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13 UNITED STATES DISTRICT COURT
14 SOUTHERN DISTRICT OF CALIFORNIA
15

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

19 Plaintiffs-Petitioners,
20

21 vs.

22 KEVIN McALEENAN, Acting
23 Secretary of Homeland Security, *et al.*,

24 Defendants-Respondents.
25
26

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

DEFENDANTS-RESPONDENTS'
ANSWER TO REMAINING CLAIMS IN
THE COMPLAINT

Defendants-Respondents (“Defendants”), by and through undersigned counsel, hereby answer the Complaint of Plaintiffs-Petitioners (“Plaintiffs”) as follows:

INTRODUCTION

1. This paragraph contains Plaintiffs’ characterization of the lawsuit and legal conclusions to which no response is required. To the extent the Court requires a response, Defendants deny that there is a “policy and practice” of detaining individuals for extended periods without promptly presenting them for an initial hearing before an immigration judge. Defendants also deny that “many individuals” “routinely languish in detention for two months or longer before they see a judge, in violation of the Constitution and applicable law.” Defendant Executive Office for Immigration Review (“EOIR”) further avers that the Otay Mesa and the Imperial Immigration Courts are currently holding initial master calendar hearings for detained individuals on average within two weeks of receiving the Notice to Appear or other charging document that commences immigration court proceedings. To the extent Plaintiffs allege that individuals are precluded from “promptly seeking judicial review of probable cause for detention,” no response to this allegation is necessary because it pertains to Plaintiffs’ Fourth Amendment Claim, which this Court previously dismissed for lack of jurisdiction, and did not reinstate. *See* ECF No. 56, at 11-13, 15; *see also Cancino Castellar v. Nielsen*, 338 F. Supp. 3d 1107 (S.D. Cal. 2018).

2. This paragraph contains legal conclusions to which no response is required. To the extent the Court requires a response, Defendants deny.

3. This paragraph contains legal conclusions to which no response is required. To the extent the Court requires a response, Defendant EOIR avers that the first hearing in removal proceedings in immigration court is known as an “initial master calendar hearing.” To the extent Plaintiffs cite materials describing what typically occurs at an initial master calendar hearing, these materials speak for themselves. Defendant EOIR further avers that the advisals and other requirements that attach for an initial master calendar hearing are set forth in 8 C.F.R. § 1240.10(a). Defendants further deny the allegation that current delays in providing an initial master calendar hearing prevent detainees from receiving the requisite

1 protections and advisals in a timely manner.

2 4. This paragraph contains legal conclusions to which no response is required.
3 Moreover, the legal assertions in this paragraph pertain to Plaintiffs' Fourth Amendment
4 Claim, which this Court previously dismissed for lack of jurisdiction, and did not reinstate.
5 *See* ECF No. 56, at 11-13, 15. Accordingly, no response is required for that reason as well.
6 To the extent the Court requires a response, Defendants deny.

7 5. Defendant Department of Homeland Security ("DHS") admits the first sentence of
8 paragraph 5. Defendant DHS denies the second sentence of paragraph 5 to the extent that
9 Plaintiffs allege that Customs and Border Protection ("CBP") "detains" individuals, and
10 avers that CBP apprehends and encounters individuals who enter without inspection or
11 parole and/or are deemed inadmissible to the United States. Defendant DHS admits that
12 some individuals who are apprehended by CBP remain in CBP custody for more than 48
13 hours, but lack sufficient information to form a belief as to the extent to which those
14 individuals in particular are "placed in removal proceedings in various facilities throughout
15 the Southern District of California." Defendant DHS likewise lacks sufficient information
16 to admit or deny Plaintiffs' allegation regarding the number of individuals detained by DHS
17 in the Southern District of California "on a given day." Defendant EOIR denies the
18 allegations in the last sentence of this paragraph and avers that the Otay Mesa and the
19 Imperial Immigration Courts currently hold initial master calendar hearings for detained
20 individuals on average within two weeks of receiving a Notice to Appear. Defendant EOIR
21 lacks sufficient information to admit or deny the allegation that "most" detainees at the Otay
22 and Imperial Regional Detention Facilities are "indigent and unrepresented by counsel."

23 6. To the extent Plaintiffs allege that they are subject to "lengthy detention without
24 judicial appearance," Defendants deny that allegation. To the extent Plaintiffs allege that
25 they are subject to detention without a determination of probable cause, that allegation
26 pertains to Plaintiffs' Fourth Amendment Claim, which this Court previously dismissed for
27 lack of jurisdiction, and did not reinstate. *See* ECF No. 56, at 11-13, 15. Defendant DHS
28 admits that the decision to detain an alien who is not lawfully in the United States is not

based on the immigration court's capacity to process cases, and that it relies on the immigration court system to set an initial hearing date in detained cases, but denies that the absence of this consideration leads to "lengthy detention without judicial appearance." Defendants also deny the allegation that individuals are detained without an "automatic custody review hearing before an immigration judge."¹ Defendant EOIR avers that when DHS issues an arrest warrant and decides to detain an alien pending removal proceedings pursuant to 8 U.S.C. § 1226(a), it provides the alien with the Form 1-286, which includes a check-box for the alien to request a bond hearing before an immigration judge. The Otay Mesa and Imperial Immigration Courts automatically schedule a bond hearing for any eligible alien who has checked the box on the Form 1-286 requesting such a hearing.

7. This paragraph contains a legal conclusion to which no response is required. To the extent the Court requires a response, Defendants deny.

8. This paragraph contains a legal conclusion to which no response is required. To the extent the Court requires a response, Defendants admit that Plaintiffs seek declaratory, injunctive, and habeas corpus relief, but deny that Plaintiffs are entitled to such relief.

PARTIES

9. Defendants deny that Jose Orlando Cancino Castellar ("Cancino Castellar") is presently detained at the Otay Detention Facility, and aver that he was released on bond on March 28, 2017. Defendants admit that DHS alleges Castellar is a native and citizen of Mexico. Defendants further aver that, at a hearing held on March 30, 2017, an immigration judge determined that Plaintiff Cancino Castellar is a native and citizen of Mexico who entered the United States without being admitted or paroled and found him subject to removal.

10. Defendants deny that Ana Maria Hernandez Aguas ("Hernandez Aguas") is presently detained at the Otay Detention Facility, and aver that she was released on bond on March

¹ To the extent paragraph 6 references the lack of judicial finding of probable cause, this allegation pertains to Plaintiffs' Fourth Amendment Claim, which the Court dismissed and did not reinstate. ECF No. 56, at 11-13, 15

1 14, 2017. Defendants admit that DHS alleges Hernandez Aguas is a native and citizen of
2 Mexico. Defendant EOIR further avers that an immigration judge administratively closed
3 Plaintiff Hernandez Aguas's immigration court case on October 8, 2017, and that her case
4 remains closed.

5 11. Defendants admit that Michael Gonzalez ("Gonzalez") is presently detained at the
6 Otay Detention Facility. Defendants admit that DHS alleges Gonzalez is a native and citizen
7 of Mexico and is subject to removal from the United States. Defendant EOIR further states
8 that an immigration judge determined that Gonzalez is a native and citizen of Mexico, is
9 not a citizen or national of the United States, and is subject to removal for failing to present
10 a valid immigrant visa or other valid entry document at the time of his application for
11 admission to the United States. Defendant EOIR states that the Board of Immigration
12 Appeals ("BIA") affirmed the immigration judge's determination of removal in a decision
13 issued April 25, 2019.

14 12. Defendants deny that John F. Kelly is presently Secretary of Homeland Security, and
15 aver that Kevin K. McAleenan is the current Acting Secretary of Homeland Security.
16 Defendants admit that DHS is an agency with several components responsible for enforcing
17 the immigration laws of the United States. Defendants further admit that Kevin K.
18 McAleenan is sued in his official capacity. Defendants deny that Kevin K. McAleenan is a
19 legal custodian of Plaintiffs and other members of the proposed class.

20 13. Defendants deny that Thomas Homan is presently the Acting Director of Immigration
21 and Customs Enforcement, and aver that Matthew T. Albence is the current Acting Director
22 of Immigration and Customs Enforcement ("ICE"). Defendants further admit that Matthew
23 T. Albence is sued in his official capacity. Defendants deny that Matthew T. Albence is a
24 legal custodian of Plaintiffs and other members of the proposed class. Defendants also deny
25 that ICE is responsible for "seizure" of alleged noncitizens, but admit that ICE is responsible
26 for detention of noncitizens, and for prosecuting removal proceedings.

27 14. Defendants deny that Kevin K. McAleenan is presently the Acting Commissioner of
28 U.S. Customs and Border Protection, and aver that Mark A. Morgan is the current Acting

Commissioner of U.S. Customs and Border Protection. Defendants further admit that Mark A. Morgan is sued in his official capacity. Defendants deny that Mark A. Morgan is a legal custodian of Plaintiffs and other members of the proposed class. Defendants also deny that CBP is responsible for “seizure and detention” of alleged noncitizens, but admits that CBP operates at ports of entry, where it is responsible for, among other efforts, the inspection, processing, and admission of persons who seek to enter or depart the United States.

15. Defendants admit that Gregory Archambeault is the Field Office Director for the San Diego Field Office of ICE, a component of DHS, and that he is sued in his official capacity. Defendants admit that Gregory Archambeault is the legal custodian of Plaintiff Gonazalez, and others who are detained at the Otay Detention Facility and the Imperial Detention Facility, but deny this allegation to the extent it presumes the existence of Plaintiffs’ proposed class.

16. Defendants deny that Jefferson B. Sessions III is presently the Attorney General of the United States and aver that, since the filing of the Complaint, William P. Barr was sworn in as Attorney General of the United States. See ECF 60 at n. 1. Defendants admit that William P. Barr is sued in his official capacity. Defendants admit that the Attorney General is the head of the U.S. Department of Justice (“DOJ”) and has the authority to interpret the immigration laws and adjudicate removal cases. Defendants admit that the Attorney General has delegated this responsibility to EOIR, which administers the immigration courts and the BIA.

17. Defendants deny that Juan P. Osuna is the Director of EOIR, and aver that the current Director of EOIR is James McHenry. Defendants admit that EOIR is the agency within DOJ responsible for the immigration courts that administer removal proceedings, including the scheduling of all hearings in such proceedings. Defendants further admit that James McHenry is sued in his official capacity.

JURISDICTION AND VENUE

18. This paragraph contains conclusions of law to which no response is required. To the extent the Court requires a response, Defendants acknowledge this Court’s September 5,

2018 Order finding that it retained subject-matter jurisdiction over Plaintiffs' Fifth Amendment and Administrative Procedure Act ("APA") claims, see ECF No. 56, and reserve the right to appeal from that decision.

19. This paragraph contains conclusions of law to which no response is required. To the extent the Court requires a response, Defendants deny that this Court may grant the relief proposed by Plaintiffs on a class-wide basis.

20. Defendants admit that venue is proper in the Southern District of California.

LEGAL AND PROCEDURAL BACKGROUND

I. Detention Pending Removal Proceedings

A. Initial Apprehension and Referral to Immigration Court

21. This paragraph contains a description of the legal framework for removal proceedings to which no response is required. Further, the statutes and regulations cited in this paragraph speak for themselves. To the extent that the Court requires a response, Defendants admit the allegations in the first sentence but note that the governing statute is the Immigration and *Nationality* (rather than "Naturalization") Act ("INA"). To the extent that a response is required, Defendants admit the allegations in the second and third sentences.

22. This paragraph contains a description of the legal framework governing DHS's authority to take an alien into custody to which no response is required. Further, the statutes and regulations cited in this paragraph speak for themselves. To the extent that the Court requires a response, Defendants aver that 8 C.F.R. § 287.3(d) contains an exception to the requirement that DHS must determine whether to hold the individual in custody and whether to issue a Notice to Appear ("NTA") within 48 hours where there is an "emergency or other extraordinary circumstances." Under such circumstances, the determination of whether to hold the alien in custody and whether to issue an NTA must be made within an "additional reasonable period of time." 8 C.F.R. § 287.3(d). The remainder of the allegations in this paragraph regarding DHS's authority to arrest pursuant to an administrative warrant pertain to Plaintiffs' Fourth Amendment claim, which this Court previously dismissed for lack of jurisdiction, and did not reinstate. See ECF No. 56, at

1 11-13, 15.

2 23. This paragraph consists of Plaintiffs' characterization of the law governing expedited
 3 removal and credible fear determinations, rather than specific alleged facts. Accordingly,
 4 no response is necessary as the statutes and regulations cited in this paragraph speak for
 5 themselves. Moreover, to the extent that Plaintiffs allege that ICE "generally" processes
 6 certain aliens for expedited removal, the allegation lacks specificity such that Defendants
 7 therefor lack sufficient information to admit or deny. In the event the Court requires a
 8 response, DHS admits that some individuals arriving at the port of entry and seeking asylum
 9 are processed for expedited removal while others are placed directly into removal
 10 proceedings. Further, Defendant EOIR admits that if an asylum officer determines that an
 11 individual subject to the expedited removal process has a credible fear, then the case is
 12 referred to the immigration court through the issuance and filing of an NTA and the case
 13 proceeds for a removal proceeding under section 240 of the INA, 8 U.S.C. § 1229a.

14 **B. Initial Master Calendar Hearing**

15 24. This paragraph consists of Plaintiffs' characterization of the law and removal
 16 proceedings generally, rather than specific alleged facts. Accordingly, no response is
 17 required. Defendants further aver that the legal authority cited by Plaintiffs speaks for itself.
 18 To the extent that the Court requires a response, Defendants admit that all individuals
 19 detained for removal proceedings commenced under section 240 of the INA, 8 U.S.C.
 20 § 1229a, are entitled to the rights and procedures specified in that statute and its
 21 implementing regulations. Defendants deny to the extent that Plaintiffs allege that the INA
 22 affords the same rights and procedures to all aliens who are detained for removal
 23 proceedings.

24 25. This paragraph consists of Plaintiffs' characterization of the law. The authorities cited
 25 by Plaintiffs speak for themselves, and accordingly, no response is required. To the extent
 26 that a response is required, Defendants admit the allegations in this paragraph.

27 26. This paragraph consists of Plaintiffs' characterization of the law and removal
 28 proceedings generally, rather than specific alleged facts. Accordingly, no response is

1 required. Defendants further aver that the authorities cited by Plaintiffs speak for
2 themselves. To the extent that a response is required, Defendant EOIR admits the
3 allegations in the first sentence. Defendant EOIR denies Plaintiffs' allegation in the second
4 sentence and avers that the cited authorities do not require EOIR to expedite detained cases
5 or create any legally enforceable rights. Defendants admit that EOIR has a policy of
6 prioritizing cases involving detained aliens.

7 27. This paragraph consists of Plaintiffs' characterization of immigration court
8 procedures and the authorities cited by Plaintiffs speak for themselves. To the extent that a
9 response is require, EOIR admits the allegations in this paragraph.

10 28. Defendant EOIR admits that it is made aware when an NTA is filed in either a
11 detained or non-detained case. Defendant EOIR denies the allegations in the second
12 sentence, and avers that in some circumstances immigration court staff use EOIR's
13 electronic scheduling system to schedule initial hearings, while in other circumstances,
14 DHS provides the alien with an initial hearing date using EOIR's Interactive Scheduling
15 System. Defendant EOIR admits that in the case of a detained individual, EOIR puts the
16 case on a detained docket which is more expedited than its non-detained docket. Defendant
17 EOIR denies the allegations in the fourth and fifth sentences, and avers that the Otay Mesa
18 and Imperial Immigration Courts maintain separate slots for docketing initial master
19 calendar hearings for detainees as opposed to subsequent master calendar hearings for
20 detainees. Defendant EOIR avers that the Otay Mesa and Imperial Immigration Courts
21 currently hold initial master calendar hearings for detained individuals on average within
22 two weeks after receiving the Notice to Appear or other charging document that commences
23 immigration court proceedings.

24 29. This paragraph consists of Plaintiffs' characterization of immigration court
25 procedures, rather than specific alleged facts. Accordingly, no response is required.
26 Defendants further aver that the authorities cited by Plaintiffs speak for themselves. To the
27 extent that a response is required, Defendant EOIR admits that generally the purpose of the
28 initial master calendar hearing is for the immigration judge to provide advisals to an alien

1 –including explaining the alien’s rights in removal proceedings, the contents of the Notice
 2 to Appear “in nontechnical language,” the right to representation at his or her own expense,
 3 the availability of pro bono legal services, and the right to present evidence and examine
 4 DHS’s evidence—unless such advisals are waived by the alien’s counsel. Defendant EOIR
 5 admits that the immigration court will provide an interpreter at all immigration court
 6 hearings, including the initial master calendar hearing, if necessary. Defendant EOIR admits
 7 that the Notice to Appear is in English but lacks sufficient information to admit or deny
 8 Plaintiffs’ allegation that the Notice to Appear is “not understandable to someone who is
 9 not versed in immigration law or does not read English.”

10 30. This paragraph consists of Plaintiffs’ characterization of the initial master calendar
 11 hearing, rather than specific alleged facts. Accordingly, no response is required. To the
 12 extent that a response is required, Defendant EOIR admits the allegations in this paragraph.

13 31. This paragraph consists of Plaintiffs’ characterization of the initial master calendar
 14 hearing and the capabilities of pro se detainees generally, rather than specifically alleged
 15 facts. Accordingly, no response is required. Defendants further aver that the authorities cited
 16 by Plaintiffs speak for themselves. To the extent that a response is required, Defendant
 17 EOIR denies Plaintiffs’ allegation that “unrepresented detainees who do not speak or write
 18 English may, for the first time, request a bond hearing with the aid of an interpreter in their
 19 native language.” Defendant EOIR avers that certain aliens detained by DHS may seek
 20 custody redetermination hearings before an immigration judge at any time before the entry
 21 of an administratively final order of removal, including *before* an alien’s initial master
 22 calendar hearing. 8 C.F.R. § 1236.1(d)(1); *Matter of Sanchez*, 20 I. & N. Dec. 223 (BIA
 23 1990). Defendant EOIR admits that after receiving a request for a bond hearing, the
 24 immigration court generally schedules the hearing for the earliest possible date. Defendant
 25 EOIR admits that a detainee who is ineligible for a bond hearing because DHS alleges that
 26 they are detained under 8 U.S.C. § 1226(c) may request a hearing to challenge the
 27 application of that statute to them, *see Matter of Joseph*, 22 I. & N. Dec. 799, 800 (BIA
 28 1999), however, EOIR denies that the “initial master calendar hearing provides the first

1 meaningful opportunity for an alien to contest his or her detention under 8 U.S.C. § 1226(c).
 2 Defendant EOIR avers that an alien detained by DHS under 8 U.S.C. § 1226(c) may seek a
 3 so-called *Matter of Joseph* hearing at any time, including before the alien's initial master
 4 calendar hearing.

5 32. This paragraph consists of Plaintiffs' characterization of the initial master calendar
 6 hearing generally as well as the capabilities of pro se detainees, rather than specifically
 7 alleged facts. Accordingly, no response is required. To the extent that a response is required,
 8 Defendant EOIR admits that an immigration judge may identify forms of relief for which
 9 the detainee may be available at the initial master calendar hearing, but deny that a detainee
 10 is precluded from beginning to work on his or her case prior to that hearing. Defendants
 11 further aver that the cited legal authorities in the remaining sentences speak for themselves.

12 33. Defendant EOIR denies the allegations in this paragraph.

13 34. This paragraph consists of Plaintiffs' characterization of the importance of the initial
 14 master calendar hearing, rather than specifically alleged facts. Accordingly, no response is
 15 required. Defendant EOIR further avers that the cited legal authority—*i.e. Franco-Gonzalez*
 16 *v. Holder*, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013)—speaks for itself. To the extent
 17 that the Court requires a response, Defendant EOIR denies the allegation in the first
 18 sentence, and avers that the *Franco-Gonzalez* injunction sets forth numerous requirements
 19 that pertain to *Franco* class members, including timing requirements, that are independent
 20 of how quickly the immigration court generally schedules initial master calendar hearings.
 21 Defendant DHS admits that they confine a substantial number of detainees with mental
 22 health issues at the Otay Detention Facility who may qualify for appointed counsel.

23 **II. Plaintiffs' allegations regarding due process rights of detainees**

24 35. This paragraph consists of Plaintiffs' characterization of the law and legal arguments,
 25 rather than specifically alleged facts. Accordingly, no response is required. Defendants
 26 further aver that the cited legal authorities speak for themselves.

27 36. This paragraph consists of Plaintiffs' characterization of the law and legal arguments,
 28 rather than specifically alleged facts. Accordingly, no response is required. Defendants

1 further aver that the cited legal authorities speak for themselves.

2 37. This paragraph consists of Plaintiffs' characterization of the law and legal arguments
3 concerning the importance of the initial appearance in immigration court, rather than
4 specifically alleged facts. Accordingly, no response is required. Defendants further aver that
5 the cited legal authorities speak for themselves.

6 **A. Plaintiffs' allegations regarding procedural due process**

7 38. This paragraph consists of Plaintiffs' characterization of the law and legal arguments,
8 rather than specifically alleged facts. Accordingly, no response is required. Defendants
9 further aver that the cited legal authorities speak for themselves.

10 39. This paragraph consists of Plaintiffs' characterization of the law and legal arguments,
11 rather than specifically alleged facts. Accordingly, no response is required. Defendants
12 further aver that the cited legal authorities speak for themselves.

13 40. This paragraph consists of Plaintiffs' characterization of the law and its application
14 to this case, rather than specifically alleged facts. Accordingly, no response is required. To
15 the extent that the Court requires a response, Defendants deny that their conduct violates
16 procedural due process.

17 **B. Plaintiffs' allegations regarding substantive due process**

18 41. This paragraph consists of Plaintiffs' characterization of the law and legal arguments,
19 rather than specifically alleged facts. Accordingly, no response is required. Defendants
20 further aver that the cited legal authorities speak for themselves.

21 42. This paragraph consists of Plaintiffs' characterization of the law and legal arguments,
22 rather than specifically alleged facts. Accordingly, no response is required. Defendants
23 further aver that the cited legal authorities speak for themselves

24 43. This paragraph consists of Plaintiffs' characterization of the law and legal arguments,
25 rather than specifically alleged facts. Accordingly, no response is required. Defendants
26 further aver that the cited legal authorities speak for themselves. To the extent that a
27 response is required, Defendants deny that a substantive due process right to prompt
28

1 presentment exists in the immigration context.

2 44. This paragraph consists of Plaintiffs' characterization of the law and legal arguments,
 3 rather than specifically alleged facts. Accordingly, no response is required. Defendants
 4 further aver that the cited legal authorities speak for themselves. To the extent that a
 5 response is required, Defendant EOIR avers that that the Otay Mesa and the Imperial
 6 Immigration Courts currently hold initial master calendar hearings for detained individuals
 7 on average within two weeks of receiving the Notice to Appear or other charging document
 8 that commences immigration court proceedings. Defendants further deny that their conduct
 9 in scheduling initial master calendar hearings violates substantive due process.

10 **III. Plaintiffs' allegations regarding Fourth Amendment rights of detainees**

11 Paragraphs 45 and 46 contain allegations regarding Plaintiffs' claims under the
 12 Fourth Amendment. Insofar as these claims were not reinstated by the Court in its
 13 September 5, 2018 Order, *see* ECF No. 56, at 16, they remain dismissed, and accordingly,
 14 no response to these claims is necessary. *See Cancino Castellar v. Nielsen*, 338 F. Supp. 3d
 15 1107 (S.D. Cal. 2018).

16 **FACTS**

17 47. Defendants admit that DHS granted Plaintiff Cancino Castellar's application for
 18 Deferred Action for Childhood Arrivals ("DACA") on December 17, 2018. Defendants
 19 admit that DHS took Plaintiff Cancino Castellar into custody on February 17, 2017, and
 20 detained him at the Otay Detention Facility. Defendants deny the allegation that Plaintiff
 21 Cancino-Castellar is currently detained and has not appeared before an immigration judge.
 22 Defendants aver that on February 21, 2017, DHS issued Plaintiff Cancino-Castellar a Notice
 23 to Appear and executed a warrant for arrest and issued a notice of custody determination
 24 (Form I-286), on which Cancino marked the box to request an immigration judge custody
 25 review. DHS filed the NTA and the Form I-286 with the Otay Mesa Immigration Court on
 26 February 24, 2017. On March 10, 2017 (prior to the current complaint being served on
 27 EOIR), the Otay Mesa Immigration Court scheduled an initial master calendar hearing and
 28 a custody redetermination hearing based on the check box on the I-286. The immigration

1 court held a master calendar hearing on March 23, 2017, during which Plaintiff Cancino
2 Castellar was represented by counsel. The immigration judge sustained the factual
3 allegations and the removal charge. A custody redetermination hearing was held on March
4 27, 2017, and the immigration judge granted Plaintiff Cancino Castellar's request for release
5 on bond. Plaintiff Cancino Castellar was released from custody on March 28, 2017 after
6 posting bond. On February 26, 2019, an immigration judge granted Plaintiff Cancino
7 Castellar's motion to terminate removal proceedings without prejudice because DHS had
8 granted his application for deferred action under the DACA program.

9 48. Defendants admit the allegations contained in the first and second sentences of this
10 paragraph, to the extent that Hernandez Aguas has two United States citizen child and may
11 apply for cancellation of removal, but deny that Hernandez Aguas has thus far established
12 that she qualifies for cancellation of removal. Defendants deny the allegations contained in
13 the third and fourth sentences. Specifically, Defendants aver that, on February 16, 2017
14 (before the complaint was filed), the Otay Mesa Immigration Court scheduled a custody
15 redetermination hearing upon the request of Plaintiff Hernandez Aguas' attorney to be held
16 on March 13, 2017. On February 21, 2017, DHS filed a Notice to Appear with the Otay
17 Mesa Immigration Court. On March 13, 2017, an immigration judge granted Plaintiff
18 Hernandez Aguas's request for release on bond. She was released from custody on March
19 14, 2017, and her case was transferred to the non-detained docket at the San Diego
20 Immigration Court. On December 18, 2017, the Immigration Court administratively closed
21 Plaintiff Hernandez Aguas's removal proceedings. Presently, her case remains
22 administratively closed.

23 49. Defendants admit that DHS disputes Plaintiff Gonzalez's claim that he is a United
24 States citizen. Defendants also admit that Gonzalez presented himself at the San Ysidro Port
25 of Entry, expressed a fear of persecution in Mexico, and that he was taken into custody and
26 transferred to the Otay Detention Facility on November 23, 2016. Defendants deny that
27 Gonzalez has remained detained since that time without appearing before a judge, and aver
28 that Plaintiffs' initial master calendar hearing was held on March 14, 2017, at the Otay Mesa

1 Immigration Court. To the extent Plaintiffs allege that Gonzalez has not received a judicial
2 determination of probable cause, this allegation pertains to Plaintiffs' now-dismissed Fourth
3 Amendment Claim, and as such, no response is necessary. Defendants admit that Gonzalez
4 was given a credible fear interview by an asylum officer on December 16, 2016, and that
5 the officer determined Gonzalez had a credible fear, but deny that this determination
6 signified that Gonzalez had a significant chance of prevailing on an asylum claim.
7 Defendants admit that Gonzalez was served with an NTA on January 5, 2017, and he was
8 initially scheduled for an initial hearing in immigration court on April 5, 2017, but aver that
9 Gonzalez's initial master calendar hearing occurred on March 14, 2017. Defendants further
10 aver that an immigration judge determined that Plaintiff Gonzalez is not a United States
11 citizen and is subject to removal from the United States. The BIA affirmed the immigration
12 judge's determination of removal and rejected Plaintiff Gonzalez's claim of citizenship in
13 a decision issued April 25, 2019.

14 50. Defendants admit the first sentence of this paragraph insofar as individuals who are
15 detained at the Otay and Imperial Regional Detention Facilities are subject to restrictions
16 on their liberty, but deny that these restrictions are "severe." The second sentence of this
17 paragraph is not an allegation to which a response is required.

18 51. Defendant DHS admits that detainees wear colored-coded uniforms but deny the
19 characterization of these items as "prison uniforms." Defendant DHS denies the allegation
20 that detainees are held in "pods" or "units" of 60-80 other individuals "where they spend
21 most of their day and may not leave without permission," and avers that the facilities in
22 question feature 128-person housing units. Defendant DHS further avers that detainees have
23 ample opportunity to leave the housing unit for access the law library, chapel services,
24 regularly-scheduled meals, legal orientation program, medical appointments, and the main
25 gymnasium, and are free to walk from the housing unit to another area without restraints
26 and without an escorting officer.

27 52. Defendant DHS admits to the allegations in this paragraph, but avers that detainees
28 are permitted up to four hours of recreation per day and that each housing unit has a concrete

1 recreational space; that each housing unit also has access to one hour per day in the large
2 indoor full-sized basketball court (which is air-conditioned at the Otay Facility) where other
3 activities such as volleyball and badminton are available; that the Imperial Facility has a
4 large dirt/gravel recreational space with two full-size soccer fields, basketball and volleyball
5 courts, and a walking/jogging track; that recreation time at the Imperial Facility begins in
6 the morning and runs into the early evening; that during peak temperatures, the recreation
7 times for the housing units rotate so each unit has equal opportunities to access the
8 recreation yard during more moderate temperatures; and that detainees can also choose
9 whether to remain indoors or go outside during their unit's scheduled recreation time in the
10 yard.

11 53. Defendant DHS admits that telephone calls from the facility require an account, and
12 aver that each detainee is issued a commissary account and phone account to make calls.
13 Defendants deny Plaintiffs' characterization of telephone calls as "expensive" and aver that
14 local and long distance calls are \$0.07 per minute, collect calls are \$0.11 per minute,
15 international calls are \$0.15 per minute (all calls include applicable federal, state, and local
16 taxes). Defendants further aver that toll free numbers are free, including the Detainee
17 Response Information Line and consulates. Defendant DHS admits that telephone
18 conversations can be recorded for security purposes, but avers that phone calls to legal
19 counsel or to a consulate are not recorded.

20 54. Defendant DHS admits the allegation in this paragraph, but aver that detainees work
21 voluntarily. Defendant DHS further avers that, depending on the type of work performed,
22 the rate of pay ranges between \$1 to \$1.75 per day. Defendant DHS further avers that jobs
23 include sanitation, laundry, food service, commissary, and landscaping.

24 55. Defendant DHS admits that meals are served on a schedule set by the facility.
25 Defendant DHS denies that the facility dictates "bed time[s]" and "wake up times," but
26 admits that the facility maintains a schedule for when the lights go on and off.

27 56. Defendant DHS admits that detainees at the Imperial Facility may receive non-legal
28 visits from family and friends, but denies that such visits are rare or that the facility is

1 “remote.” Defendant DHS avers that visitations occur frequently at Imperial Facility.
 2 Defendant DHS further avers that the Imperial Facility is within a normal standard drive for
 3 visitation between significantly-populated cities. Defendant DHS further avers that the city
 4 of El Centro, California has a population of over 44,000 and is 17 miles away from Imperial
 5 Facility, and that San Diego has a population of 1.42 million and is 131 miles away from
 6 Imperial Facility, approximately a two-hour drive from the facility.

7 57. Defendant DHS admits the allegations in this paragraph.

8 **CLASS ACTION ALLEGATIONS**

9 **I. Plaintiffs’ allegations regarding Defendants’ policies and practices for** 10 **keeping detainees in the Southern District of California.**

11 58. To the extent the allegations in this paragraph are couched in the generalized terms
 12 of what happens “[o]n any given day,” Defendants lack sufficient information to admit or
 13 deny these allegations. Further, Defendant EOIR avers that that the Otay Mesa and the
 14 Imperial Immigration Courts are currently holding initial master calendar hearings for
 15 detained individuals on average within two weeks of receiving the Notice to Appear or other
 16 charging document that commences immigration court proceedings.

17 59. Defendants admit the first sentence of this paragraph. To the extent the allegations in
 18 the second sentence of this paragraph are couched in the generalized terms of what happens
 19 “[o]n any given day,” Defendants lack sufficient information to admit or deny this
 20 allegation. With respect to the first sentence of footnote 8, Defendants admit that the
 21 Imperial Regional Detention Facility has an operational capacity of 704 beds, with a total
 22 of 782 beds, including 64 segregation beds and 14 medical beds, and deny the remainder of
 23 the first sentence to the extent that the Imperial Regional Detention Facility averaged 678
 24 beds for FY 2016. With respect to the second sentence of footnote 8, Defendants deny that
 25 the Otay Detention Facility has capacity for 1120 immigration detainees, avers that the
 26 operational capacity of the Otay Detention Facility is 1,572 beds (1,005 beds for ICE and
 27 567 beds for U.S. Marshals), and admit the remainder of the sentence.

60. Defendants deny Plaintiffs' characterization of CBP facilities in the Southern District of California as "detention centers," but admit CBP maintains facilities in the Southern District of California where individuals are held in custody for immigration processing. With regard to the second sentence, Defendants admit that the individuals may be in CBP's custody for more than 48 hours, but lack sufficient knowledge or information to form a belief as to the truth of whether "many" individuals in CBP's custody for more than 48 hours are also brought before an immigration judge for removal proceedings. Defendants deny the allegations in the third sentence of this paragraph.

61. Defendant EOIR admits in part and denies in part the allegations in this paragraph. Authority over removal cases at the Otay and Imperial Regional Detention Facilities currently falls under the Otay Mesa and Imperial Immigration Courts. Those courts are controlled, operated, and supervised by EOIR's Office of the Chief Immigration Judge.

62. Defendant DHS admits that the decision to detain an alien who is not lawfully in the United States is not based on the immigration court's capacity to process cases, but deny that this results in any unlawful delay in a detainee's first appearance before an immigration judge.

63. Defendants deny the allegations in this paragraph, and aver that immigration judges have authority to conduct bond hearings for certain categories of detained aliens. Defendant EOIR further avers when DHS issues an arrest warrant and decides to detain an alien pending removal proceedings pursuant to 8 U.S.C. § 1226(a), it provides the alien with the Form 1-286, which includes a check-box for the alien to request a bond hearing before an IJ. The Otay Mesa and Imperial Immigration Courts automatically schedule a bond hearing for any eligible alien who has checked the box on the Form 1-286 requesting such a bond hearing. Defendant EOIR denies the allegation that Defendants' practices result in "detention centers being flooded with more individuals than the immigration court can reasonably handle and, as such, significantly delays the initial Master Calendar Hearings." Defendant EOIR avers that that the Otay Mesa and the Imperial Immigration Courts currently hold initial master calendar hearings for detained individuals on average within

1 two weeks of receiving the Notice to Appear or other charging document that commences
2 immigration court proceedings. Moreover, to the extent the allegations in this paragraph
3 pertain to Plaintiffs' now-dismissed Fourth Amendment Claim, no response is necessary.

4 64. Defendant DHS denies that "as a general practice" it fails to provide the time, place
5 and date of the initial master calendar hearing in the NTA, and avers that, while the time,
6 place, and date initial master calendar hearing generally does not appear on NTAs in
7 detained cases, that information does generally appear on the NTA in non-detained cases.
8 Defendants further aver that there is no statutory or regulatory requirement for DHS to
9 provide this information in the NTA. With regard to the second sentence, Defendant DHS
10 admits that, in detained cases, DHS relies on EOIR to schedule the hearing, but denies that
11 Defendant DHS takes no responsibility for presenting the individuals in its custody to the
12 court promptly.

13 65. Defendants deny the allegation in this paragraph.

14 66. Without specific information as to the source of Plaintiffs' statistics in this paragraph,
15 Defendant EOIR can neither admit nor deny the allegations in this paragraph.

16 67. Defendants deny the allegation in this paragraph.

17 **II. Plaintiffs' assertion that this case meets the requirements of Federal Rule of**
18 **Civil Procedure 23.**

19 68. Defendants admit that Plaintiffs seek to certify a class, but deny that certification of
20 the proposed class is permissible under the Federal Rules of Civil Procedure and the INA.
21 This paragraph sets forth legal conclusions regarding Plaintiffs' proposed class to which no
22 response is required. To the extent the Court requires a response, because the allegations in
23 the second sentence of this paragraph are couched in the generalized terms of what
24 happens "[a]t any given time" or "on any given day," Defendants lack sufficient information
25 to admit or deny this allegation. Defendants deny the third sentence of this paragraph in that
26 it presumes the existence of class which does not yet exist. No response is required to
27 Plaintiffs' allegations regarding a lack of judicial review of probable cause because those
28 allegations pertain to Plaintiffs' now-dismissed Fourth Amendment Claim.

69. This paragraph sets forth legal conclusions regarding Plaintiffs' proposed class to which no response is required. To the extent the Court requires a response, Defendants admit that Plaintiffs seek to certify a class, but deny that certification of the proposed class is permissible under the Federal Rules of Civil Procedure and the INA. No response is required to Plaintiffs' allegations regarding a lack of judicial review of probable cause because those allegations pertain to Plaintiffs' now-dismissed Fourth Amendment Claim.

70. This paragraph sets forth legal conclusions regarding Plaintiffs' proposed class to which no response is required. To the extent the Court requires a response, Defendants admit that Plaintiffs seek to certify a class, but deny that certification of the proposed class is permissible under the Federal Rules of Civil Procedure and the INA. No response is required to Plaintiffs' allegations regarding a lack of judicial review of probable cause because those allegations pertain to Plaintiffs' now-dismissed Fourth Amendment Claim.

71. This paragraph sets forth legal conclusions regarding Plaintiffs' proposed class to which no response is required. To the extent the Court requires a response, Defendants admit that Plaintiffs seek to certify a class, but deny that certification of the proposed class is permissible under the Federal Rules of Civil Procedure and the INA. No response is required to Plaintiffs' allegations regarding a lack of judicial review of probable cause because those allegations pertain to Plaintiffs' now-dismissed Fourth Amendment Claim.

72. This paragraph sets forth legal conclusions regarding Plaintiffs' proposed class to which no response is required. To the extent the Court requires a response, Defendants admit that Plaintiffs seek to certify a class, but deny that certification of the proposed class is permissible under the Federal Rules of Civil Procedure and the INA. No response is required to Plaintiffs' allegations regarding a lack of judicial review of probable cause because those allegations pertain to Plaintiffs' now-dismissed Fourth Amendment Claim.

73. This paragraph sets forth legal conclusions regarding Plaintiffs' proposed class to which no response is required. To the extent the Court requires a response, Defendants admit that Plaintiffs seek to certify a class, but deny that certification of the proposed class is permissible under the Federal Rules of Civil Procedure and the INA. No response is

1 required to Plaintiffs' allegations regarding a lack of judicial review of probable cause
2 because those allegations pertain to Plaintiffs' now-dismissed Fourth Amendment Claim.

3 74. This paragraph sets forth legal conclusions regarding Plaintiffs' proposed class to
4 which no response is required. To the extent the Court requires a response, Defendants
5 admit that Plaintiffs seek to certify a class, but deny that certification of the proposed class
6 is permissible under the Federal Rules of Civil Procedure and the INA. No response is
7 required to Plaintiffs' allegations regarding a lack of judicial review of probable cause
8 because those allegations pertain to Plaintiffs' now-dismissed Fourth Amendment Claim.

9 **CLAIMS FOR RELIEF**

10 **FIRST CLAIM**

11 **Allegations regarding the Due Process Clause of the Constitution**

12 75. This paragraph serves to "repeat and reallege" and "incorporate by reference" all
13 previous allegations, and accordingly no response is required. To the extent the Court
14 requires a response, Defendants repeat and incorporate by reference their responses to the
15 allegations discussed above.

16 76. This paragraph sets forth a statement of the law to which no response is required as
17 the legal authority cited speaks for itself.

18 77. This paragraph sets forth a conclusion of law to which no response is required. To
19 the extent the Court requires a response, Defendants deny.

20 78. This paragraph sets forth a conclusion of law to which no response is required. To
21 the extent the Court requires a response, Defendants deny.

22 79. This paragraph sets forth a conclusion of law to which no response is required. To
23 the extent the Court requires a response, Defendants deny.

24 80. This paragraph sets forth a conclusion of law to which no response is required. To
25 the extent the Court requires a response, Defendants deny.

SECOND CLAIM

Allegations regarding the Fourth Amendment to the United States Constitution

Plaintiffs' Second Claim (paragraphs 81 through 84 of the Complaint) is their Fourth Amendment claim, which the Court did not reinstate in its September 5, 2018 Order. See ECF No. 56, at 16; *see also Cancino Castellar v. Nielsen*, 338 F. Supp. 3d 1107 (S.D. Cal. 2018). Insofar as this claim remains dismissed, no response is necessary to paragraphs 81 through 84. To the extent the Court requires a response, Defendants deny these allegations.

THIRD CLAIM

Allegations regarding violation of 5 U.S.C. §§ 702, 706(1), (2)(A)-(D)

85. This paragraph serves to "repeat and reallege" and "incorporate by reference" all previous allegations, and accordingly no response is required. To the extent the Court requires a response, Defendants repeat and incorporate by reference their responses to the allegations discussed above.

86. This paragraph sets forth a statement of the law to which no response is required as the legal authority cited speaks for itself.

87. This paragraph sets forth a statement of the law to which no response is required as the legal authority cited speaks for itself.

88. This paragraph sets forth a conclusion of law to which no response is required. To the extent the Court requires a response, Defendants deny, and also note that the Court has dismissed Plaintiffs' claims under 5 U.S.C. § 706(1) without prejudice. *See* ECF No. 63, at 42, 45.

89. This paragraph sets forth a conclusion of law to which no response is required. To the extent the Court requires a response, Defendants deny, and also note that the Court has dismissed Plaintiffs' claims under 5 U.S.C. § 706(1) without prejudice. *See* ECF No. 63, at 42, 45.

90. This paragraph sets forth a conclusion of law to which no response is required. To the extent the Court requires a response, Defendants deny, and also note that the Court has dismissed Plaintiffs' claims under 5 U.S.C. § 706(1) without prejudice. *See* ECF No. 63, at

1 42, 45

2 **PRAYER FOR RELIEF**

3 This section sets forth Plaintiffs' prayer for relief, to which no response is required.
4 To the extent the Court requires a response, Defendants deny that Plaintiffs are entitled to
5 any of the relief requested or any other relief from Defendants.

6 **GENERAL DENIAL**

7 Pursuant to Rule 8(b)(3), Defendants deny all allegations in the Complaint which
8 they have not otherwise specifically admitted or denied herein.

9 **DEFENSES**

10 Defendants reserve the right to any and all such affirmative defenses, or any
11 applicable state and state and federal statutes, as may become apparent in the course of
12 litigation.
13

14 WHEREFORE, Defendants respectfully request that the Court dismiss all claims in
15 the Complaint with prejudice and grant it such other relief as may be just and appropriate.

16
17 DATED: July 15, 2019

Respectfully Submitted,

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United States Department of Justice

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on July 15, 2019, to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Civil Local Rule 5.4. Any other counsel will be served by electronic mail, facsimile and/or overnight delivery.

Executed on July 15, 2019, at Washington, D.C.

s/ C. Frederick Sheffield
C. FREDERICK SHEFFIELD