Orantes-Hernandez v. Gonzales

United States District Court for the Central District of California
October 11, 2006, Decided ; October 11, 2006, Filed
CASE NO. CV 82-01107 MMM (VBKx)

Reporter: 2006 U.S. Dist. LEXIS 95388
CROSBY WILFREDO ORANTES-HERNANDEZ, et al., Plaintiffs, vs. ALBERTO R. GONZALES, Attorney General of the United States, Defendant.

Subsequent History: Motion granted by, in part, Motion denied by, in part Orantes-Hernandez v. Gonzales, 2007 U.S. Dist. LEXIS 66904 (C.D. Cal., July 23, 2007)

Prior History: Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1988 U.S. Dist. LEXIS 5809 (C.D. Cal., 1988)

Counsel: [*1] For Crosby Wilfredo Orantes-Hernandez, Organizacion de Profesionales Y Tecnicos Salvadorenos, Casa El Salvador-Farabundo Marti, Salvadorean American Professional Association, Concillo Manzo, Central American Refugee Program, Marta Ester Paniaguavides, Jose Sanchez Flores, Dora Alicia Ayala de Castillo, Adelso Salome Flores, Uvaldo Aguilar, Dora Elia Estrada, Juan Francisco Perez-Cruz, Ana Estela Guevarra-Flores, Maria Elena Molina, Candido Carcamo Marroquin, Deia Elizabeth Garcia-Quintanilla, Marta Osorio, Gloria De Flores, Jose Eduardo Rubio, Jose Francisco Marroquin-Salvador, Refugiado Uno-Cuatro, Plaintiffs: Ahilan T Arulanantham, LEAD ATTORNEY, Mark D. Rosenbaum, LEAD ATTORNEY, ACLU Foundation of Southern California, Los Angeles, CA; Karen C Tumlin, LEAD ATTORNEY, Linton Joaquin, LEAD ATTORNEY, National Immigration Law Center, Los Angeles, CA, US.

For Alberto R Gonzales, Attorney General of the United States, William French Smith, Attorney General of the United States, Immigration and Naturalization Service, Alexader Haig, Secretary of the United States Department of State, Defendants: Frank Michael Travieso, LEAD ATTORNEY, John E Nordin, II, LEAD ATTORNEY, AUSA - Office of [*2] US Attorney, Civil Division, Los Angeles, CA; Victor M Lawrence, LEAD ATTORNEY, Office of U.S. Immigration Litigation, Civil Division, U.S. Department of Justice, Washington, DC.

Judges: MARGARET M. MORROW, UNITED STATES DISTRICT JUDGE.

Opinion by: MARGARET M. MORROW

Opinion

ORDER RE ALLEGED FACIAL CONFLICTS BETWEEN THE PERMANENT INJUNCTION AND THE EXPEDITED REMOVAL STATUTE

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), aff'd., 919 F.2d 549 (9th Cir. 1990)*("Orantes II").* Judge David Kenyon certified the *Orantes* class on April 30, 1982. [1]

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

On November 28, 2005, the government filed a motion to dissolve the permanent injunction, and advanced several arguments in support of the motion: (1) there has been a

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

[2] The 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.

significant change in the [*4] factual circumstances that led to issuance of the injunction - i.e., the end of the civil war and human rights abuses in El Salvador, and the adoption of a range of procedures by U.S. immigration authorities that ensure aliens are advised of their right to apply for asylum and are not coerced into waiving that right; and (2) there has been an intervening change in the law - i.e., the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), which provides for expedited removal of inadmissible aliens. As respects the latter argument, the government contends that the injunction conflicts with the statute and regulations governing expedited removal, and also that the injunction makes it burdensome for immigration authorities to place Salvadorans in expedited removal. On August 31, 2006, the court agreed to bifurcate and hear defendant's argument that there is a purported facial conflict between the injunction and the expedited removal statute before addressing the balance of the reasons advanced for dissolving the injunction. This order addresses only the parties' arguments concerning the alleged facial conflict.

I. DISCUSSION

A. Legal [*5] Standard Governing Modification Or Dissolution Of An Injunction

A court has power to enforce, modify or dissolve an injunction it has entered. See *United States v. Swift & Co.,* 286 U.S. 106, 114, 52 S. Ct. 460, 76 L. Ed. 999 (1932) ("We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions, though it was entered by consent"); see *Dombrowski v. Pfister,* 380 U.S. 479, 492, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965) ("[D]istrict courts retain power to modify injunctions in light of changed circumstances"); *Ass'n For Retarded Citizens of North Dakota v. Sinner,* 942 F.2d 1235, 1239 (8th Cir. 1991) ("It is well settled that a district court retains authority under *Rule 60(b)(5)* to modify or terminate a continuing, permanent injunction if the injunction has become illegal or changed circumstances have caused it to operate unjustly"); *King-Seeley Thermos Co. v. Aladdin Indus., Inc.,* 418 F.2d 31, 35 (2d Cir. 1969) (Friendly, J.) (recognizing the broad power of an issuing court to modify its injunctions); *Elgin Nat'l Watch Co. v. Barrett,* 213 F.2d 776, 778-79, 780 (5th Cir. 1954) [*6] (the district court has inherent power to dissolve permanent injunction and statutory power under *Federal Rule of Civil Procedure 60(b)(5)* to grant relief from an injunction when it is no longer equitable); see also *Frew v. Hawkins,* 540 U.S. 431, 440, 124 S. Ct. 899, 157 L. Ed. 2d 855 (2004) ("Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced").

The Supreme Court delineated the modern standard governing modification or dissolution of an injunction in *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992). Rejecting an earlier standard under which modification or dissolution was deemed inappropriate absent "a clear showing of grievous wrong evoked by new and unforeseen conditions," *Swift,* 286 U.S. at 119, the *Rufo* Court held that "a district court should exercise flexibility in considering requests for modification of an institutional reform consent decree," *Rufo,* 502 U.S. at 383.

Under *Rufo,* "[a] party seeking modification of an [injunction] may meet its initial burden by showing a significant change either in [*7] factual conditions or in law." *Id.* at 384; see also *Sharp v. Weston,* 233 F.3d 1166, 1170 (9th Cir. 2000) ("A party seeking modification or dissolution of an injunction bears the burden of establishing that a significant change in facts or law warrants revision or dissolution of the injunction"); *FED. R. CIV. PROC. 60(b)(5)* (a court may modify or dissolve an injunction if "it is no longer equitable that the judgment should have prospective application"). If the moving party meets its burden, "the court should consider whether the proposed modification is suitably tailored to the changed circumstance." *Rufo,* 502 U.S. at 383.

Modification "may be warranted when changed factual conditions make compliance … substantially more onerous." *Id.* at 384. In addition, injunctions "must of course be modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law." *Id.* at 388. Likewise, modification "may be warranted when the statutory or decisional law has changed to make legal what the decree was designed to prevent." *Id;* see also *Biodiversity Associates v. Cables,* 357 F.3d 1152, 1165 (10th Cir. 2004) [*8] ("The purpose of an injunction is to define and enforce legal obligations, not to freeze them into place. Thus, when Congress changes the laws, it is those amended laws - not the terms of past injunctions - that must be given prospective legal effect").

As an example of a situation where modification was warranted because an injunction's provisions directly conflicted with evolving law, the *Rufo* court cited *System Fed. No. 91, Railway Employees' Dep't, AFL-CIO v. Wright,* 364 U.S. 642, 81 S. Ct. 368, 5 L. Ed. 2d 349 (1961). In *Wright,* a railroad and its unions were sued for violating the Railway Labor Act, which banned discrimination against nonunion employees. *Id.* at 643. The district court adopted a consent decree enjoining the defendants from discriminating against employees who refused to become union members. *Id.* at 644. Some years later, Congress amended the Railway Labor Act to permit contracts that require a union shop. *Id.* The court held that the union was entitled to a modification of the consent

decree because the parties correctly recognized that what the consent decree prohibited had become legal under the amended Railway [*9] Labor Act. *Id.* at 651; see also *Pennsylvania v. Wheeling & Belmont Bridge Co.,* 59 U.S. (18 How.) 421, 431, 15 L. Ed. 435 (1855) (holding that an injunction that restrained construction of a bridge on the basis that it interfered with the right of navigation could not be enforced after Congress passed a statute declaring that the bridge was a "lawful structure").

Where a change in law is shown, as in *Wright* and *Wheeling & Belmont Bridge,* a court abuses its discretion by refusing to modify an injunction. *Agostini v. Felton,* 521 U.S. 203, 215, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (citing *Wright,* 364 U.S. 642, 652-53, 81 S. Ct. 368, 5 L. Ed. 2d 349 (1961) ("[T]he court cannot be required to disregard significant changes in law or facts if it is satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong")); *Toussaint v. McCarthy,* 801 F.2d 1080, 1090 (9th Cir. 1986) ("A change in the law may constitute a changing circumstance requiring the modification of an injunction"); see also *Landgraf v. USI Film Products,* 511 U.S. 244, 273, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) [*10] ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive").

B. Whether The *Orantes* Injunction Facially Conflicts With The Expedited Removal Statute

The government contends that the *Orantes* injunction must be modified because its provisions conflict with an intervening and superseding law, i.e. the expedited removal statute. This statute - 8 U.S.C. § 1225 - was enacted by Congress in 1996 as part of IIRIRA. It establishes a program for expediting the removal of aliens who arrive at the border but "indisputably have no authorization to be admitted …, while providing an opportunity for such an alien who claims asylum to have the merits of his or her claim promptly assessed by officers with full professional training in adjudicating asylum disputes." *American Immigration Lawyers Association (AILA) v. Reno,* 18 F. Supp. 2d 38, 41-42 (D.D.C. 1998) (quoting H.R. CONF. REP. 104-828 at 209 (1996)), aff'd., 339 U.S. App. D.C. 341, 199 F.3d 1352, 1354 (D.C. Cir. 2000). To that end, the statute permits an immigration officer to order an alien [*11] removed from the United States "without further hearing or review" upon finding that the alien is inadmissible because she possesses fraudulent documentation or has no valid documentation. *8 U.S.C. §§ 1182(a)(6)(C)*, *1182(a)(7)*.

Upon arrival at a port of entry, an alien is subject to "primary inspection" by an immigration officer. *AILA,* 18 F. Supp. 2d at 42. If the immigration officer discovers discrepancies in the documents presented or the answers given, or if there are other problems, questions, or suspicions, the alien is referred to "secondary inspection." *Id.* At secondary inspection, any alien found to have fraudulent documentation or no valid documentation becomes subject to expedited removal. *Id.;* see also *8 U.S.C. §§ 1182(a)(6)(C)*, *1182(a)(7)*, 1225(b)(1)(A)(i). If the alien is found inadmissible for some other reason, she is referred for "regular," non-expedited removal proceedings under Immigration and Nationality Act ("INA § 240. *Id.* See also 8 U.S.C. § 1225(b)(2)(A).

An alien found inadmissible for having fraudulent documentation or no valid documentation is ordered [*12] "removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under *section 1158* of this title or a fear of persecution." 8 U.S.C. § 1225(b)(1)(A)(i). An alien who express a fear of persecution or an intent to pursue asylum is referred to an interview with an asylum officer. *Id.,*§ 1225(b)(1)(A)(ii). If the asylum officer determines that the alien lacks a credible fear of persecution, "the officer shall order the alien removed from the United States without further hearing or review," unless the alien promptly requests review before an immigration judge. *Id.,*§ 1225(b)(1)(B)(iii)(I),(III). If the asylum officer finds that the alien has a credible fear of persecution, however, she is given a full removal hearing under INA § 240.

Defendants contend that this statutory scheme facially conflicts with paragraphs two and eleven of the *Orantes* injunction.

1. Paragraph Two Of The Injunction

Paragraph two of the modified permanent injunction requires that, "[a]t the time any class member is processed, whether or not he or she is automatically processed for a hearing, Defendants [*13] shall inform the class member of the existence of his or her rights to be represented by an attorney, to request a deportation hearing, and to apply for political asylum." Each class member must also be given a written "advisal of rights," known as the *"Orantes* advisal." [3] Defendants contend that under current law, as set forth in the expedited removal statute, aliens have no such rights.

a. Right To Request A Deportation Hearing

The government argues first that the expedited removal statute authorizes removal of aliens *without* a deportation

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[3] See Declarations and Exhibits in Support of Plaintiffs' Memorandum of Points and Authorities re Alleged Facial Conflict Between the Permanent Injunction and the Expedited Removal Statute ("Pls.' Exhs.")', Exh. 2-3 (Forms I-848 and I-848A).

hearing. See 8 U.S.C. § 1225(b)(1)(A)(i) ("If an immigration officer determines that an alien … is inadmissible … the officer shall order the alien removed from the United States without further [*14] hearing or review unless the alien indicates either an intention to apply for asylum … or is in fear of persecution"). It asserts that paragraph two's requirement that Salvadorans be advised of their right to a deportation hearing conflicts directly with the expedited removal statute.

Plaintiffs insist there is no conflict because paragraph two, on its face, does not require that the government provide Salvadorans with a hearing; rather, they contend, it merely requires that the government notify Salvadorans of their statutory rights. Plaintiffs concede, however, that paragraph two is "inaccurate" because it requires the government to advise Salvadorans of rights they may not have. Specifically, paragraph two requires the government to notify Salvadorans that they have a right to request a deportation or removal hearing, [4] when in fact they may not have such a right. While the expedited removal statute does not expressly prohibit the government from informing aliens that they have a right to request such a hearing, the prohibition is implicit in the statutory directive that an immigration officer remove, without further hearing, any alien found inadmissible for having fraudulent [*15] documentation or no valid documentation. See 8 U.S.C. § 1225(b)(1)(A)(I); id., *§ 1182(a)(6)(C)*; *id.,§ 1182(a)(7)*. In practical effect, this provision makes it unlawful for immigration officers to tell Salvadorans ordered removed under the expedited removal statute that they have the right to request a removal hearing. Because the *Orantes* injunction requires this, it cannot continue in force in its present form. See *Railway Employees,* 364 U.S. at 651 ("The parties have no power to require of the court continuing enforcement of rights the statute no longer gives").

[*16] Plaintiffs do not dispute this. They argue, however, that there is no conflict between the statute and the injunction with respect to Salvadorans found to have a credible fear of persecution, since the statute grants aliens who establish a credible fear the right to a removal hearing.

As noted, aliens who "indicate[] either an intention to apply for asylum . . . or a fear persecution" are referred for a credible fear interview before an asylum officer. 8 U.S.C. § 1225(b)(1)(A)(ii). If the asylum officer concludes that the alien has a credible fear of persecution, she receives a removal hearing before an immigration judge. *Id.,*§ 1225(b)(1)(B)(ii); 8 C. F. R. § 208.30(f). If the asylum officer concludes that the alien does not have a credible fear of persecution, she is ordered removed without further hearing unless she makes a timely request for "review" by an immigration judge under § 1225(b)(1)(B)(iii)(III) ("credible fear review"). The government argues, and plaintiffs do not dispute, that this "credible fear review" is a summary procedure in which the only issue is whether the alien's fear of persecution is credible. The review is not equivalent [*17] to a removal hearing before an immigration judge. If the immigration judge agrees with the asylum officer and concludes that the alien does not have a credible fear of persecution, she is removed without further review. 8 C.F.R. § 208.31(g)(1). If the immigration judge disagrees with the asylum officer, and finds that the alien has demonstrated a credible fear of persecution, the case is referred for a removal hearing before an immigration judge. *Id.,*§ 1208.30(g)(2)(iv)(B). Whether or not review is requested, only aliens who establish a credible fear are entitled to a removal hearing.

Given the statutory scheme, the court concludes that aliens found to have a credible fear of persecution are entitled to a removal hearing before an immigration judge. As respects these individuals, therefore, the *Orantes* advisal concerning the right to request a deportation hearing (although using outdated terminology) does not conflict with the expedited removal statute.

b. Right To Apply For Political Asylum

The government concedes that all aliens have the right to apply for political asylum, but argues that it has no obligation to advise an alien of this right unless she is found [*18] to have a credible fear of persecution. [5] It does not contend that the expedited removal statute makes it illegal for immigration agents to advise Salvadorans of

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[4] Under the IIRIRA, "removal" proceedings replaced what had previously been known as "deportation" and "exclusion" proceedings. See *United States v. Luna-Madellaga*, 315 F.3d 1224, 1225 n. 2 (9th Cir. 2003) ("The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ('IIRIRA') eliminated the previous legal distinction between deportation, removal, and exclusion, merging all into a broader category entitled 'removal'"); *Calcano-Martinez v. INS*, 533 U.S. 348, 350 n. 1, 121 S. Ct. 2268, 150 L. Ed. 2d 392 (2001) ("An additional difference between the old and the new statute with regard to petitions for review is one of nomenclature. In keeping with a statute-wide change in terminology, the new provision refers to orders of removal' rather than orders of deportation' or 'exclusion'").

[5] The government takes contradictory positions on this issue. In its moving papers, the government states: "[A]lthough all aliens have the right to apply for political asylum, there is no obligation by the government to advise of these rights unless an alien is determined to possess a credible fear of persecution." (Defendants' Brief Demonstrating Facial Conflict ("Defs.' Mot.") at 6:1-4). In its reply, the government asserts that an "alien does not have [the right to apply for political asylum] until he is

their right to apply for asylum. [6] That the government has no statutory obligation to inform aliens (including class members) of the right does not mean that it is legally prohibited from advising of the right.

[*20] Were the government precluded by statute or case law from telling class members that they have the right to seek asylum, a conflict would exist and modification of the *Orantes* injunction would be required. The government, however, has asserted only that paragraph two of the injunction imposes an obligation it would not otherwise have. This was precisely what Judge Kenyon intended when he entered the *Orantes* injunction. Under the regulations in force at that time, immigration officers had no duty to advise aliens of their right to apply for asylum except in limited circumstances. See *Orantes II,* 685 F. Supp. at 1499 ("In general, the immigration court will notify a detainee of the right to asylum only when the alien declines to designate a country of deportation," citing 8 C.F.R. § 242.17(c) (1982); see also *Duran v. INS,* 756 F.2d 1338, 1340-41 (9th Cir. 1985) ("The Immigration Judge concluded that the Immigration and Naturalization Service (INS) regulations do not require an immigration judge to notify an alien of his right to apply for relief under *section 208(a)* [asylum] or section 243(h). We agree…. In *Ramirez-Gonzalez [v.* INS, 695 F.2d 1208 (9th Cir. 1983)], [*21] we held that 8 C.F.R. § 242.17(c) does not, by its terms, require notice of the right to apply for asylum on the basis of likely political persecution in the country designated by the alien"); cf. *Ramirez-Osorio v. INS,* 745 F.2d 937, 944 (5th Cir. 1984) ("[U]nder current INS procedures an alien is notified of his right to petition for asylum if he is to be deported to a country other than the one he designates or if it appears that he may be persecuted on his return").

Judge Kenyon required the government to notify class members of their right to seek asylum to remedy pervasive

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deemed to have a credible fear." (Reply in Support of Defendants' Brief Demonstrating Facial Conflict ("Defs.' Reply") at 9:1-4; see also Defs.' Reply at 4:13-16 ("[P]aragraph two states that aliens have a right to apply for asylum, but aliens in expedited removal do not have that right unless they are deemed to have a credible fear")).

The government's reply brief suggests that an alien does not "apply" for asylum until she is found to have a credible fear of persecution. Plaintiffs note that this view is accurate if "apply" means "to make a written application for asylum to an immigration judge," because written applications are made only after an alien is referred to removal proceedings. They argue, however, that as used in the *Orantes* injunction, "apply" refers not to a written application but to the opportunity to request asylum and invoke applicable procedures. The court agrees. As the *Orantes* court made clear, the advisal was designed to notify class members that requesting political asylum was an available option so that they could seek such relief. See *Orantes I,* 541 F.Supp. at 375 (rejecting the notion that "Congress intended to make asylum available only to those fortunate enough to be familiar with the intricacies of United States immigration law," and noting that congressional reaffirmations of a policy "welcoming persons subject to persecution in their homelands" would "become meaningless if those intended to benefit by the asylum provision are never informed of its existence"). The government's interpretation would defeat the purpose of the advisal by deferring it until *after* an alien requested asylum, i.e. after she had expressed an intent to apply for asylum or a fear of persecution.

Moreover, it is clear from the plain language of the expedited removal statute that an "application" for asylum is made before an asylum officer or immigration judge makes a finding of credible fear. The statute requires that an alien who expresses a fear of persecution or an intent to apply for asylum be referred for an interview with an asylum officer. 8 U.S.C. § 1225(b)(1)(A)(ii). If the asylum officer determines that the alien has a credible fear of persecution, "the alien shall be detained for further consideration of the application for asylum." *Id.*.§ 1225(b)(1)(B)(ii). The statute's use of the term "further consideration of the application" makes it apparent that the application is extant and under consideration at the time the asylum interview takes place. For this reason, the court concludes that an alien "applies" for asylum before she is found to have a credible fear of persecution. To "apply" for asylum and obtain a credible fear interview, an alien need only express fear of persecution or an intent to apply for asylum.

For both of these reasons, the court rejects the argument made in the government's reply that the right to apply for asylum attaches only to aliens found to have a credible fear of persecution.

[6] In fact, it appears that the government currently advise aliens in expedited removal proceedings of the availability of political asylum. See Form I-867A, Defendants' [Proposed] Order Modifying Permanent Injunction, Exh. A (informing aliens that "U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear"). The government represents that this form is given to aliens in expedited removal. (See Defendants' Brief Demonstrating Facial Conflict ("Defs.' Br.") at 7:3-5). See also *AILA,* 18 F. Supp. 2d at 43 ("Form I-867A/B is to be used in every case in which expedited removal procedures will be applied. Form I-867A/B indicates that aliens undergoing expedited removal procedures are to be given information concerning the asylum interview, regardless of whether they have yet articulated any fear of persecution or intent to apply for asylum"). That the government currently advise aliens of the availability of asylum is further evidence that it would not violate the expedited removal statute by satisfying the injunction's mandate that it advise class members they have a right to apply for asylum.

efforts by INS agents to prevent Salvadorans from applying for asylum. Whether the practices that led to issuance of the injunction continue in 2006 is a question that will be addressed at a later stage of this proceeding. The only question presently before the court is whether the expedited removal statute facially conflicts with paragraph two of the injunction. Because the government has shown nothing more than that paragraph two imposes, a duty to notify that would not otherwise exist, it has failed to demonstrate a true conflict between the statute and the injunction.

c. Right [*22] **To Representation By An Attorney**

The government next argues that, under the expedited removal statute, only aliens found to have a credible fear of persecution have the right to be represented by an attorney. Because not all class members are entitled to representation under the expedited removal statute, the government asserts, the *Orantes* advisal (which must be given to all class members) facially conflicts with the statute and should be deleted.

Plaintiffs contend the government's request is overbroad and not "suitably tailored" to address the change in law. Plaintiffs do not dispute that Salvadorans who do not express a fear of persecution or state an intent to apply for asylum have no right to attorney representation. See also *Sinclair v. I.N.S.,* No. 98 CIV. 0537 (DC), 1998 U.S. Dist. LEXIS 19152, 1998 WL 856113, *3 (S.D.N.Y. Dec. 9, 1998) ("Sinclair presumably traces his second constitutional claim - that he was denied the right to an attorney - to the INS agent's alleged statement that Sinclair did not require an attorney when Sinclair signed the expedited removal order. As previously discussed, an immigration official may remove an alien who enters the United States with false [*23] documentation without further hearing or review…. Under the statute, therefore, Sinclair was not entitled to a lawyer," citing 8 U.S.C. § 1225(b)(1)(A)(i)).

Salvadorans found to have a credible fear, however, are entitled to representation under 8 U.S.C. § 1362. See *id.,* § 1362 ("In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose").

Plaintiffs argue that the statute also grants aliens the right to consult with an attorney prior to a credible fear interview with an asylum officer. Under § 1225(b)(1)(B)(iv), "[a]n alien who is eligible for [a credible fear] interview may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, according to regulations prescribed by the Attorney General. Such consultation shall be at no expense to the Government and shall not unreasonably delay the process." Additionally, [*24] "[a]ny persons or persons with whom the alien chooses to consult may be present at the interview and may be permitted, in the discretion of the asylum officer, to present a statement at the end of the interview. " 8 C.F.R. § 208.30(d)(4); see also *AILA,* 18 F. Supp. 2d at 54 (stating that the right attaches only if an alien expresses a fear of persecution or an intent to apply for asylum, and only "in the time *between* secondary inspection and the credible fear interview" (emphasis original)).

Plaintiffs assert, and the government does not dispute, that the right to consult "persons" encompasses the right to consult an attorney. Plaintiffs cite no authority, however, for the proposition that the right to "consult" an attorney is same as the right to be "represented" by counsel, and the court concludes the terms are not equivalent. A consultation is "[t]he act of asking the advice or opinion of someone (such as a lawyer)." BLACK'S LAW DICTIONARY 311 (7th ed. 1999). In contrast, representation is "[t]he act or an instance of standing for or acting on behalf of another, esp. by a lawyer on behalf of a client." *Id.* at 1304.

It is true that lawyers must [*25] maintain confidentially information provided during a consultation. See, *e.g., Barton v. United States District Court,* 410 F.3d 1104, 1111 (9th Cir. 2005) (the attorney-client privilege applies to communications made during preliminary consultations because "without it, people could not safely bring their problems to lawyers unless the lawyers had already been retained"); *B.F. Goodrich Co. v. Formosa Plastics Corp.,* 638 F.Supp. 1050, 1052 (S.D. Tex. 1986) ("The fact that the attorney-client relationship had not yet been established does not mean that the Arnold firm owed no duty whatever to Goodrich. . . . [A] lawyer must preserve the confidences and secrets of one who has 'sought to employ him'"). [7]

[*26] So long as they explain fully the scope of the retention, however, lawyers may ethically limit the

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[7] ABA MODEL RULES PROF. CONDUCT 1.18 (2002) (a lawyer may not use or reveal information learned in a consultation with a prospective client, even if no attorney-client relationship ensues, and the lawyer may not represent someone with interests materially adverse to the prospective client in a matter if that party could be significantly harmed by the information the lawyer received from the prospective client); CAL. FORMAL ETHICS OPINION No. 1984-84 (an attorney has a duty to maintain confidences reasonably entrusted during discussions preliminary to forming an attorney-client relationship); LOS ANGELES

services they provide to consultation and advice, and decline to undertake the representation of a client. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 19(1) ("Subject to other requirements stated in this Restatement, a client and lawyer may agree to limit a duty that a lawyer would otherwise owe to the client if: (a) the client is adequately informed and consents; and (b) the terms of the limitation are reasonable in the circumstances"); LOS ANGELES COUNTY BAR ASSN. FORM. OP. 483, March 20, 1995 ("An attorney may limit the scope of representation of a litigation client to consultation, preparation of pleadings to be filed by the client in pro per, and participation in settlement negotiations so long as the limited scope of representation is fully explained and the client consents to it"); see also *Ricotta v. State of California,* 4 F. Supp. 2d 961, 987 (S.D. Cal. 1998) ("a licensed attorney does not violate procedural, substantive, and professional rules of a federal court by lending some assistance to friends, family members, and others with whom [*27] he or she may want to share specialized knowledge"). As a result, the court concludes that an alien's right to consult with "a person or persons of their choosing" under § 1225(b)(1)(B)(iv) is not a right to representation by counsel. This is particularly true since the person consulted has no absolute right to speak during the asylum hearing; rather, this is a matter within the discretion of the asylum officer.

Consequently, the court finds that the right to representation by an attorney does not attach until an alien is found to have a credible fear of persecution. As respects all other aliens, paragraph two conflicts with the expedited removal statute.

d. Summary Of The Conflict Between Paragraph Two And The Expedited Removal Statute

A review of the expedited removal statute and paragraph two of the *Orantes* injunction reveals the following:

> (1) Defendants must inform class members that they have a right to apply for asylum.
>
> (2) Defendants cannot be obligated to inform class members processed under the expedited removal statute that they have a right to a removal hearing unless and until the class member is found to have a credible fear of persecution. [*28]
>
> (3) Defendants cannot be obligated to advise class members processed under the expedited removal statute that they have a right to representation by counsel unless and until the class member is found to have a credible fear of persecution.

With these parameters in mind, the court examines the parties' proposed modifications to paragraph two.

e. Modifications To Paragraph Two

"Once a moving party has met its burden of establishing either a change in fact or in law warranting modification of a consent decree, the district court should determine whether the proposed modification is suitably tailored to the changed circumstance." *Rufo,* 502 U.S. at 391. In crafting a modification, the court "must not create or perpetuate a constitutional violation" nor "strive to rewrite [the injunction] so that it conforms to the constitutional floor." *Id.* Rather, "the focus should be on whether the proposed modification is tailored to resolve the problems created by the change in circumstances." *Id.;* see also *id.* at 383 ("a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances [*29] warrants revision of the decree. If the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstance").

(1) The Government's First Proposal

The government argues that paragraph two should be eliminated in its entirety, as the advisals given during the expedited removal process are sufficient to apprise Salvadorans, and all other aliens, of their right to apply for asylum. These advisals appear in Forms I-867A and M-444. [8] Plaintiffs counter that (1) the government's argument regarding the adequacy of the advisals set forth on Forms I-867A and M-444 is fact-based and cannot be resolved before plaintiffs complete their discovery; (2) Form I-867A is inadequate because it does not advise aliens who express a fear of persecution that they are entitled to a removal hearing and to representation by counsel; (3) Form M-444 does not mention access to removal hearings for aliens found to have a credible fear of persecution; and (4) Form M-444 is not provided to all aliens in expedited removal, but only to those referred for a credible fear interview.

[*30] The government's proposal is overbroad, because it has not shown that paragraph two, in its entirety, conflicts with the expedited removal statute. Because it is legal to advise aliens of their right to apply for asylum,

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COUNTY BAR ASSN. FORM. OP. 506, January 2, 2001 (an attorney has the duty to preserve confidential information obtained during initial consultations with a prospective client, where the consultations do not result in the retention of the attorney).

[8] See Defendants' [Proposed] Order Modifying Injunction, Exhs. A and B.

deletion of the entire paragraph would not be suitably tailored to resolve the problems created by the change in law. See *Rufo,* 502 U.S. at 391; see also *Still's Pharmacy, Inc. v. Cuomo,* 981 F.2d 632, 638 (2d Cir. 1992)*("Rufo* directs the district court to make an independent inquiry and only requires that the modification be suitably tailored to address the changed circumstances"); *Pigford v. Veneman,* 217 F. Supp. 2d 95, 98 (D.D.C. 2002) (noting that the court would fashion a remedy that was "'suitably tailored to the changed circumstances'"). Furthermore, as plaintiffs note, the government's assertion that paragraph two is unnecessary given the current use of Forms I-867A and M-444 is a fact-based argument that is not premised on a facial conflict between the expedited removal statute and the injunction. As a result, the court declines to address whether Forms 1-867A and M-444 constitute adequate substitutes [*31] for the advisals required by paragraph two at this time. [9]

[*32] **(2) Plaintiffs' Proposal And Defendants' Second Proposal**

Plaintiffs, for their part, propose the following modifications:

> "At the time any class member is processed, whether or not he or she is automatically processed for a hearing, Defendants shall inform the class member of the existence of his or her rights, under the applicable law, to be represented by an attorney, to obtain a hearing before an immigration judge, and to apply for political asylum and relief under the Convention Against Torture." (proposed changes underlined).

In its reply, the government offers this alternative language:

> "At the time any class member is processed, whether or not he or she is automatically processed for a hearing, Defendants shall inform the class member of the existence of his or her rights, if available under the applicable law, to be represented by an attorney, to request a hearing before an immigration judge, and to apply for political asylum." (proposed change underlined).

In addition, defendants propose that the third sentence of paragraph two be modified to insert an introductory clause, as follows: "If these three rights are available [*33] under applicable law, Defendants shall . . ."

(a) Convention Against Torture

Plaintiffs argue that addition of the phrase - "and relief under the Convention Against Torture"- is appropriate because this form of relief from removal was adopted in 1999, after the *Orantes* injunction was entered. They note that relief under the convention is closely analogous to asylum, and is recognized by the government as a basis for referring individuals in expedited removal for credible fear interviews. Plaintiffs do not contend that paragraph two conflicts with the availability of relief under Convention Against Torture ("CAT"), and the fact that aliens may seek relief from removal under CAT the does not render "one or more of the obligations placed upon the parties [by the injunction]… impermissible under federal law," nor "make legal what the [injunction] was designed to prevent." *Rofu,* 502 U.S. at 388. Because there is no conflict between the terms of the injunction and the newly available right, the court declines to find that the availability of relief under CAT constitutes a changed circumstance that warrants modification of the injunction. See *id.* at 383, 391 [*34] (noting that the court should focus on resolving problems created by changes in law or other circumstances).

(b) Applicable Law

The parties' proposals regarding "the applicable law," while technically accurate, do not adequately address the need for modification of the injunction because they do not describe the required acts with sufficient specificity. *Rule 65(d) of the Federal Rules of Civil Procedure* requires that an injunction "shall be specific in terms [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." *FED. R. CIV. P. 65(d)*; see *Chicago Bd. of Educ. v. Substance,* Inc. 354 F.3d 624, 631-32 (7th Cir. 2003) ("[B]ecause an injunction frequently affects third

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[9] The government emphasizes that the court may not require it to amend Forms I-867A and M-444 to conform to modifications made to the *Orantes* injunction because the purpose of this proceeding is to eliminate facial conflicts between the injunction and the expedited removal statute, not to review the validity of the forms generally used by the government to effect expedited removal. The government asserts that the court lacks jurisdiction to review the forms because *8 U.S.C. § 1252(e)(3)(A)* limits judicial review of "written procedure issued by or under the authority of the Attorney General to implement [expedited removal]" to the United States District Court for the District of Columbia. The court declines to address these arguments as plaintiffs do not propose, and the court does not undertake, to amend Forms I-867A and M-444. See Plaintiffs' Ex Parte Application for Leave to File Sur-Reply Re: Alleged Facial Conflicts ("Pls.' Surreply"), Exh. 2 at 6:17-18 ("[P]laintiffs do not seek to have the Court amend the government's expedited removal forms").)

parties and consumes judicial resources, a court has an independent duty to assure that the injunctions it issues comply with the directive of *Fed.R.Civ.P. 65(d)* that injunctions 'shall be specific in terms' and 'shall describe in reasonable detail … the act or acts sought to be restrained'"); see also *Schmidt v. Lessard,* 414 U.S. 473, 476-77, 94 S. Ct. 713, 38 L. Ed. 2d 661 (1974) (vacating vague [*35] injunction). Under this standard, the parties' proposed language regarding "the applicable law" is inadequate because it does not describe the required acts with specificity, but merely incorporates them by reference to "the applicable law."

The government objects to plaintiffs' proposal that the word "request" be changed to "obtain," arguing (1) that plaintiffs do not explain why "request" is inappropriate and (2) that the change could later form the basis for an argument that hearings are required individuals placed in expedited removal. In their surreply, plaintiffs explain that they propose the change only to eliminate ambiguity and to "clarify that the applicable law . . . establishes the scope of non-citizens' rights to hearings." [10] Because the court cannot adopt either party's proposal regarding insertion of a reference to "the applicable law," it cannot accept plaintiffs' attempt to "clarify" the scope of rights available under "the applicable law." For the same reason, the court cannot accept the government's suggested change to the third sentence of paragraph two.

[*36] **(3) Conclusion Regarding Modifications To Paragraph Two**

Based on its findings regarding the nature of the conflict between the expedited removal statute and paragraph two of the injunction, the court modifies paragraph two as follows:

> "At the time any class member is processed in secondary inspection at the border or processed after being found within the territorial boundaries of the United States, whether or not he or she is automatically processed for a hearing, Defendants shall inform the class member of the existence of his or her right to apply for political asylum. Defendants shall also inform (1) each class member placed in section 240 proceedings that he or she has the right to be represented by an attorney and to request a removal hearing before an immigration judge; and (2) each class member placed in expedited removal that he or she will have the right to be represented by an attorney and to request a removal hearing before an immigration judge if, and only if, he or she applies for asylum and is found to have a credible fear of persecution."

f. Modifications To The *Orantes* Advisal

Plaintiffs have proposed modifications to the *Orantes* [*37] advisal that is currently given to class members, most of which are opposed by the government. The parties are directed to meet and confer regarding appropriate modifications to the advisal in light of the court's findings regarding the nature and extent of the facial conflict between the expedited removal statute and the *Orantes* injunction. The parties are directed to submit a stipulated, proposed advisal to the court for approval no later than October 30, 2006.

2. Paragraph Eleven Of The Injunction

Paragraph eleven of the *Orantes* injunction contains two provisions:

> "(a) Defendants shall not transfer detained class members who are unrepresented by counsel from the district of their apprehension for at least seven (7) days to afford class members the opportunity to obtain counsel.
>
> (b) Where a class member is represented by counsel or obtains counsel during the seven-day period described above, he or she can be transferred to other locations in accordance with *8 U.S.C. § 1252(c)*; however, venue shall remain in the district where the class member's counsel is located. Furthermore, the class member must be returned to the district [*38] in which venue is set sufficiently in advance of any proceeding in order to allow the detainee adequate time to consult with counsel. The class member must be returned within a reasonable time after receiving a request to do so from the detainee's counsel."

a. Detention Capacity

Under the regulations implementing the expedited removal statute, aliens in expedited removal proceedings must be detained until their removal. See 8 C.F.R. § 235.3(b)(2)(iii) ("An alien whose inadmissibility is being considered under this section or who has been ordered removed pursuant to this section shall be detained pending

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[10] Plaintiffs' Ex Parte Application for Leave to File Sur-Reply Re: Alleged Facial Conflicts ("Pls.' Surreply"), Exh. 2 at 5:10-11.

determination and removal. . ."); *id.,* § 235.3(b)(4)(ii) ("Pending the credible fear determination by an asylum officer and any review of that determination by an immigration judge, the alien shall be detained"). The *Orantes* injunction requires that Salvadorans be detained in the district of apprehension for seven days unless represented by counsel. Thus, the number of apprehended Salvadorans who can be detained for expedited removal in any district is limited at all times to the detention capacity - i.e., number of beds - available in that district. The government [*39] contends, as a result, that the injunction imposes a cap on the number of apprehended Salvadorans who can be placed in expedited removal during any seven-day period. Because the expedited removal statute does not except Salvadorans from its reach, and places no limitation on the number of Salvadorans who can be placed in expedited removal, the government argues that the transfer restrictions set forth in paragraph eleven are inconsistent with the statute and implementing regulations.

On its face, paragraph eleven does not prevent Salvadorans from being placed in expedited removal, and does not cap the number of Salvadorans who can be removed under the expedited removal statute. It merely prohibits transferring class members for seven days after apprehension if they are not represented by counsel. The expedited removal statute contains no contrary requirement. Consequently, the enactment of that statute does not render illegal the obligations placed on the government in paragraph eleven.

Despite its assertion that a facial conflict exists, the government's alleged inability to place Salvadorans in expedited removal is traceable not to the provisions of the injunction, but to the number [*40] of beds available in each district. To place more Salvadorans in expedited removal, the government would have to create more bed space in each district. While undoubtedly costly, the addition of beds would clearly be permissible under the terms of the injunction. Thus, the real question is whether modification or dissolution of the injunction is warranted because of the burden it places on the government's implementation of expedited removal. This, of course, is not issue before the court in this bifurcated proceeding.

b. "Class Members"

The government next argues that, as used in paragraph eleven, the definition of "class members" creates a facial conflict with the expedited removal statute. The *Orantes* injunction defines "class members" as "[a]ll citizens and nationals of El Salvador eligible to apply for political asylum under *8 U.S.C. § 1158* who … have been or will be taken into custody pursuant to 8 U.S.C. § 1357 by agents of the [Department of Homeland Security.]" *Orantes II,* 685 F.Supp. at 1490. This definition was crafted at a time when the only type of removal proceeding available was a deportation [*41] proceeding under what is now section 240 of the Immigration and Nationality Act ("INA"). In these deportation proceedings - which continue to exist as "regular," non-expedited removal proceedings - all aliens are presumed to be "eligible" to apply for political asylum. The only exceptions are minor ones codified at *8 U.S.C. § 1158(a)(2)*. See *8 U.S.C. § 1158(a)(1)* ("Any alien who is physically present in the United States or who arrives in the United States … irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title"). The government contends that the presumption of eligibility is reversed in expedited removal proceedings under § 1225, where only aliens who establish a credible fear of persecution are "eligible" to apply for political asylum. As a result, it asserts, there is a facial conflict between paragraph eleven and the expedited removal statute.

The government has not shown that there is a conflict between the statute and the injunction, or a shift in the presumption regarding eligibility to apply for asylum. The government asserts that § 1225(b)(1)(B)(v) [*42] reverses the presumption of eligibility. That section provides that "the term credible fear of persecution' means … there is a significant possibility … that the alien could establish eligibility for asylum under *section 1158* of this title." *Id.,* § 1225(b)(1)(B)(v). Contrary to the government's argument, the provision does not require that aliens establish a credible fear of persecution before they are eligible to *apply* for asylum; rather, it identifies a showing of credible fear as a prerequisite to "eligibility for asylum." It is axiomatic that an alien may apply for asylum, yet be ineligible for relief.

The government's position is undercut further by § 1225(b)(1)(B)(ii), which states: "If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)), the alien shall be detained for further consideration of the application for asylum." *Id., §* 1225(b)(1)(B)(ii). As noted earlier, this reference to "further consideration" of the asylum application clearly indicates that an alien applies for asylum prior to the credible fear interview. To apply for asylum and obtain an interview, [*43] an alien need only express a fear of persecution or an intent to apply for asylum.

Consequently, there has been no shift in presumption as the government suggests, and the court declines the government's invitation (a) to delete paragraph eleven entirely or (b) to amend the class definition to include only Salvadorans who have been placed in § 240 proceedings. As respects the latter proposal, plaintiffs correctly note that it is overbroad, as it would affect not only paragraph

eleven, but eliminate all other protections and safeguards mandated by the *Orantes* injunction for class members processed through expedited removal procedures.

c. Defendants' Ability To Remove Class Members Who Do Not Express A Fear Of Persecution Or An Intent To Apply For Asylum

To the extent there is any potential discrepancy between paragraph eleven and the expedited removal statute, it stems from the possibility that the transfer provision could be read to prevent final removal from the United States for seven days of Salvadorans who have not expressed a fear of persecution or an intent to pursue asylum, and who are thus not eligible to apply for asylum. Plaintiffs assert there is no conflict. [*44] They contend that, as used in the *Orantes* injunction, "transfer" means the transfer of aliens to detention facilities in the United States, not the transfer of aliens out of the country. [11] They contrast this with the "removal" of individuals from the country.

Nonetheless, to remedy any ambiguity, [12] plaintiffs propose the addition of the following language to the end of paragraph eleven:

"The term 'transfer' as used in this paragraph refers to the relocation [*45] from one detention facility to another of class members who are held in detention pending the initiation or resolution of their immigration proceedings. The restrictions of this provision do not apply to the transportation of individuals who are subject to final orders of removal including expedited removal orders, where the transportation is for their immediate removal from the country, rather than for continued detention." [13]

The government agrees with the first sentence of plaintiffs' proposed modification, but requests that the second sentence be amended as follows: "The restrictions of this paragraph do not apply to the detention, transfer, or other transportation of individuals who are subject to final orders of removal." [14] Specifically, the government objects [*46] to the phrase "immediate removal from the country." It contends that "immediate" means "instantaneous," [15] and that no alien is instantaneously removed from the country, because time is required to obtain travel documents and arrange flights. In their surreply, plaintiffs agree that the word "immediate" should be deleted, but assert that the balance of the language should remain.

The government also contends that the term "continued detention" is ambiguous, and proposes that it be exempted from paragraph eleven's limitations when "det[aining], transfer[ring], or … transport[ing] … individuals who are subject to final orders of removal." As the court reads the *Orantes* injunction and expedited removal statute, the government may transfer individuals subject to final removal [*47] orders even without the addition of this language. Paragraph eleven, like the rest of the *Orantes* injunction, applies only to class members, defined as "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 II,* 685 F. Supp. at 1491.

Under the expedited removal statute, aliens subject to a final order of removal either (a) failed to express a fear or persecution or an intent to seek asylum; or (b) failed to establish a credible fear of persecution before an asylum officer and/or immigration judge. In both cases, the individuals are no longer "eligible to apply for political asylum," and accordingly fall outside the class definition. [16]

[*48] The government's proposed language states this expressly. In the interest of clarity, the court finds it

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[11] Pls.' Opp at 15:2-5. As plaintiffs note, the *Orantes* injunction uses other terms to describe removal from the country. See, *e.g.*, *Orantes* injunction, P 6(c) ("If an attorney informs the officer that he or she wishes to communicate with a specifically identified member of the plaintiff class who is scheduled for voluntary departure, and that he or she has not yet been able to do so, Defendants shall not *expel* the plaintiff class member until such counsel has had a reasonable opportunity for such communication" (emphasis added)).

[12] The government does not argue that such an ambiguity exists in its brief, but has raised the point at earlier hearings.

[13] Plaintiffs' Memorandum of Points and Authorities Re Alleged Facial Conflicts ("Pls.' Opp.) at 17:16-20.

[14] Defs.' Reply at 11:5-8.

[15] *Id.* at 10:14-26 (citing MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 578 (10th ed. 2002) (defining "immediate" as "occurring, acting, or accomplished without loss or interval of time: INSTANT")).

[16] The parties agreed at oral hearing that aliens placed in section 240 proceedings remain "eligible to apply for asylum" even after they receive a final order of removal. Plaintiffs argued that the same is true of individuals who receive final removal orders following expedited removal proceedings. Specifically, plaintiffs asserted that such aliens can move to reopen expedited removal proceedings and/or apply for habeas relief. The court is not aware of any statute or regulation that allows aliens who receive a final order of removal following expedited removal proceedings to move to reopen those proceedings. Moreover, a review of the statutory scheme demonstrates that aliens who receive a final order of removal following expedited removal proceedings may not

appropriate to adopt the government's proposal that paragraph eleven be modified to make clear that its restrictions "do not apply to the detention, transfer, or other transportation of individuals who are subject to final orders of" expedited removal. See *FED. R. CIV. PROC. 65(d)* (requiring that an injunction "be specific in terms [and] . . . describe in reasonable detail … the act or acts sought to be restrained"); *United States v. Holtzman,* 762 F.2d 720, 726 (9th Cir. 1985) ("*Rule 65(d)* requires the language of injunctions to be reasonably clear so that ordinary persons will know precisely what action is proscribed").

Having considered the parties' arguments and proposals, the court finds it appropriate to add the following language to the end of paragraph eleven:

> "The term 'transfer' as used in this paragraph refers to the relocation from one detention facility to another of class members who are held in detention pending the initiation or resolution of their immigration proceedings. The restrictions of this paragraph do not apply to the detention, [*49] transfer, or other transportation of individuals who are subject to final orders of removal entered as a result of expedited removal proceedings."

C. Plaintiffs' Request For Limited Discovery

On August 21, 2006, the court granted plaintiffs limited discovery on matters relevant to the government's claims that "the requirements of the *Orantes* injunction make it burdensome for the government to place Salvadorans in expedited removal, and . . . that changes in standards have obviated the need for the protections afforded by the *Orantes* injunction." [17] Plaintiffs submit that, even if the court modifies paragraphs two and eleven, they are entitled to this limited discovery so that they may rebut defendants' argument that the *Orantes* injunction imposes an undue burden on the government's ability to place Salvadorans in expedited removal and so that they may demonstrate there is a continued need for the injunction's protections. [18]

[*50] The government counters that discovery will be unnecessary if the court adopts its proposed modifications to paragraphs two and eleven, since the injunction will "no longer . . . be in conflict with expedited removal, nor will it burden expedited removal." [19] Indeed, the government represents that, if the court adopts its proposed modifications, it will abandon its argument that the injunction burdens its ability to place Salvadorans in expedited removal. Because the court is unable to adopt the government's proposal with respect to paragraph two,

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apply for asylum, or seek an order permitting them to apply for asylum, by filing a petition for writ of habeas corpus. IIRIRA severely restricts the scope of habeas relief available to aliens removed through the expedited removal program. Under *8 U.S.C. § 1252(e)*, habeas review of expedited removal decisions is limited to the following inquiries: "(A) whether the petitioner is an alien, (B) whether the petitioner was ordered removed under such section, and (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under *section 1158* of this title, such status not having been terminated, and is entitled to further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title." Where an alien has been placed in expedited removal, federal courts lack jurisdiction to review his or her eligibility for asylum in the context of a habeas petition. *See Brumme v. INS,* 275 F.3d 443, 444, 446 (5th Cir. 2001) (affirming the district court's dismissal of habeas petition because "[t]he real issue [petitioner] asked the district court to address … was whether she was admissible or entitled to relief from removal," which "the court . . . was expressly precluded from considering . . . in light of *§ 1252(e)(5)*"); *Li v. Eddy,* 259 F.3d 1132, 1134 (9th Cir. 2001) ("There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal," citing *8 U.S.C. § 1252(e)(5)*), later vacated as moot, 324 F.3d 1109 (9th Cir. 2003).

[17] Order Granting Plaintiffs' Request for Limited Discovery on Expedited Removal, Aug. 21, 2006 ("August 21, 2006 Order") at 8.

[18] In conjunction with this request, plaintiffs proffer the affidavits of fifteen Salvadorans who were recently apprehended and detained by the Border Patrol. These individuals state that they were pressured by Border Patrol agents to sign the *Orantes* advisals and other forms. See, e.g., Declaration of Sandro Faustino Marroquin-Sanchez, PP 13-14 ("While I was at the Border Patrol office, they put a stack of papers in front of me to sign. The agent put his arm across the stack of papers so I couldn't read them.… Mainly, I could just see the parts where I was supposed to sign. The agent was very aggressive and told me to 'sign, sign, sign.' He told me if I didn't sign the papers I would have to stay there longer and would be left behind when the other men I came with were moved. I was afraid to be left behind and felt pressure to sign the forms even though I didn't understand what they said, so I did. The agent did not explain the forms to me"). As plaintiffs acknowledge, their argument that there is a continuing need for the *Orantes* injunction is not before the court at this time. (See August 21, 2006 Order at 8 ("[I]f the government contends that these provisions of the injunction facially conflict with the expedited removal statute and its implementing regulations, they may seek bifurcation of, and a hearing on, the purported facial conflict"); Further Telephone Status Conference, August 31, 2006 ("The government's request for a hearing on the facial conflict between the Orantes injunction and the expedited removal statute is granted")). Consequently, the court declines to consider the declarations submitted with plaintiffs' opposition at this time.

[19] Defs.' Reply at 12:15-17.

and its modifications to the injunction do not resolve or moot the government's changed circumstances arguments, some limited discovery remains appropriate. Because this order moots defendants'. argument that the injunction imposes excessive burdens on their ability to place Salvadorans in expedited removal, however, the court modifies its August 21, 2006 discovery order. The following discovery remains relevant to the government's claim that changes in standards have obviated the need for the protections afforded by the *Orantes* injunction:

1.Document Requests:

1. All training materials, manuals, instructions, [*51] directives, and guidance provided to the United States Customs and Border Protection ("CBP") and the United States Immigration and Customs Enforcement ("ICE") personnel concerning the processing and treatment of aliens in expedited removal from initial inspection through the end of the expedited removal proceedings;

2. All training materials, manuals, instructions, directives, and guidance provided to CBP and ICE personnel concerning the processing and treatment of aliens in expanded expedited removal from apprehension through the end of expedited removal proceedings;

3. From January 1, 2003 until the present, all portions of reports, studies, evaluations, audits, or similar documents provided to DHS or DHS agencies by the United States High Commission on Refugees (UNHCR) concerning the impact of expedited removal or expanded expedited removal on asylum seekers or potential asylum seekers.

4. All documents containing policies concerning the processing and treatment of aliens in expedited removal and expanded expedited removal, which were created after February 2005 in response to the recommendations of the United States Commission on International Religious Freedom [*52] ("USCIRF") Expedited Removal Study, entitled "Report on Asylum Seekers In Expedited Removal." [20]

5. Those portions of reports, studies, evaluations, audits, or similar documents
concerning expanded expedited removal in the possession of DHS agencies that address the impact of the program on asylum seekers or potential asylum seekers.

2. Interrogatories:

1. Identify the name(s), position(s), and address(es) of the DHS or DHS agency official, officer, agent, or other employee(s) who is most knowledgeable about the procedures for conducting expedited removal.

2. Identify the name(s), position(s), and address(es) of the DHS or DHS agency official, officer, agent, or other employee(s) who is most knowledgeable about the procedures for conducting expanded expedited removal.

3. Identify the name(s), position(s), and address(es) of the DHS or DHS agency official, officer, agent, or other employee(s) who is most knowledgeable about the training of inspectors who conduct expedited removal, and for each such person list her or his responsibilities with respect to expedited removal.

4. Identify the name(s), position(s), and address(es) of the DHS or DHS agency [*53] official, officer, agent, or other employee(s) who is most knowledgeable about the training of inspectors who conduct expanded expedited removal, and for each such person list her or his responsibilities with respect to expanded expedited removal.

5. Identify the name(s), position(s), and address(es) of the DHS or DHS agency official, officer, agent, or other employee(s) who is most knowledgeable about the USCIRF Expedited Removal Study, including any changes in policies or procedures made in response to the study, and for each such person list her or his responsibilities with respect to expedited removal.

6. Identify the name(s), position(s), and address(es) of a supervising officer or employee responsible for supervising Border Patrol officers, agents, or other employees who process aliens under expanded expedited

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[20] This discovery is relevant in assessing the continuing need for the injunction in light of the government's contention that changes in standards have obviated the need for the protections the injunction affords. Although plaintiffs have previously had discovery on the new standards, they were precluded from seeking discovery regarding the effect of the expedited removal program on the continued need for the injunction.

removal in the following border sectors: Laredo, Texas; San Diego, California; and Tuscon, Arizona, and for each such person identify her or his responsibilities with respect to expedited removal.

7. State the number of Salvadoran aliens removed through expedited removal at all ports-of-entry for Fiscal Year (FY) 2004 and 2005.

8. State the number [*54] of Salvadoran aliens subject to expedited removal at all ports-of-entry who were referred for credible fear interviews in FY 2004 and 2005.

9. Identify the name(s), position(s), and address(es) of each person who participated or assisted in responding to Plaintiffs' Interrogatories - Set Four, and to Plaintiffs' Request for Production of Documents pursuant to Federal Rule of Civil Procedure 34 - Set Four. For each discovery response, state whether the person who prepared the answer has personal knowledge of the information contained in the answer, and if not, state the name(s), position(s), and address(es) of each person having personal knowledge who has supplied the information. Also identify each document relied on in preparing the answer and the person having custody of that document.

[*55] **II. CONCLUSION**

For the foregoing reasons, the court modifies paragraph two of the *Orantes* injunction as follows:

> "At the time any class member is processed in secondary inspection at the border or processed after being found within the territorial boundaries of the United States, whether or not he or she is automatically processed for a hearing, Defendants shall inform the class member of the existence of his or her right to apply for political asylum. Defendants shall also inform (1) each class member placed in section 240 proceedings that he or she has the right to be represented by an attorney and to request a removal hearing before an immigration judge; and (2) each class member placed in expedited removal that he or she will have the right to be represented by an attorney and to request a removal hearing before an immigration judge if, and only if, he or she applies for asylum and is found to have a credible fear of persecution."

The court adds the following language to the end of paragraph eleven:

> "The term 'transfer' as used in this paragraph refers to the relocation from one detention facility to another of class members who are held in detention [*56] pending the initiation or resolution of their immigration proceedings. The restrictions of this paragraph do not apply to the detention, transfer, or other transportation of individuals who are subject to final orders of removal entered as a result of expedited removal proceedings."

The parties are directed to meet and confer regarding modifications to the *Orantes* advisals that are consistent with the findings and conclusions in this order. The parties are directed to submit stipulated, proposed *Orantes* advisals to the court for approval no later than October 30, 2006.

DATED: October 11, 2006

MARGARET M. MORROW

UNITED STATES DISTRICT JUDGE