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13 UNITED STATES DISTRICT COURT
14 SOUTHERN DISTRICT OF CALIFORNIA
15

16 JOSE ORLANDO CANCINO
17 CASTELLAR, ANA MARIA
18 HERNANDEZ AGUAS, MICHAEL
GONZALEZ,

19 Plaintiffs-Petitioners,

20 vs.
21

22 KIRSTJEN M. NIELSEN, Secretary of
23 Homeland Security, *et al.*,

24 Defendants-Respondents.
25
26

Case No. 17-cv-00491-BAS-BGS

TIME: TBD

DATE: December 10, 2018

CTRM: 4B (Schwartz)

**NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT**

DEFENDANTS-RESPONDENTS' REPLY
IN SUPPORT OF THEIR MOTION TO
DISMISS COMPLAINT

I. INTRODUCTION

On October 15, 2018, Defendants filed a renewed Motion to Dismiss Plaintiffs’ remaining claims under Federal Rule of Civil Procedure 12(b)(6) (“Rule 12(b)(6)”), ECF No. 60, as well as a memorandum in support of that Motion. ECF No. 60-1. Plaintiffs filed their response in opposition to Defendants’ Motion on November 26, 2018. ECF No. 61. Defendants now set forth the following in reply to Plaintiffs’ Response.

II. ARGUMENT

A. Plaintiffs’ Constitutional Avoidance Arguments

As explained in Defendants’ Motion to Dismiss, Plaintiffs effectively ask this Court to invalidate the statutory scheme governing aliens’ first appearances before immigration judges. See ECF No. 60-1, at 12 (noting that judging the constitutionality of an act is a grave and delicate task, and that deference is owed to congressional judgment). In response, Plaintiffs propose that this Court avoid grappling with the implications of their constitutional arguments by simply construing the Immigration and Nationality Act (“INA”) to contain some implicit and unwritten limitation on the time that an alien may be detained prior to an initial appearance before an immigration judge. In so doing, they advocate for misapplying the “cannon of constitutional avoidance” in precisely the same manner that the Supreme Court rejected earlier this year in *Jennings v. Rodriguez*, 138 S.Ct. 830, 843-48 (2018). Like the plaintiffs in *Jennings*, Plaintiffs here urge the Court to effectively insert new language – an unwritten time limit – into the statutory framework based on what they perceive to be a constitutional problem. But as *Jennings* clarified, “[t]hat is not how the cannon of constitutional avoidance works. Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases.” 138 S.Ct. at 843. Rather, “the canon permits a court to choose between competing *plausible* interpretations of statutory text.” *Id.* (original emphasis) (citation and internal quotation marks omitted).

Notwithstanding the Supreme Court’s clear admonition, Plaintiffs argue that *Jennings* does not foreclose their interpretation of the statutory framework because the Court’s decision there turned on the fact that “the statutory language was *not* silent on the

length of detention and precluded the sixth month limit.” ECF No. 61, at 20 (emphasis added). According to Plaintiffs, because the statutory framework at issue here is silent as to how long an alien may be detained prior to an initial appearance before an immigration judge, this Court is free to fill this “silence” as it pleases, even if doing so effectively rewrites the statutory scheme. Plaintiffs greatly overstate the significance of “statutory silence” in *Jennings*. The majority in *Jennings* only noted the concept of “statutory silence” in response to (and while rejecting) the plaintiffs’ assertion that one particular section at issue – § 1226(c) – was “silent” regarding the length of permissible detention. *Jennings*, 138 S.Ct. at 846 (observing that “§ 1226(c) is *not* ‘silent’ as to the length of detention . . . [and] mandates detention pending a decision on whether the alien is to be removed from the United States.”) (original emphasis). The Court then continued by noting that “[e]ven if courts were permitted to fashion 6-month time limits out of statutory silence, they certainly may not transmute existing statutory language into its polar opposite.” *Id.* Plaintiffs read this portion of *Jennings* to mean that, so long as a statute is silent on a matter, courts remain free to add what they perceive as missing language under the guise of constitutional avoidance. This reading is plainly incorrect, and one need look no further than the Court’s analysis of § 1226(a) to understand why. *Id.* at 836, 847-48. In rejecting the Ninth Circuit’s decision that § 1226(a) must be read to allow for existing procedural protections that go “well beyond the initial bond hearing established by existing regulations,” the majority, joined by Justice Sotomayor (who otherwise dissented), stated that:

Nothing in § 1226(a)’s text – which says only that the Attorney General ‘may release’ the alien ‘on . . . bond’ – even remotely supports the imposition of either of those [additional] requirements. Nor does § 1226(a)’s text even hint that the length of detention prior to a bond hearing must specifically be considered in determining whether the alien should be released.

Id. at 847-48. In other words, the Court rejected the notion that § 1226(a) could be read to require additional procedural protections for the simple reason that those protections had

1 no foundation whatsoever in the statutory text. The holding in *Jennings* with respect to
 2 § 1226(a) thus directly forecloses Plaintiffs’ suggestion that the Court may rule in their
 3 favor based on the cannon of constitutional avoidance simply because the statutory
 4 framework is “silent” on the matter.

5 The fact that the statutory framework contains no explicit time limit in the manner
 6 Plaintiffs propose means the statute should be read to contain no such limit, not that the
 7 Court is free to graft whatever limit it deems appropriate. Moreover, as this Court has
 8 already observed, “[a]t each point, applicable statutory and regulatory provisions define
 9 the existence of the initial removal hearing, its timing and the provision of notice
 10 regarding its timing by particular Defendants.” ECF No. 49, at 25. There is thus no merit
 11 to Plaintiffs’ argument that the Court may employ the cannon of constitutional avoidance
 12 in the manner they propose.

13 **B. Procedural Due Process**

14 Like the Supreme Court in *Reno v. Flores*, 507 U.S. 292, 306 (1993), and more
 15 recently, the district court in *Aguilar v. U.S. Immigration and Customs Enforcement*
 16 *Chicago Field Office*, --- F. Supp. ----, 2018 WL 4679569 (N.D. Ill. Sept. 28, 2018), this
 17 Court should find that Plaintiffs have failed to state a claim with respect to the procedures
 18 they challenge. Plaintiffs’ invocation of the principle that “the state may not incarcerate
 19 any individual randomly and without specific protective procedures,” *see* ECF No. 61, at
 20 10, does nothing to advance their specific case. As this Court and Plaintiffs are well
 21 aware, Defendants do not incarcerate people randomly or without specific procedures.
 22 Rather, as explained in Defendants’ motion to dismiss, the regulations *do* provide a
 23 framework for ensuring that the rights of aliens who are detained for civil immigration
 24 purposes remain protected. *See* ECF No. 60-1, at 14. It was precisely this same set of
 25 procedures that the district court examined in *Aguilar* when ruling against plaintiffs on the
 26 issue of procedural due process. *Aguilar*, 2018 WL 4679569, at *13-14.

1 Plaintiffs' response also relies on a series of criminal and non-immigration civil
2 cases, which emphasize the role of "promptness" in assessing whether various
3 post-detention processes satisfy due process. See ECF No. 61, at 10-12. But the
4 requirement of due process "is flexible and calls for such procedural protections as the
5 particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Thus,
6 while it is certainly true as a general matter that "[f]reedom from bodily restraint has
7 always been at the core of the liberty protected by the Due Process Clause," see ECF No.
8 61, at 10 (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)), it does not necessarily
9 follow that this liberty interest must be protected in the same manner in all contexts. In
10 this case, the members of the proposed class are individuals who have been detained for
11 removal proceedings. And as the Supreme Court has explicitly held, "[d]etention during
12 removal proceedings is a constitutionally permissible part of that process." *Demore v.*
13 *Kim*, 538 U.S. 510, 531 (2003). Accordingly, any assessment of the "nature of the private
14 interest that will be affected," see ECF No. 60-1 (citing *Mathews v. Eldridge*, 424 U.S.
15 319, 335 (1976)), must begin with an acknowledgement that aliens charged with being
16 removable or inadmissible have no fundamental right to be released during removal
17 proceedings. *Jennings*, 138 S.Ct. at 838 (recognizing that the INA authorizes the detention
18 of both aliens seeking admission to the country, as well as those already in the country
19 pending the outcome of removal proceedings); see also *Flores*, 507 U.S. at 306 ("in
20 enacting the precursor to 8 U.S.C. § 1252(a), Congress eliminated the presumption of
21 release pending deportation, committing that determination to the discretion of the
22 Attorney General").

23 Plaintiffs' procedural due process claim also fails because neither their complaint
24 nor their response adequately explains how imposing earlier first appearances would
25 reduce the risk of *erroneous* deprivation of their liberty. See ECF No. 61, at 12-16.
26 Plaintiffs casually assert that it is "beside the point whether any named plaintiffs was in
27 fact 'erroneously detained.'" *Id.* at 14. But absent even an *allegation* that the current
28 procedures fail with some degree of frequency, it is impossible for this Court to assess

1 “the comparative risk of erroneous deprivation . . . with and without additional or
 2 substitute procedural safeguards.”¹ *Mathews v. Eldridge*, 424 U.S. at 335. Rather than
 3 identifying anyone in the Southern District of California who has in fact been
 4 “erroneously detained,” Plaintiffs instead rely on the vague claim that some form of “first
 5 appearance,” which “need not mirror the [master calendar hearing],” is a constitutional
 6 imperative. See ECF No. 61, at 13, 17. According to Plaintiffs, this is necessary because
 7 an immigration judge can “review the NTA, notify detainees of their rights, provide an
 8 opportunity to challenge detention or seek release, and observe detainees’ mental health
 9 and capacity to represent themselves.” ECF No. 61, at 13. But as explained in Defendants’
 10 motion to dismiss, the current procedures already require that an examining immigration
 11 officer ensure many of these same protections *before* the first appearance. ECF No. 60-1,
 12 at 14. Although Plaintiffs’ allege these existing procedures “are insufficient because they
 13 do not involve a neutral adjudicator,” *id.* at 15, immigration officials are entitled to a
 14 presumption of regularity. *Hernandez v. Gonzales*, 221 F. App’x 588, 590 (9th Cir. 2007)
 15 (“Absent evidence to the contrary, we presume that the immigration officers properly
 16 discharged their duties when issuing [petitioner’s Notice to Appear].”). Perhaps more
 17 significantly though, it is entirely unclear what an immigration judge might accomplish if,
 18 as Plaintiffs propose, the initial hearing “need not involve entry of a plea, narrowing of the
 19 issues for merits hearing, evidentiary stipulations, or other matters typically discussed in a
 20 master calendar hearing.”² ECF No. 61, at 14.

21 To the extent Plaintiffs assert that delays in initial appearances undermine their
 22 ability to seek custody redeterminations, this claim also falls short of properly alleging a

23
 24 ¹ Plaintiffs’ claim that they are entitled to a “reasonable inference that there are
 25 numerous ways in which prompt presentment would ‘meaningfully reduce the risk of
 26 erroneous detention,’” see ECF No. 61, at 13, is simply incorrect. Although for purposes
 of a motion to dismiss the court must take all of the factual allegations in the complaint as
 true, it is “not bound to accept as true a legal conclusions couched as a factual
 allegations.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (citation omitted).

27 ² Plaintiffs’ suggestion in a footnote that an immigration judge might offer *legal*
 28 *advice* to an individual who is detained separately from family members, or propose
 options for litigation in federal court, does not accurately reflect the role of an
 immigration judge. See ECF No. 61, at 13, n.4.

1 risk of “erroneous deprivation of liberty.” The fact that certain aliens who are properly
 2 subject to removal proceedings – *and who thus may be lawfully detained under the INA* –
 3 must wait several weeks before appearing at a custody redetermination hearings does not
 4 in any sense render their detention “erroneous.”³ Plaintiffs further claim that, “[a]lthough
 5 detainees can in theory request a custody hearing before initial presentment, they often
 6 lack knowledge of that right.”⁴ See ECF No. 61, at 15. But if this is their primary concern,
 7 it is unclear why requiring immigration courts to reorganize themselves around
 8 accelerated, but limited scope, initial appearances is the only constitutionally adequate
 9 remedy. In sum, Plaintiffs have not properly alleged that the current procedures result in a
 10 significant risk of “erroneous deprivation” of liberty, or that the additional procedures they
 11 propose would meaningfully reduce this alleged risk.

12 **C. Arriving Aliens**

13 In arguing that the “‘entry fiction’ does not preclude a substantive or procedural due
 14 process claim” for arriving aliens, Plaintiffs rely primarily on *Kwai Fun Wong v. United*
 15 *States*, 373 F.3d 952 (9th Cir. 2004). See ECF No. 61, at 22-23. *Kwai Fun Wong* held that,
 16 even if aliens “on the threshold of initial entry” are entitled to fewer constitutional
 17 protections than those who have been admitted, “the entry fiction does not preclude
 18 non-admitted aliens . . . from coming within the ambit of the equal protection component
 19 of the Due Process Clause.” 373 F.3d at 974. In reaching this decision, the court described
 20 the “entry fiction” as a doctrine that “primarily determines the *procedures* that the
 21

22 ³ While it is conceivable that an individual immigration detainee may bring a
 23 procedural due process claim based on lack of prompt presentment *based on the facts of*
 24 *his or her particular case*, this theoretical possibility does not support Plaintiffs’ request
 25 for class-wide relief based on “common questions of law or fact.” ECF No. 1, at ¶ 71.

26 ⁴ Plaintiffs attempt to distinguish *Flores* on the basis that they “do not seek
 27 automatic custody hearings,” but rather “allege that presentment delays undermine their
 28 ability to request them.” ECF No. 61, at 12. But *Flores* did not simply reject the notion
 that plaintiffs were entitled to automatic custody hearings. 507 U.S. at 307-09. Rather, it
 considered the entire regulatory framework and held that “due process is satisfied by
 giving detained alien juveniles the *right* to a hearing before an immigration judge.” *Id.* at
 309 (original emphasis). Insofar as it is undisputed that Plaintiffs also have “a right to a
 hearing before an immigration judge,” Plaintiffs’ procedural due process claim necessarily
 fails under *Flores*.

1 executive branch must follow before turning an immigrant away.” *Id.* at 973 (original
 2 emphasis); *see also id.* (“The entry fiction thus appears determinative of the procedural
 3 rights of aliens with respect to their applications for admission. The entry doctrine has not,
 4 however, been applied . . . to deny all constitutional rights to non-admitted aliens.”).

5 The fact that *Kwai Fun Wong* left open the possibility that aliens seeking admission
 6 may assert certain substantive due process rights, however, is of no aid to Plaintiffs here.
 7 Indeed, to the extent the proposed class includes arriving aliens, their claim *does* challenge
 8 the procedures associated with admission; i.e., according to Plaintiffs, the *procedures* in
 9 place for aliens seeking admission are inadequate because they fail to ensure a “prompt”
 10 first appearance before an immigration judge. Plaintiffs’ argument that the entry fiction
 11 only limits the specific procedures associated with the *determination* of whether an alien
 12 is admissible is directly at odds with *Shaughnessy v. United States ex rel Mezei*, 345 U.S.
 13 206, 215-16 (1953), the very case in which the Supreme Court first explained the “entry
 14 fiction.” Indeed, in *Mezei* the Court ruled that the alien’s “continued exclusion” *and*
 15 *temporary detention* on Ellis Island “did not affect[] [the] alien’s status; he is treated as if
 16 stopped at the border.” *Id.* at 215. On that basis, the Court rejected the notion that the
 17 respondent, who sought a writ of habeas corpus, was deprived of any statutory or
 18 constitutional right. *Id.* at 215-16 (“the respondent’s right to enter the United States
 19 depends on the congressional will, and courts cannot substitute their judgment for the
 20 legislative mandate.”); *see Rodriguez v. Robbins*, 715 F.3d 1127, 1140-41 (9th Cir. 2013)
 21 (acknowledging that the § 1226(b) subclass “would fall into the category of aliens
 22 described in *Mezei* and *Barrera-Echavarria* [*v. Rison*, 44 F.3d 1441 (9th Cir. 1995)],” but
 23 nevertheless interpreting the statute “through the prism of constitutional avoidance”),
 24 overruled by *Jennings*, 138 S. Ct. at 830. For the same reasons, Plaintiffs’ procedural due
 25 process arguments, even if sufficient to state a claim, do not apply in the case of aliens
 26 seeking admission.⁵

27
 28 ⁵ Even assuming the Court disagrees with Defendants’ arguments regarding aliens
 seeking admission, the Court should still dismiss the complaint because Plaintiffs’
 procedural and substantive due process arguments both fail to state a claim upon which

D. Substantive Due Process

The Court should reject Plaintiffs' attempt to re-characterize what is plainly a challenge to the *procedural* protections available to immigration detainees as a substantive due process case. Indeed, by asking this Court to recognize a substantive due process right of immigration detainees to presentment before an immigration judge within a particular time frame, Plaintiffs propose that the Court reach a holding no federal court has reached before. While "the Supreme Court has a long history of recognizing unenumerated fundamental rights as protected by substantive due process the Court has cautioned against the doctrine's expansion" because "guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended and because judicial extension of constitutional protection for asserted substantive due process rights places the matter outside the arena of public debate and legislative action." *Raich v. Gonzales*, 500 F.3d 850, 863 (9th Cir. 2007) (citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

The reason Plaintiffs are unable to cite successful prompt presentment claims in the immigration detention context is because the Supreme Court has repeatedly held that "Congress has the authority to detain aliens suspected of entering the country illegally pending their deportation hearings." *See Flores*, 507 U.S. at 306 (citing *Carlson v. Landon*, 342 U.S. 524, 538 (1952)). While Plaintiffs charge Defendants with "collaps[ing] removal into detention," *see* ECF No. 61, at 8, again, the Supreme Court has plainly stated that "[d]etention during removal proceedings is a constitutionally permissible part of that process." *Demore*, 538 U.S. at 531 (emphasis added). Moreover, "in the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens." *Id.* (citing *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)); *see also Matthews v. Diaz*, 426 U.S. 67, 79-80 (1976)).

Plaintiffs' contention that the Due Process Clause contains a heretofore-unrecognized right of immigration detainees to appear before an immigration

the Court can grant relief, regardless of the status of the individual at issue.

1 judge within a particular timeframe runs squarely up against this backdrop of Supreme
 2 Court case law. In order to make out a successful substantive due process claim, Plaintiffs
 3 must show that the liberty interest they assert is “deeply rooted in the Nation’s history and
 4 tradition.” *Raich*, 500 F.3d 862-63 (citation omitted); *see also County of Sacramento v.*
 5 *Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring) (while history and tradition are
 6 the starting point for a substantive due process inquiry, “there is room as well for an
 7 objective assessment of the necessities of law enforcement”). Plaintiffs here can make no
 8 such showing when the Supreme Court has, in its own words, “*firmly and repeatedly*
 9 endorsed the proposition that Congress may make rules as to aliens that would be
 10 unacceptable if applied to citizens.” *Demore*, 538 U.S. at 522 (original emphasis).

11 To the extent that Plaintiffs attempt to liken immigration detention to other forms of
 12 civil confinement, the majority in *Demore* rejected this analogy. Indeed, the dissent in
 13 *Demore* took the view that “the only reasonable starting point [for analyzing detention
 14 under section 1226] is the traditional doctrine concerning the Government’s physical
 15 confinement of individuals,” and accordingly, relied on several civil confinement cases.
 16 538 U.S. at 547, 550 (J. Souter, dissenting). But the majority in *Demore* explicitly
 17 disagreed with this approach because “any policy toward aliens is vitally and intricately
 18 interwoven with contemporaneous policies in regard to the conduct of foreign nations, the
 19 war power, and the maintenance of a republican form of government.” *Id.* at 522.
 20 Plaintiffs’ reliance on the Seventh Circuit’s decision in *Armstrong v. Squardrito*, 152 F.3d
 21 564 (7th Cir. 1998), a case not involving an immigration detainee, is thus inapposite.⁶ *See*
 22 ECF No. 61, at 5. *Armstrong* is also easily distinguishable in that it involved a clear
 23 mistake by the sheriff’s department that arrested the plaintiff. *Armstrong*, 152 F. 3d at 57
 24 (“the sheriff’s office misfiled his records and held him for 57 days despite his repeated
 25 inquiries.”). Unlike here, the case did not involve a challenge to an entire statutory scheme
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27
 28 ⁶ The *Armstrong* decision also relied heavily on another Seventh Circuit case,
Coleman v. Frantz, 754 F.2d 719 (7th Cir. 1985), which as noted in Defendants’ Motion,
 is inapplicable here because it arose in the criminal context. *See* ECF No. 61-1, at 20.

1 in an area where courts have traditionally recognized great deference to Congress. *Fiallo*,
 2 430 U.S. at 792.

3 Accordingly, the fact that courts have occasionally borrowed criminal law
 4 substantive due process principles in certain specific cases involving civil confinement
 5 does not mean that it is appropriate to do so in every instance. Indeed, the court in
 6 *Armstrong* recognized as much when it stated that “substantive due process involves an
 7 appraisal of the totality of the circumstances rather than a formalistic expression of fixed
 8 elements.” 152 F.3d at 570. “That which may, in one setting, constitute a denial of
 9 fundamental fairness, shocking to the universal sense of justice, may, in other
 10 circumstances, and in light of other considerations, fall short of such denial.” *Id.* (quoting
 11 *County of Sacramento*, 118 S.Ct. at 1719).

12 **E. Plaintiffs’ claims under the Administrative Procedure Act**

13 Plaintiffs’ APA claims fail because, as discussed above, the practices they
 14 challenge do not violate the Constitution or any statute. Moreover, Plaintiffs’ argument
 15 that this case involves a “final agency action” because “Defendants *decided* to arrest and
 16 detain individuals without providing a prompt hearing,” *see* ECF No. 61, at 25 (emphasis
 17 added), is plainly meritless. Even assuming, without conceding, that immigration
 18 detention can constitute a “sanction” for APA purposes, *id.* at 25, Plaintiffs completely
 19 fail to identify any specific agency *decision* or *action* that led to the circumstances they
 20 challenge. Rather, to the extent delays in first appearances exist at all, and are attributable
 21 to Defendants, they exist because of a multitude of factors and not because of a single
 22 agency “decision” or “action.”

23 **III. CONCLUSION**

24 For the reasons explained above, as well as those set forth in Defendants’ renewed
 25 motion to dismiss, the Court should dismiss Plaintiffs’ remaining claims under Federal
 26 Rule of Civil Procedure 12(b)(6).

27 DATED: December 3, 2018

Respectfully Submitted,

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