbearable conditions in CBP’s holding facilities in the Rio Grande Valley Sector.

14. The notoriously abysmal conditions of BP stations throughout the country are well-documented in federal litigation and third-party reports. These facilities, termed "hieleras" (Spanish for "freezers") are typically small, concrete rooms with concrete or metal benches. In Customs and Border Protection's own words, these facilities are "not designed for sleeping": they have no beds and showers are not guaranteed. Nevertheless, Border Patrol routinely imprisons individuals in Border Patrol field stations for days or weeks. An ACLU review of FOIA documents from 2009-2014 from Border Patrol holding facilities along the Southern border revealed "horrific detention conditions: children held in freezing rooms with no blankets, food, or clean water; forced to sleep on concrete floors or share overcrowded cells with adult strangers; [and] denied necessary medical care." Many individuals are suffering severe mental distress due to the extreme conditions under which they are detained.

15. Courts across the country have made factual findings about the horrific conditions in Border Patrol holding facilities. For example, the District Court of Arizona granted, and the Ninth Circuit affirmed, a preliminary injunction ordering Border Patrol to address grave deficiencies in the Tucson Sector stations' holding facilities. *Doe v. Kelly*, 878 F.3d 710, 716 (9th Cir. 2017) (detailing unsanitary and 8 unsafe conditions); see also *Flores v. Sessions*, No. 85-4544, ECF No. 459-1 (C.D. Cal. July 16, 2018) (July 2018 Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Enforce Settlement detailing physical and verbal assault, unsanitary drinking water, inedible food, freezing cell

temperatures and inadequate sleeping conditions in ICE detention centers and Border Patrol stations).

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

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

18. Respondents' conduct violates the Fifth Amendment's prohibition against holding a prisoner incommunicado. As noted in *Halvorsen v. Baird*, 146 F.3d 680, 688–89 (9th Cir. 1998): There is a well established tradition against holding prisoners incommunicado in the United States. It would be hard to find an American who thought people could be picked up by a policeman and held incommunicado, without the opportunity to let anyone know where they were, and without the opportunity for anyone on the outside looking for them to confirm where they were. This right applies to civil detainees as well as those in criminal custody. *Id.*: That a person is committed civilly ... cannot diminish his right not to be held incommunicado.

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

20. The Due Process Clause guarantees that all non-citizens must "be free from detention that is arbitrary or capricious." *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting); see also *Mathews v. Diaz*, 426 U.S. 67, 77, 87 (1976) (confirming that those "whose presence in this country is unlawful, involuntary, or transitory" have due process rights). In order to comply with the Due Process Clause, detention must therefore be reasonable in relation to its purpose. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). In the immigration context, the basic purposes of detention are to prevent flight and danger, and, if there is no relief from removal, to ensure the detainee appears for removal. See *Zadvydas*, 533

U.S. at 699 (explaining the relevant detention statute's "basic purpose" as "to assure the alien's presence at the moment of removal").

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

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

23. It is submitted that CBP is wrong: under the conditions in the Border Patrol holding facilities in the Valley, detention longer than twelve hours violates detainees' constitutional rights. See *Doe v. Kelly*, supra, (affirming injunction requiring Border Patrol facilities in the Tucson Sector to provide mats and Mylar blankets to immigrants held longer than 12 hours because "a person who has been detained in a station for over 12 hours . . . has a right to lie down and rest."). Regardless, Petitioner's detention far exceeds the legal limit and CBP's own policy.

V. CAUSES OF ACTION

A. HABEAS CORPUS

24. Petitioner incorporates by reference the allegations of paragraph 1-23 above.

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

26. It is therefore urged that this Honorable Court issue a Writ of Habeas Corpus, ordering that the

named Petitioner either be immediately released with an electronic tracking device, or that reasonable bond, not to exceed \$2,500, be set.

**B. THE ADMINISTRATIVE PROCEDURE ACT
DECLARATORY AND INJUNCTIVE RELIEF**

27. Petitioner incorporate by reference the allegations of paragraph 1-26 above.

28. Petitioner also seeks relief under the Administrative Procedure Act, 5 U.S.C. §702 et seq. Her detention without access to counsel in overcrowded holding cells without adequate food, water, and sanitation or sleeping facilities, for more than 72 hours, violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution and other legal rights, giving rise to causes of action under the APA.

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

30. Pursuant to 5 U.S.C. §706, this Court therefore is urged to issue a Declaratory Judgment, declaring such agency unlawful, on the grounds that they are: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

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

31. Petitioner incorporates by reference the allegations of paragraphs 1- 30 above.

32. On information and belief, it is alleged that the named Petitioner has well-founded fear of returning

to her country of origin for reasons which sound in asylum. She has been denied access to legal counsel, and prejudiced from such denial in that she has not had the opportunity to apply for asylum.

33. As such, Petitioner has shown by clear and convincing evidence that it would be unconstitutional and prohibited as a matter of law to execute any order of expedited removal against the Petitioner without first allowing him access to counsel and a meaningful opportunity to seek any relief from removal for which he may be eligible. See, 8 U.S.C. § 1252(f)(2).

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

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests that this Court:

- 1) Assume jurisdiction over the instant action;
- 2) Declare unlawful the actions of Respondents in holding Petitioner in CBP holding cells within the jurisdiction of this Court for periods of time exceeding 72 hours, on the grounds that said actions are contrary to law and violate Due Process;
- 3) Issue a Temporary Restraining Order, restraining and enjoining Respondents from removing Petitioner from the United States and from not releasing her either on a reasonable bond (not to exceed \$2,500), or with an electronic monitoring device;
- 4) It is further urged that the Court set the case for a hearing on the motion for preliminary injunction at the Court's earliest convenience.
- 5) It is further urged that the Court grant such order and further relief as the Court deems appropriate and just, including an award of court costs and attorneys fees.

Respectfully submitted,

/s/ Manuel Solis

Manuel Solis, Attorney
Law Offices of Manuel Solis
P.O. Box 230529
Houston, Texas 77223-0529
Federal ID: 36113
State Bar No: 18826790

CERTIFICATE OF SERVICE

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

/s/ Manuel Solis

**UNITED STATES DISTRICT COURT
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RESPONDENTS/DEFENDANTS

**ORDER GRANTING
APPLICATION FOR TEMPORARY RESTRAINING ORDER PRECLUDING DEFENDANTS
FROM PHYSICALLY REMOVING DEFENDANTS FROM THE UNITED STATES AND
ORDER FOR DEFENDANTS TO SHOW CAUSE AS TO WHY PLAINTIFFS HABEAS
CORPUS PETITION SHOULD NOT BE GRANTED**

Before the Court is the verified petition of Plaintiffs for a Writ of Habeas Corpus and Application for Temporary Restraining Order, precluding Defendants from physically removing Plaintiffs from the United States. Plaintiffs also seek a corresponding preliminary injunction.

On consideration of same,

IT IS HEREBY ORDERED that:

- 1) Defendants are precluded from physically removing Plaintiffs from the United States;
- 2) A hearing on Plaintiffs' motion for a preliminary injunction is scheduled for the _____ day of _____, before this Court.

Judge Presiding

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AFFIDAVIT

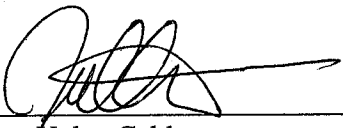
"My name is Ana Yulen Calderon, a United States citizen, and I am the next of friend of my sister, Suying Maria Calderon-Wong . We are Plaintiffs in the above styled matter. I am presenting this affidavit in support of Plaintiff's Application for Temporary Restraining Order.

My sister was apprehended on or about August 23rd and was detained by agents of U.S. Customs and Border Protection (CBP). Subsequent to her detention, she has been confined for more than four days in a holding facility, termed "hielera" (Spanish for "freezer") near McAllen, Texas.

I have not been able to speak with my sister. However, I am concerned about the well being of my sister. I have heard reports that detainees are not provided with a bed or clean bedding and are held overnight in overcrowded rooms and do not have access to personal hygiene items.

Lastly, I am concerned that my sister has not been given any access to speak to officials about her case, has not been allowed access to counsel and has not been informed as to what is going to happen to her.”

Affiant further sayeth not.



Ana Yulen Calderon