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I. INTRODUCTION AND STATEMENT OF AMICI CURIAE¹

Amici the American Immigration Council (Council) and the American Immigration Lawyers Association (AILA) proffer this brief to urge this Court to grant Plaintiffs' motion for summary judgment. Defendant U.S. Department of Homeland Security (DHS) would force individuals seeking protection from persecution and torture to undergo critical screening for asylum eligibility while detained in U.S. Customs and Border Protection (CBP) facilities through two pilot programs, the Prompt Asylum Claim Review program (PACR) and the Humanitarian Asylum Review Process (HARP). If not enjoined by this Court, these programs will prevent asylum seekers from exercising their rights to counsel and meaningful participation in the credible fear process.

Amici submit this brief to address the inhumane and substandard conditions and lack of access to counsel in CBP detention facilities. Evidence, including that obtained by Amicus the Council in litigation challenging the constitutionality of detention in equivalent facilities in the Tucson Sector of U.S. Border Patrol, demonstrates that these facilities are overcrowded and lack sanitation, beds, adequate food or water, or proper medical care. Moreover, the experiences of members of Amicus AILA demonstrate that these facilities are not designed to permit access to counsel. Requiring asylum seekers to complete credible fear screenings while detained for days or longer in these coercive conditions threatens their rights in that process.

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration

¹ Pursuant to Local Civ. R. 7(o) and Fed. R. App. Pr. 29(a)(4)(E), Amici certify that no party's counsel authored the brief in whole or in part, no party or party's counsel contributed money intended to fund preparation or submission of this brief, and no person other than Amici and their counsel contributed money intended to fund preparation or submission of the brief.

laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council frequently appears before federal courts on issues relating to the due process rights of noncitizens, including those held in immigration detention. In particular, the Council is co-counsel in a class action challenging the unconstitutional conditions of detention in Border Patrol facilities in the Tucson Sector. *See Doe v. Wolf*, No. 4:15-cv-00250-TUC-DCB (D. Ariz. filed June 8, 2015).

AILA is a national association with more than 15,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security (DHS) and before the Executive Office for Immigration Review (immigration courts), as well as before the United States District Courts, Courts of Appeal, and the United States Supreme Court.

II. ARGUMENT

A. Extensive Evidence Demonstrates the Inadequate Conditions in CBP Detention Facilities

As Plaintiffs have explained, *see* ECF No. 35-1, Plfs' Mem. of Law in Supp. of Mot. for Summ. J., at 10, Defendants' PACR and HARP programs halted DHS' usual practice of transferring asylum seekers to U.S. Immigration and Customs Enforcement (ICE) detention facilities during the credible fear process, an initial screening to assess whether individuals with a fear of persecution or torture may seek protection in front of an immigration judge or will face

summary removal.² Instead, under these programs, asylum seekers must remain in CBP detention facilities, often for days or longer, even though these are short-term holding facilities intended only for the minimal amount of time necessary to complete initial processing and are not meant for the lengthy detentions to which asylum seekers are being subjected. *See* ECF No. 35-3, Certified Administrative Record (AR) at 618 (Dep’t of Homeland Sec., *U.S. Customs and Border Protection National Standards on Transport, Escort, Detention, and Search* 4.1 (Oct. 2015)); ECF No. 21-3, Exh. 9 (U.S. Customs & Border Prot., *CBP Security Policy and Procedures Handbook, HB1400-02B* 494 (Aug. 13, 2009) (hereinafter *CBP Handbook*)) (acknowledging that the facilities have “[n]o beds” because “a hold room is not designed for sleeping”). These facilities, where individuals regularly have been subject to substandard conditions and prevented from accessing attorneys, are singularly unsuited for detention during the credible fear process.

The U.S. Border Patrol is a component of CBP, which, in turn, is a component of DHS. It has nine sectors with more than 70 stations in four states along the U.S. southern border—Texas, New Mexico, Arizona, and California. *See* U.S. Customs & Border Prot., *Border Patrol Sectors*, <https://bit.ly/38PrSia>. Most of these stations are equipped with holding cells. ECF No. 21-3, Exh. 9 (*CBP Handbook* at 492). Upon apprehension of an individual suspected of being a noncitizen in the United States without authorization, Border Patrol detains the individual for initial processing prior to referring the individual to ICE or another federal agency for further proceedings. During fiscal year 2019, CBP detained over 850,000 migrants in these cells. U.S.

² DHS initially piloted the PACR and HARP programs in Border Patrol’s El Paso Sector, but have since expanded the program to the Rio Grande Valley Sector in Texas and the Yuma Sector in Arizona, and plan for additional expansion. *See* ECF 35-1 at 10.

Customs & Border Prot., *Southwest Border Migration FY 2019*, <https://bit.ly/31cc8mH>. In the El Paso Sector alone, CBP apprehended over 180,000 people. U.S. Customs & Border Prot., *U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2019*, <https://bit.ly/36FqWeP>. The Rio Grande Valley and Yuma Sectors together account for another 400,000 of those apprehended. *Id.*

1. CBP Detention Facilities Are Overcrowded, with Inadequate Food, Water, and Medical Care

a. Federal Courts Have Already Recognized the Unlawful Conditions in CBP Facilities

Federal courts have recognized that CBP detention facilities, like those where individuals subject to PACR and HAPR are held, have substandard conditions.³ Individuals held in these facilities face conditions that do not permit them to sleep, are overcrowded, and lack necessary sanitation, food, water, and medical care.

In *Doe v. Johnson* (now *Wolf*), a class action challenging the constitutionality of conditions in Border Patrol holding cells in its Tucson Sector, a federal judge ordered corrective measures at these facilities. *See* No. 4:15-cv-15-00250-TUC-DCB, 2016 WL 8188563, at *3, *15-16 (D. Ariz. Nov. 18, 2016) (recognizing “persuasive evidence that the basic human needs of detainees are not being met”). Specifically, the court examined evidence that individuals held in the facilities were forced to sleep on concrete floors or benches without beds or mats, with inadequate blankets, in cells that were overcrowded and lit day and night and kept at cold temperatures. *Id.* at *7-9. The court concluded “that the law and the facts clearly favor Plaintiffs’

³ *See, e.g., Flores v. Johnson*, 212 F. Supp. 3d 864, 882 (C.D. Cal. 2015), *clarified on denial of recons. sub nom., Flores v. Lynch*, 212 F. Supp. 3d 907 (C.D. Cal. 2015), *aff’d in part, rev’d in part and remanded*, 828 F.3d 898 (9th Cir. 2016) (granting motion to enforce settlement agreement requiring “safe and sanitary” conditions in CBP facilities for class members).

position that Defendants are violating Plaintiffs’ constitutional right to sleep.” *Id.* at *9; *see also id.* at *7-9 (noting evidence of “the harshness caused by the lack of mats and the inadequacy of the Mylar blankets” to keep individuals warm; lights being on all day and night; cells which were overcrowded because “occupancy limits are established for detainees sitting up” but “[d]etainees need to lie down to sleep because they are detained at the Border Patrol stations in excess of 12 hours;” and the cold temperatures, exacerbated by the fact that “body heat is affected by the sedentary nature of the detention and whether or not detainees have the ability to move around”).

Regarding sanitation, the court relied upon the testimony of plaintiffs’ sanitation expert who “personally observed holding rooms with floors, walls, benches, drains, toilets, sinks, stalls, and other fixtures . . . which were badly soiled.” *Id.* at *9. The expert “concluded that cleaning was not sufficient to sanitize the holding cells . . . [and] that exposure to garbage increases the risk of disease and presence of vermin, and is psychologically stressful.” *Id.* As for medical screening, the court relied upon plaintiffs’ medical expert, who testified that “there was no evidence of any formalized screening process being carried out by agents at the detention centers.” *Id.* at *13. In his expert opinion, “detainees are high risk for medical problems because they have just crossed the desert under extreme physical hardship, lacking in water and food, without access to medication and medical supplies” —an opinion which the court found was supported by defendants’ own data. *Id.* at *14.

The court stressed that “[i]f detainees are held long enough to require them to sleep in these facilities, take regular meals, need showers, etc., then the Defendants must provide conditions of confinement to meet these human needs.” *Id.* at *15.⁴

⁴ The relief ordered by the *Doe* court will not assist the Plaintiffs in this case; the *Doe* preliminary injunction is limited to the Tucson Sector of the Border Patrol and CBP is not

Subsequently, the *Doe* plaintiffs presented additional evidence that the Border Patrol facilities in the Tucson sector continued to “pose an objectively unreasonable risk of serious damage to health and they deprive Plaintiffs of basic human needs—including sleep, warmth, food, water, sanitation, hygiene, medical care.” Plfs. Prop. Find. of Fact & Concl. of L. at 15, *Doe v. Wolf*, No. 4:15-cv-00250-TUC-DCB (D. Ariz. Jan. 9, 2020), ECF No. 447-1; *see also* Paul Ingram, *Women testify about squalid conditions in Border Patrol detention centers*, Tucson Sentinel (Jan. 14, 2020), <http://bit.ly/2u6MfbM> (summarizing trial testimony from plaintiffs’ witnesses and expert on conditions in detention, including testimony that inhumane conditions persist and “in fact they’re getting worse”); American Immigration Council (@immcouncil), Twitter (Jan. 17, 2020, 3:13 PM), <https://twitter.com/immcouncil/status/1218265080099475456> (publishing recent images of conditions in CBP facilities in Border Patrol’s Tucson Sector). As Plaintiffs have argued in this case, the evidence and court findings in *Doe* demonstrate that where conditions in CBP facilities deny people “basic human needs” and are “psychologically stressful,” those same facilities cannot also accommodate the credible fear legal process.

b. Reporting Has Consistently Documented Coercive and Dehumanizing Conditions in CBP Facilities

For over a decade, non-governmental organizations, the media, and those previously detained have reported on the cruel and substandard conditions in CBP detention facilities akin to those found unlawful by the court in *Doe*. These reports consistently describe overcrowded, unbearably cold cells where individuals must sleep on concrete benches or the floor, with at most a thin mat and Mylar sheet as bedding, and without access to adequate food, water, hygiene products to clean themselves, or adequate medical screening and care. The reports reveal

implementing it in other sectors. *See id.* at *1.

systemic problems along the southern border, which includes facilities in El Paso, that have persisted for years despite orders like the one in *Doe*.

In 2019, DHS's Office of Inspector General (OIG) conducted investigations into conditions at CBP facilities in Texas, including an investigation into the El Paso Del Norte Processing Center. *See* ECF No. 21-3, Exh. 13 (Office of Inspector Gen., Dep't of Homeland Sec., OIG-19-46, Management Alert – DHS Needs to Address Dangerous Overcrowding Among Single Adults at El Paso Del Norte Processing Center (Redacted) (May 30, 2019)); *see also* ECF No. 21-4, Exh. 32 (Office of Inspector Gen., Dep't of Homeland Sec., OIG-19-46, Management Alert – DHS Needs to Address Dangerous Overcrowding and Prolonged Detention of Children and Adults in the Rio Grande Valley (Redacted) (July 2, 2019)). OIG's May 2019 report on the El Paso center found that “overcrowding and prolonged detention represent an immediate risk to the health and safety” of people detained in those facilities. ECF No. 21-3, Exh. 13 at 6. During the unannounced inspections, OIG investigators learned that “some of the detainees had been held in standing-room only conditions for days or weeks,” people “were wearing soiled clothing for days or weeks,” and investigators “observed detainees standing on toilets in the cells to make room and gain breathing space.” *Id.* at 5, 7-8. The OIG report recommended “immediate corrective action.” *Id.* at 10. Subsequently, on July 24, 2019, the U.S House of Representatives' Committee on Appropriations echoed OIG's concerns in its report accompanying the DHS appropriations bill for fiscal year 2020, stating that “consistent overcrowding presents safety, health, and hygiene risks to individuals in custody.” Staff of H. Comm. on Appropriations, Rep. No. 116-180, Rep. on Dep't of Homeland Sec. Appropriations Bill, 2020 21 (July 24, 2019), <http://bit.ly/3197juu>.

Other reports mirror these findings and demonstrate the long-standing and systemic nature of these substandard and inhumane conditions. More than ten years ago, in a February 2009 report, the Women's Refugee Commission stated that the holding cells in three Border Patrol stations in Texas "were exceedingly cold," that "[l]ike adults, children sleep on cold floors, thin mats, plastic sheets, cement benches, newspaper or plastic 'boat beds,'" that children were "not given enough food or water," and that "[t]here [were] no shower facilities or clean clothes available to children." Women's Refugee Commission, *Halfway Home: Unaccompanied Children in Immigration Custody* 9-10 (Feb. 2009), <https://bit.ly/2Ixt93u>.

In a December 2015 report based in part on interviews with 391 individuals whom CBP detained in the Rio Grande Valley, Amicus the Council corroborated the continued deplorable and substandard conditions in Border Patrol facilities continued to exist. ECF No. 21-4, Exh. 31 at 1-2 (Guillermo Cantor, American Immigration Council, *Hieleras (Iceboxes) in the Rio Grande Valley Sector: Lengthy Detention, Deplorable Conditions, and Abuse in CBP Holding Cells* 1-2, 9 (Dec. 2015)) (hereinafter, *Hieleras Report*). The women interviewed for the 2015 report consistently recounted "overcrowding, separation of mothers from their children, inadequate access to medication and/or medical care, extreme temperature, lack of access to showers, food insufficiency, and sleep deprivation." *Id.* at 2. Specifically, the women described how the conditions interfered with their ability to sleep. As one woman reported: "We slept on the floor, but we couldn't really sleep because the lights were on and they were very bright. They also kept making us get up all the time, so sleep was really impossible." *Id.* at 17. In addition, every individual surveyed reported insufficient space to lie down in the holding cells because of severe overcrowding. *Id.* at 12.

A Human Rights Watch report issued in 2018 documented that, two years later,

conditions remained the same in detention facilities in Texas, New Mexico, Arizona, and California, especially noting the cold temperatures in the cells. ECF No. 21-4, Exh. 27 (Human Rights Watch, *In the Freezer: Abusive Conditions for Women and Children in US Immigration Holding Cells* (2018)). One woman held in a CBP facility in El Paso with her seven-year-old son in May 2017 recalled: “It was a very cold room. We had winter clothes and still couldn’t handle the temperature. We slept directly on the floor. The lights were on the whole time, even in the room.” *Id.* at 7. Another woman held in El Paso with her son in November 2017 reported that they only received mats to sleep on for two of the three nights they were detained at the CBP facility: “The last night they took the mats away, maybe because they had too many people there. They didn’t explain why they took the mats.” *Id.* at 15. Yet another woman detained in El Paso in June 2017 reported receiving neither a mat nor a Mylar sheet her first night in the CBP facility. *Id.* at 16.

Regarding basic personal hygiene, in what Human Rights Watch indicates is a “typical account,” a woman held in a CBP facility in California stated that she and her son spent two days in a cell without toothpaste, a change of clothes, or a chance to shower. *Id.* Two women held in a CBP facility near El Paso reported going five days without a shower. *Id.* at 17. Another woman stated that the El Paso facility where she was held for three nights in 2017 “did not make sanitary napkins or other hygiene products available to menstruating women” and she recalled having to take her son to the toilet “because there were no diapers” available. *Id.* at 18. The women and children interviewed also continued to report that the cells were overcrowded, the food was insufficient, and that they were disoriented due to the lights being on all day and night, making sleep extremely difficult. *Id.* at 19-20.

The inhumane conditions in CBP facilities are compounded by the lack of adequate

medical screening and care. One woman held with her son in a CBP facility in 2015 recounted how CBP officers confiscated and threw away her son's asthma medication. ECF No. 21-4, Exh. 31 at 14 (*Hieleras* Report). When the mother requested medical care and attention for her son she reports: "CBP ignored my requests. They told me and women with sick kids 'this isn't a hospital.'" *Id.* The severe inadequacy of the medical care available in CBP facilities is evident in the recent reports of deaths in CBP custody. *See, e.g.,* Nicole Acevedo, *Why are migrant children dying in U.S. custody?*, NBC News (May 29, 2019), <https://nbcnews.to/36J9hCW>; *see also* Am. Immigration Lawyers Ass'n, *Conditions in CBP Custody*, AILA Doc. No. 18122608 (Jan. 17, 2020), <https://bit.ly/36JteJQ> (collecting information about deaths related to CBP detention). In December 2018, Jakelin Caal Maquin, a seven-year-old girl detained by Border Patrol, died of an infection in El Paso, Texas. *See* Acevedo, *Why are migrant children dying in U.S. custody?*. On Christmas Eve 2018, Felipe Gomez Alonzo, an eight-year-old boy held in Border Patrol custody for almost a week died of flu complications. *Id.* In May 2019, two more children died: Carlos Gregorio Hernández Vásquez, a sixteen-year-old who spent a week in CBP custody, died of the flu and Wilmer Josué Ramírez Vásquez, a two-and-a-half-year-old held in CBP custody, died of pneumonia after being sent to the hospital. *Id.*

These reports highlight the impact—sometimes deadly—of time spent subjected to the harsh and dehumanizing conditions in CBP custody. Moreover, the systemic nature of the conditions in CBP custody underscores that those detained in such facilities under the PACR and HARP programs will be facing imminent risks to their health and safety while simultaneously being asked to make the legal case for why they deserve protection in the United States.

2. CBP Prevents Individuals from Accessing Counsel in Detention Facilities

As Plaintiffs demonstrated, individuals subject to substandard conditions in CBP

detention facilities also lack access to counsel: outside counsel are not permitted to enter the facilities or provided with a mechanism to determine whether their clients are in the facilities, individuals in the facilities often are not provided with any telephone access to contact counsel or family members, and the facilities themselves reportedly lack space at which counsel visits could occur. *See* ECF No. 35-1 at 10-11. In practice, this means that, even before the creation of PACR and HARP, because of the increased time people spend in CBP facilities before transfer elsewhere, Defendants could prevent attorney members of Amicus AILA from contacting their clients for weeks, even if they needed assistance in preparing for the credible fear process.

For example, an attorney member of Amicus AILA was retained by a family member to represent two individuals, C.S. and H.L., on July 19, 2019.⁵ C.S. was held in an ICE detention facility, and the attorney was able to locate and communicate with her shortly after being retained. However, H.L. was not located in the facility. The attorney attempted to locate H.L. on ICE's online locator system, and by repeatedly calling eight phone numbers she had been provided for various ICE and CBP offices. The attorney received no information until July 24, 2019, when a CBP official informed her by telephone that H.L. likely was detained by CBP in McAllen, Texas. However, the CBP official informed the attorney that, because H.L. was in CBP custody, he could not make or receive telephone calls, even for calls to an attorney, and that CBP did not permit in person visits. Only a month later, on August 23, 2019, did the attorney learn that H.L. had been transferred to ICE custody to face a credible fear interview (CFI); because

⁵ All accounts described below use pseudonymous initials and are drawn from correspondence between Amici and counsel or former counsel for the individual involved. All documentation is on file with counsel for Amici. *See also* ECF No. 21-9, Decl. of Linda Corchado; ECF No. 21-13, Decl. of Allegra Love; ECF No. 21-21, Decl. of Jodi Goodwin; ECF No. 35-7, Supp. Decl. of Linda Corchado (additional declarations by attorney members of Amicus AILA detailing lack of access to clients held in CBP detention).

H.L. was not subject to PACR or HARP, he finally was able to speak to his attorney at that point.

Another attorney was contacted by the wife of an asylum seeker from Honduras, A.B., after he entered the United States in June of 2019. The attorney was unable to contact, or even confirm the location of, A.B. for the entire eighteen days he was held by CBP before being sent to Mexico under the Migrant Protection Protocols.⁶ Notably, A.B. later reported to his attorney that, during his time in CBP detention, individuals needed to take turns sleeping because of lack of space in the cells and never received soap or a toothbrush. CBP officers permitted A.B. one phone call but did not tell him his specific location to allow an attorney to subsequently contact him; CBP never made legal materials available to him to allow him to prepare for a credible fear interview.

Now, under HARP and PACR, the same lack of attorney access prevents members of Amicus AILA from even speaking to potential clients before they receive credible fear determinations. One attorney reports that she has received a call from a family member of an individual in CBP custody approximately once every two weeks since HARP and PACR were initiated. Generally, the family member contacts her shortly after receiving a phone call from the detained individual. She has emailed various local CBP officials to seek information about the individuals' locations, but never received substantive responses. Because she has no way to contact the individuals detained at CBP facilities, she can only request that their family members provide them with her contact information if the family is able to speak to the detained person again by telephone—an unlikely proposition. She has only been able to speak with two

⁶ Under the Migrant Protection Protocols, DHS sends individuals entering or seeking admission at the United States-Mexico border back to Mexico for the duration of their removal proceedings. ECF No. 35-3 at AR013 (Dep't of Homeland Sec., *Migrant Protection Protocols* (Jan. 24, 2019)).

individuals held by CBP through this process.

Thus, individuals held in inhumane and coercive conditions are left to participate in the credible fear process without any legal assistance.

B. These Detention Conditions Prevent Asylum Seekers from Exercising Their Rights During the Credible Fear Process

Under PACR and HARP, individuals who previously would have been processed for credible fear interviews (CFIs) while in ICE custody now must undertake those interviews from CBP detention facilities, subject to the substandard conditions and lack of access to counsel discussed *supra*. The credible fear process determines whether a person fleeing persecution or torture in his or her country of origin will be able to present an asylum application to an immigration judge or, alternatively, will be summarily removed. Thus, asylum seekers must be prepared, focused and—wherever possible—assisted by an attorney during a CFI. During the interview, a noncitizen must provide “all relevant and useful information bearing on whether [he or she] has a credible fear of persecution or torture” and must do so in a manner the interviewing officer finds credible. 8 C.F.R. § 208.30(d), (e). He or she must therefore recall and recount, in a coherent and convincing manner, facts that establish a credible fear of persecution or torture. *See id.* Notably, the record created in the CFI will follow the individual throughout their immigration proceedings, either as part of an immigration judge’s review of a negative CFI, 8 C.F.R. § 208.30(g)(2)(ii), or in removal proceedings under 28 U.S.C. § 1229a. However, the harsh conditions noncitizens endure in CBP facilities undermine their ability to complete these tasks and participate effectively in CFIs—and can even coerce them into abandoning the process altogether.⁷

⁷ This is especially true where, as here, individuals subject to coercive conditions lack

Sleep deprivation, inadequate food and water, and poor or nonexistent medical care interfere with the cognitive functioning necessary to understand and engage in the credible fear process. *Cf. Clewis v. Texas*, 386 U.S. 707, 712 (1967) (expressing “substantial concern” that an individual’s “faculties were impaired by inadequate sleep and food, sickness, and long subjection to police custody with little or no contact with anyone other than police”); *United States ex rel. Clayton v. Mancusi*, 326 F. Supp. 1366, 1371 (E.D.N.Y. 1971), *aff’d*, 454 F.2d 454 (2d Cir. 1972) (observing that an individual’s “faculties might well have been impaired . . . by inadequate sleep and food” in police custody). These findings are supported by scientific analysis establishing that sleep deprivation and hunger may cause “profound impairment.” Deborah Davis & Richard A. Leo, *Interrogation-Related Regulatory Decline: Ego Depletion, Failures of Self-Regulation, and the Decision to Confess*, 18 *Psychol. Pub. Pol’y & L.* 673, 694 (2012) (“While glucose depletion, stress, fatigue, and sleep deprivation separately impair executive functions of cognition and control, together they pose the specter of much more profound impairment.”); *see also, e.g.*, June J. Pilcher & Allen I. Huffcutt, *Effects of Sleep Deprivation on Performance: A Meta Analysis*, 19 *Sleep* 318, 323 (1996), <http://bit.ly/36C1iaV> (finding, consistent with previous

attorneys to guide them through a complex legal process with potentially life-altering consequences. As courts recognize, “[w]ith only a small degree of hyperbole, the immigration laws have been termed second only to the Internal Revenue Code in complexity. A lawyer is often the only person who could thread the labyrinth.” *Castro-O’Ryan v. Immigration and Naturalization Serv.*, 847 F.2d 1307, 1312 (9th Cir. 1988) (internal quotation and citation omitted); *see also* ECF No. 35-1 at 21-27 (providing evidence that timely and regular in person access to counsel is necessary to navigate the credible fear process, especially given the special vulnerabilities of asylum seekers); *id.* at 27-28 (describing recognition of the right to access to counsel during the credible fear process under Defendants’ own statutes, regulations, and guidance); 8 C.F.R. § 208.30(d)(1), (d)(4) (providing for the right to consult with a person of one’s choosing prior to a credible fear interview, submit evidence, and effectively participate in the interview).

studies, “that sleep deprivation has a significant effect on human functioning,” including cognitive functioning).

As evidence provided by Plaintiffs explains, people subjected to poor conditions in CBP custody have felt these cognitive effects. *See* ECF No. 35-1 at 29-30 (citing, inter alia, ECF No. 35-2, Plfs’ Statement of Undisputed Material Facts ¶ 53); ECF No. 21-1 at 12-15 (citing, inter alia, ECF No. 21-17, Decl. of Aaron Reichlin-Melnick; ECF No. 21-19, Decl. of Clara Long).⁸ That evidence is supported by records submitted in *United States v. Hernandez-Becerra*, No. 18-50403 (9th Cir. argued Dec. 9, 2019).⁹ There, attorneys representing people confined in CBP facilities reported that their clients suffered from “dehydration, sleeplessness, [and] panic,” were so sleep deprived that they could not stay awake during their court proceedings, and were unable to engage with their defense attorneys. Excerpts of Record at 262-63, 268, 284, 337, 340, 372, 376, *United States v. Hernandez-Becerra*, No. 18-50403 (9th Cir. Apr. 10, 2019), ECF No. 7 (hereinafter, *Hernandez-Becerra* Excerpts of Record).¹⁰ Panic, exhaustion, and an inability to

⁸ In particular, there is evidence in this case that “people in CBP custody for more than 24 hours tend to suffer from sleep deprivation, which can interfere with their ability to meaningfully participate in their cases,” while others reported “being so hungry that they couldn’t think.” ECF No. 21-17 ¶¶ 16-17; *see also* ECF No. 21-19 ¶¶ 13, 18 (explaining those in CBP facilities suffer additional “trauma” due to conditions of confinement and are often “exhausted and sleep deprived”).

⁹ The records consist of transcripts of magistrate judge proceedings in Operation Streamline cases in the U.S. District Court for the Southern District of California. Operation Streamline is an initiative favoring the criminal prosecution of migrants for illegal entry under 8 U.S.C. § 1325 and illegal reentry under 8 U.S.C § 1326. *See* Office of Inspector Gen., Dep’t of Homeland Sec., OIG-15-95, Streamline: Measuring Its Effect on Illegal Border Crossing 3 (May 15, 2015), <http://bit.ly/37Jzeno>.

¹⁰ Lawyers reported that their clients had not slept in days. *See Hernandez-Becerra* Excerpts of Record at 162 (“[B]ecause of the nature of the cell and so many people in there, he hasn’t been able to sleep in almost a week.”); *id.* at 261 (“[H]e indicated he hasn’t slept in about a week.”); *id.* at 270 (“He hasn’t slept [for four days]”); *id.* at 371-72 (“[T]his is a man that basically has not slept since June 11. We are now at June 16.”).

engage left these noncitizens ill-equipped to knowingly enter a guilty plea, *see id.* at 372, 376, just as individuals suffering the same poor conditions will struggle to meaningfully participate in the demanding, high-stakes credible fear process.

The inhumane conditions in CBP facilities also have a coercive effect. An asylum seeker may feel compelled to abandon the credible fear process rather than continue to endure abusive conditions, in hopes of finding another way to safety. *See* ECF No. 21-1 at 15 (citing, inter alia, ECF No. 21-9, reporting that clients in PACR and HARP have considered abandoning their asylum claims “to secure quicker release from CBP custody due to their concerns regarding detention conditions for them and their children”). Courts have repeatedly recognized that harsh conditions of confinement, like those in CBP facilities, can overcome the will of a detained person. *See Greenwald v. Wisconsin*, 390 U.S. 519, 521 (1968) (pointing to “the lack of food, sleep, and medication” as a “relevant” factor in an involuntary confession); *Clewis*, 386 U.S. at 712 (relying in part on “inadequate sleep and food” as evidence that a statement was involuntary); *Payne v. Arkansas*, 356 U.S. 560, 567 (1958) (finding a confession was coerced where an individual “was denied food for long periods” and “was held incommunicado for three days, without counsel, advisor or friend,” among other factors); *United States v. Hull*, 441 F.2d 308, 313 (7th Cir. 1971) (“Lack of food, sleep and medication add to the evidence of involuntariness.”); *Wilson v. O'Brien*, 869 F. Supp. 2d 169, 173 (D.D.C. 2012) (explaining that among the factors courts consider when determining whether a statement is voluntary is “deprivation of food or sleep”).

Those in CBP custody prosecuted through Operation Streamline similarly have felt coerced. Attorneys repeatedly expressed concerns to magistrate judges that their clients were not

voluntarily entering guilty pleas, in full or in part because of the coercive nature of the conditions of CBP custody:

- “I know that he’s overwhelmed. He didn’t sleep at all last night. He was in a room—a cell that was completely packed. They were huddled on the floor and all around, and he didn’t sleep at all. And he was told that he was being arrested and wasn’t given any idea how long he was facing. I know he didn’t really understand the proceedings or the charges. . . . I have concerns . . . that he can’t voluntarily and knowingly plead based on these circumstances. It feels inherently coercive, Your Honor.” *Hernandez-Becerra* Excerpts of Record at 211.
- “What makes it even more difficult [to represent clients in CBP custody] is the fact that almost all of these individuals have had little to no sleep. Their ability to understand the complexities of our legal system is really difficult. Most of my clients just keep repeating the question of when do they get to go home.” *Id.* at 267.
- “I know that he’s communicated to me multiple times that he wants to plead guilty and go home as soon as possible. I don’t know if that is because he hasn’t slept for four days, because he’s been treated this way, because he’s tired and exhausted and emotional and just wants to get home, or if that’s because he knows what exactly is going on today.” *Id.* at 373.
- “[The individual] said his last . . . night of actual sleep was [two days earlier] on Tuesday. . . . [H]e stayed at the Border Patrol station in a cell with 20 other people. They had thin mats and what they referred to as paper blankets, were given burritos, cookies, and juice, but he hasn’t had a good night’s rest in several days. However, what he does know is—like most of the individuals, I think, that are appearing before the Court, is

they'll do whatever it is that the Court is asking so that they can go home today[.]” *Id.* at 268-69.

Forcing asylum seekers to navigate the credible fear process while in equally brutal conditions, especially where they lack access to counsel, places them in an untenable position: either continue to suffer deprivations of basic necessities and attempt to pass a CFI despite diminished capacity or abandon the process through which they seek protection altogether. PACR and HARP force individuals like Plaintiffs to make this impossible choice.

III. CONCLUSION

For the foregoing reasons, Amici urge the Court to grant Plaintiffs’ motion for summary judgment.

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Respectfully submitted,

s/ Karolina J. Walters

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