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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOSE ORLANDO CANCINO CASTELLAR, ANA MARIA HERNANDEZ AGUAS, MICHAEL GONZALEZ, Plaintiffs-Petitioners, vs. JOHN F. KELLY, Secretary of Homeland Security, *et al.*, Defendants-Respondents.	Case No. 17-cv-00491-BAS-BGS TIME: TBD DATE: July 10, 2017 CTRM: 4B (Schwartz) **NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT** DEFENDANTS-RESPONDENTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS COMPLAINT

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INTRODUCTION

Plaintiffs brought this sweeping class action asking this Court to fundamentally re-write the statutory and regulatory framework governing the detention of aliens. Plaintiffs would have this Court import criminal procedural requirements into the civil administrative processes of removing aliens from the United States under the immigration laws, imposing responsibilities and obligations upon DHS and the Immigration Courts that neither the Constitution nor statutes require.

As discussed in their Opposition, Plaintiffs seek a "prompt" initial hearing before a judicial officer for two purposes: (1) to conduct a judicial probable cause determination of a detainee's detention; and (2) to notify detainees of certain rights under the INA. ECF No. 35, Plaintiffs' Opposition ("Opp.") at 1, 9. Essentially, Plaintiffs are asking this court to create new requirements for removal proceedings; procedures this court is precluded from interfering with under multiple subsections of 8 U.S.C. § 1252. Moreover, the procedures in place – immigration officers' probable cause determinations and the current scheme regarding initial master calendar hearings and bond hearings – already satisfy constitutional requirements in the civil immigration context.

ARGUMENT

I. This Court lacks jurisdiction under 8 U.S.C. 1252(a)(5), (b)(9), and (g).

Plaintiffs seek to challenge both the timing of and manner in which removal proceedings are conducted before the immigration judge. While Plaintiffs deny that they are asking this Court to intervene in their removal proceedings, Opp. at 10-15, they ask this Court to require a "prompt" initial master calendar hearing in order to determine the probable cause for a detainee's detention, and to vindicate certain rights secured by the INA, specifically to: "notif[y] [aliens] of the charges; facilitate[] access to pro bono counsel; and provide[] them an opportunity to contest detention, seek a bond hearing, and request the evidence against them," Opp. at 1, 9. However, this Court does not have jurisdiction over such a claim under various subsections of 8 U.S.C. § 1252.

8 U.S.C. §1252(a)(5) and (b)(9)

The INA, as amended by the REAL ID Act, has provided a specific statutory mechanism that expressly channels all claims relating to removal proceedings into a petition for review before the appropriate circuit court of appeals, after the alien has completed the administrative removal process and is the subject of a final order of removal. Section 1252(a)(5) clearly states that "[A] petition for review . . . shall be the *sole and exclusive* means for judicial review of an order of removal. . . ." *Id.* (emphasis added). Moreover, 8 U.S.C. § 1252(b)(9) further clarifies that "[j]udicial review of *all questions of law and fact*, including interpretation and application of constitutional and statutory provision, *arising from any action taken or proceeding brought* to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order," 8 U.S.C. § 1252(b)(9) (emphasis added), which may occur exclusively through a petition for review in the courts of appeals, *id.*§ 1252(a)(5). *See J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) (noting that Section 1252(b)(9) is "breathtaking in scope and vise-like in grip and therefore swallows up virtually all claims that are tied to removal proceedings") (quoting *Aguilar v. ICE*, 510 F.3d 1, 9 (1st Cir. 2007). Thus, "[t]aken together, § 1252(a)(5) and § 1252(b)(9) mean that any issue—whether legal or factual—arising from any removal-related activity can be reviewed only through the [petition for review] process." *J.E.F.M.*, 837 F.3d at 1031 (citations omitted).

The first relief requested by Plaintiffs, that the master calendar hearing be set within a specific timeline so that aliens in removal proceedings receive certain notices and advisals quickly, is inextricably linked to those removal proceedings because it is "part and parcel of the removal proceeding itself. . . ." *Aguilar v. U.S. ICE*, 510 F.3d 1, 13 (1st Cir. 2007); *see also J.E.F.M.*, 837 F.3d at 1035 ("We conclude that §§ 1252(a)(5) and 1252(b)(9) channel review of all claims, including policies-and-practices challenges, through the [petition for review] process whenever they 'arise from' removal proceedings."); *Id.* at 1033 (holding that "the right-to-counsel claims must be raised through the PFR process because . . . [they are] not independent or ancillary to the removal proceedings. Rather, these claims are bound up in and an inextricable part of the administrative process."); *see* ECF No. 28.1, Defendants' Memorandum in Support of Motion to Dismiss ("Defs. Mot."), at 11-13. Indeed, a deprivation of any of the statutory rights cited by Plaintiffs can and has been appealed to the Board of Immigration Appeals and reviewed through a petition for review, further supporting Defendants' argument that the district court lacks jurisdiction under 8 U.S.C. § 1252(a)(5). *See, e.g., Jacinto v. INS*, 208 F.3d 725 (9th Cir. 2000) (reversing and remanding removal order where the immigration judge failed to provide certain rights' advisals and explain procedures); *Leslie v. Attorney Gen. of U.S.*, 611 F.3d 171 (3d Cir. 2010) (immigration judge's failure to inform alien of the availability of free legal services rendered removal order invalid).

Plaintiffs second basis for requesting an initial master calendar hearing within a proscribed time – so that detainees can receive a probable cause determination – is also barred by § 1252(a)(5) and (b)(9), because the determination of probable cause (i.e. whether the person is removable from the United States) is a question of law and fact "arising from any action taken or proceeding brought to remove an alien from the United States. . . ." 8 U.S.C. § 1252(b)(9). Indeed, and as discussed below, *see infra*, in the immigration context, a probable cause determination would necessarily involve an examination of the underlying charge against an alien – i.e. whether that alien is in the United States in violation of law. Notably, Plaintiffs concede that "some of the benefits of a prompt hearing may be relevant to the merits." Opp. at 15.[1] Thus, Plaintiffs' attempt to divorce their claims from the jurisdiction stripping provisions of Sections 1252(b)(9) and 1252(a)(5) fails.

[1] Notably, in discussing this Court's jurisdiction under 8 U.S.C. §§ 1252(a)(5) and (9) in their Opposition, Plaintiffs focus solely on their request for a "prompt" review of probable cause for their detention and do not provide any support for their claim that this Court can order the immigration judge to conduct an initial master calendar hearing (where these rights are discussed) within a certain time frame. *See* Opp. at 13-15.

8 U.S.C. § 1252(g)

With respect to their request for a "prompt" determination of probable cause by a judicial officer, federal courts lack subject matter jurisdiction over "any cause or claim by or on behalf of any alien *arising from the decision or action by the Attorney General to commence proceedings*, adjudicate cases, or execute removal orders . . . ." 8 U.S.C. § 1252(g). Plaintiffs argue that this case does not implicate the decision to commence proceedings, adjudicate cases, or execute removal orders. Opp. at 10. First, Plaintiffs' request for an initial master calendar hearing within a prescribed timeframe in order to evaluate probable cause and vindicate certain rights secured by the INA, is a claim that directly arises from the action by the Attorney General to commence proceedings and adjudicate cases and is thus barred by § 1252(g).

Moreover, Plaintiffs' request for a *probable cause* determination would require an examination of whether there is evidence that an alien is removable from the United States, which goes to the core of DHS's decision to initiate removal proceedings. In the immigration context, warrantless arrest and detention of an alien only occurs when an immigration official has "reason to believe[2] that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest. . . ." 8 U.S.C. § 1357(a)(2)[3]; Defs. Mot. at 5-6. Accordingly, in the immigration context, a probable cause determination would necessarily involve an examination of the underlying charge against an alien – i.e. whether that alien is in the United States in violation of law. Although Plaintiffs assert that they are "challenging their treatment *after* DHS has made the 'initial determination' to charge and detain them," Opp. at 11 (emphasis in original), at its core, such review would necessarily require an immigration judge to examine the underlying basis for DHS's decision to charge and detain

[2] "Reason to believe" has been equated with the constitutional requirement of probable cause. *See Tejeda-Mata v. I.N.S.*, 626 F.2d 721, 725 (9th Cir. 1980) (internal citations omitted).

[3] Section 1357, and the resulting requirement of presentment before another examining officer, pursuant to 8 C.F.R. § 287.3. applies only to warrantless arrests.

them. Thus, despite Plaintiffs' claims, it is inaccurate that the "court may rule on [the challenge to their detention] without calling into question the decision to commence proceedings." Opp. at 12. Any probable cause hearing necessarily would necessarily go to the heart of the Government's decision to initiate removal proceedings, and is therefore barred by section 1252(g).

Plaintiffs' assertion – that their claim is not barred by 8 U.S.C. § 1252 because it challenges detention during removal proceedings – fairs no better. Opp. at 14-15. It is true that challenges related to prolonged detention and the availability of bond hearings can be raised in district court notwithstanding section 1252. *See Rodriguez v. Robbins* ("*Rodriguez III*"), 804 F.3d 1060, 1079-81 (9th Cir. 2015), *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (June 20, 2016) (No. 15-1204), (upholding *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013) ("*Rodriguez II*")) (considering whether prolonged detention without individualized bond hearings pursuant to certain federal immigration statutes was constitutional); *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (concluding that "§ 2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention"). However, Plaintiffs themselves acknowledge that their claim is not limited to the availability of bond hearings. *See* Opp. at 22-23 (explaining that Plaintiffs are not asking "this Court to require that the first appearance necessarily be a custody review hearing," but rather are seeking a "prompt hearing, at which detainees may request custody review either immediately or later."). Moreover, the issue Plaintiffs raise is not unconstitutionally lengthy detention; rather, they allege that it is Defendants' failure to provide judicial review of ICE officers' probable cause determinations that violates the constitution. Additionally, even if their claim were challenging unconstitutionally lengthy detention, their claim does not involve "prolonged detention" as defined by the Ninth Circuit in *Rodriguez*. *See Rodriguez III*, 804 F.3d at 1079-81 (upholding *Rodriguez II*, and requiring a bond hearing for aliens detained under § 1226(c) at the six month mark).

II. The Constitutional protections set forth in the Fourth and Fifth Amendments are satisfied in the immigration context by the procedures already in place.

Plaintiffs argue that "the government's position ultimately reduces to magical thinking that immigration detention is somehow exempt from the constitutional rules that apply to all other forms of detention." Opp. at 3. However, Defendants have made no such argument. *See* Defs. Mot. at 18-32. Rather, Defendants assert that the constitutional protections set forth in the Fourth and Fifth Amendments are satisfied in the immigration context with the current statutory scheme regarding initial master calendar hearings and immigration officers' probable cause determinations.

A. The Fourth Amendment does not require Defendants to present individuals for judicial review of probable cause for detention within 48 hours.

In their Opposition, Plaintiffs assert that Defendants violate the Fourth Amendment by "detaining individuals without any review of probable cause by a neutral and detached magistrate, before or after arrest." Opp. at 28. Plaintiffs argue that the Ninth Circuit's holding in *Rhoden v. United States*, 55 F.3d 428, 432 n.7 (9th Cir. 1995) (per curiam), supports their assertion that it "violates the Fourth Amendment to detain them for one to three months without judicial review." *Id.* at 29. However, Plaintiffs inaccurately cite *Rhoden* as holding that the plaintiff was entitled to a prompt probable cause hearing. *Id.* To the contrary, the Ninth Circuit held that immigration detention must only be "reasonable," *Rhoden*, 55 F.3d at 432, but the court made no decision whatsoever about the timeliness of a probable cause hearing, *see generally*, *id*.

As discussed in Defendants' Motion to Dismiss, nothing in the immigration statutes requires judicial review of probable cause to sustain the alien's detention pending removal proceedings. *See, e.g.*, 8 U.S.C. §§ 1225(b)(1)(B)(ii), 1357(a)(2), and 1226(a); Defs. Mot. at 18-32. Indeed, the Fourth Amendment has long permitted civil immigration detention notwithstanding the fact that the probable-cause determinations are made by administrative officers rather than a neutral magistrate. *See Abel v. United States*, 362 U.S. 217, 217 (1960). (discussing long-standing administrative arrest procedures in deportation cases). Plaintiffs, by stating that Defendants violate the Fourth Amendment "by detaining individuals without any review of probable cause by a neutral and detached magistrate, before or after arrest," are essentially asking this Court to strike down this entire immigration scheme.

Moreover, and contrary to Plaintiffs' contentions, Defendants do not argue that the Fourth Amendment does not apply at all in the civil immigration context. Rather, the Fourth Amendment's protections as outlined in *Gerstein* and *County of Riverside* are satisfied in the immigration context without judicial review of ICE officers' probable cause determinations and examinations of detainees. *See Gonzalez v. Immigration and Customs Enforcement*, 2017 WL 2559616, at *10 (C.D. Cal. June 12, 2017) (holding that "the Fourth Amendment does not require judicial review of ICE officers' probable cause determinations"). In *Gonzalez,* the Central District of California recently addressed whether the Fourth Amendment requires an immigration detainee to be brought before a neutral magistrate within forty-eight hours of detention. *Id.* at *6-*10. There, the court analyzed the immigration statutory scheme related to aliens arrested without a warrant, and noted that "the Legislature has permitted an ICE officer to determine probable cause on his or her own and has permitted review of the arresting ICE officers' probable cause determination by another ICE officer." *Id.* at *5. After examining the difference between the requirements of criminal proceedings and civil immigration proceedings granted, the court concluded that the statutory scheme did not violate the Fourth Amendment. *Id.* at *10 ("Based on the deference the Court must afford the executive and legislative branches in the immigration arena and the distinctions between the protections afforded in criminal cases rather than civil immigration proceedings, the Court finds that it is not unconstitutional under the Fourth Amendment for the Legislature to delegate a probable cause determination to an executive officer, such as an ICE agent, rather than to an immigration, magistrate, or federal district court judge."). Indeed, Plaintiffs' requested relief would require the Court to find that the statutory and regulatory scheme is unconstitutional.

This decision is supported by the history of distinctions between criminal proceedings and civil immigration proceedings. Plaintiffs repeatedly assert that *Gerstein* applies in the civil immigration context and requires a judicial determination of probable cause following detention. Opp. at 27-29 (citing *Gerstein v. Pugh*, 420 U.S. 103 (1975)). However, in *Gerstein*, the Supreme Court explicitly limited its analysis to the criminal context. *Gerstein*, 420 U.S. at 125 n. 27. The Court explained that "the Fourth Amendment was tailored explicitly for the criminal justice system,"[4] and that "the Fourth Amendment probable cause determination is in fact only the first stage of an elaborate system, unique in jurisprudence, *designed to safeguard the rights of those accused of criminal conduct*." *Id.* (emphasis added). The Court noted that "civil procedures . . . are inapposite and irrelevant in the wholly different context of the criminal justice system." *Id.* This explains why the INA provides that warrants may be issued by DHS's own officials, 8 U.S.C. § 1226(a), and likewise authorizes DHS officials to make warrantless arrests, *id.*at § 1357(a)(2).

In short, courts have "frequently . . . upheld administrative deportation proceedings shown . . . to have been begun by arrests pursuant to" such processes. *Abel*, 362 U.S. at 233-34. As the Supreme Court has expressed, there is "overwhelming historical legislative recognition of the propriety of administrative arrest[s] for deportable aliens[.]" *Abel*, 362 U.S. at 233. Plaintiffs argue that *Abel* is not informative as it "stands only for the proposition that petitioner forfeited the question whether the administrative warrant for his arrest was valid," Opp. at 28-29; however, such a limited reading is not supported by the language in *Abel*, 362 U.S. at 230 ("Statutes authorizing administrative arrest to achieve detention pending deportation proceedings have the sanction of time."); *id.* ("It would emphasize the disregard for the presumptive respect the Court owes to the validity of Acts of Congress, especially when confirmed by uncontested historical legitimacy, to bring into question for the first time such a long-sanctioned practice of government[.]"); *cf. United States v. Tejada*, 255 F.3d 1, 3-4 (1st Cir. 2001) (holding that alien arrested and detained pursuant to 8 U.S.C. § 1357(a)(2) is subject to civil detention, which "does not trigger the protections of [Federal

[4] Plaintiffs note that the fact that the Fourth Amendment was tailored for the criminal justice system "does not mean it has no application to civil detention," Opp. at 29. As discussed above, *supra*, Defendants do not argue that the Fourth Amendment does not apply at all in the civil immigration context. Rather, the Fourth Amendment's protections are satisfied in the immigration context by the procedures currently in place.

Rule of Criminal Procedure] 5(a)," and, accordingly, "[t]he requirement that a magistrate evaluate his detention within 48 hours of his arrest is therefore inapplicable").

The Court must further reject Plaintiffs' effort to turn the Government's language in its rule-making practices against itself. Opp. at 29 (citing INS, Final Rule-Making, "Enhancing the Enforcement Authority of Immigration Officers," 59 Fed. Reg. 42406-01, 42411 (1994)). Congress has authorized ICE officers to make immigration arrests, and DHS has issued and amended regulations implementing that section of the INA. *See* 8 U.S.C. § 1357(a)(2); 8 C.F.R. 287.3. Both the statute and the regulation express that ICE agents will examine arrested aliens. *Id.* And pursuant to these regulations, DHS officers are required to provide a probable cause determination within 48 hours.

Plaintiffs' arguments, in essence, seek to invalidate 8 U.S.C. § 1357(a)(2), which authorizes immigration officers to undertake a warrantless arrest. Congress is fully aware of the U.S. Constitution, *Gerstein*, and, in general, the concept of "probable cause." *See, generally*, *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 554 (1995) ("Congress is presumed to know the law."). Congress directed that, following a warrantless arrest for an immigration violation, "the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States." 8 U.S.C. § 1357(a)(2). As noted, *supra*, courts – including the Supreme Court – have already affirmed the validity of this statute. *See Reno v. Flores*, 507 U.S. 292, 307 (1993) (noting, without setting a time frame, that "due process is satisfied by giving the detained alien juveniles the *right* to a hearing before an immigration judge.") (emphasis in original); *see also Gonzalez*, 2017 WL 2559616, at *5-*10 (finding that ICE officers' probable cause determinations are sufficient to satisfy the Fourth Amendment in the civil immigration context); *Tejada*, 255 F.3d at 3-4 (civil detention following 8 U.S.C. § 1357(a)(2) arrest does not implicate requirement that a magistrate evaluate detention within 48 hours of arrest); *Buquer v. City of Indianapolis*, No. 1:11-cv-00708-SEB, 2013 WL 1332158 (S.D. Ind. Mar. 28, 2013), at *8.

B. *The Fifth Amendment's Due Process Clause is Satisfied by the Statutory and Regulatory Protections Currently in Place.*

a. **Substantive Due Process**

Plaintiffs argue that detention for over a month[5] without a hearing violates substantive due process. Opp. at 24-27. However, as discussed above, under Supreme Court precedent, arrest and detention by administrative officers in the context of civil immigration enforcement do not violate the Fourth and Fifth Amendments to the Constitution. *See Abel*, 362 U.S. at 217 (discussing long-standing administrative arrest procedures in deportation cases); *c.f. Gonzalez*, 2017 WL 2559616, at *5-*10 (finding that ICE officers' probable cause determinations are sufficient to satisfy the Fourth Amendment in the civil immigration context). Plaintiffs argue that Defendants attempt to undermine the importance of a first appearance by "drawing an arbitrary distinction between criminal and civil detention," Opp. at 24-25; however, "the Ninth Circuit *has* recognized a distinction between criminal proceedings and civil immigration proceedings," *Gonzalez*, 2017 WL 2559616, at 15 (C.D. Cal. June 12, 2017) (emphasis in original) (citing *Rhoden*, 55 F.3d at 432 n.7 (noting that civil immigration proceedings stemming from border detentions "involve a distinct set of considerations and require different administrative procedures" than criminal proceedings); *Arizona v. United States*, 132 S.Ct. 2492, 2499 (2012) ("Removal is a civil, not a criminal, matter. A principal feature of the removal system is the broad discretion exercised by immigration officials."); *Flores v. Meese*, 913 F.2d 1315, 1367 (9th Cir. 1990) (Tang, J., concurring) (finding that *Gerstein* did not apply in a deportation proceedings because "[d]eportation is a civil, not a criminal, proceeding"), *reversed on other grounds by Reno*, 507 U.S. at 292).

Removal proceedings are without doubt civil proceedings and "the full trappings of legal protections that are accorded to criminal defendants are not necessarily constitutionally required in deportation proceedings." *Dor v. I.N.S.*, 891 F.2d 997, 1003 (2d

[5] Plaintiffs generally request a "prompt" initial hearing; however, they clarify that "the question is whether delays of one to three months violate" the substantive due process right. Opp. at 25.

Cir. 1989). For this reason, Plaintiffs reliance on cases like *Coleman v. Frantz*, 754 F.2d 719, 724 (7th Cir. 1985) and *Hayes v. Faulkner Cty.*, 388 F.3d 669, 673 (8th Cir. 2004), Opp. at 25-26, is misplaced, because those cases found a Fifth Amendment right to a prompt initial hearing necessary to protect certain constitutional rights that apply exclusively in the criminal context. *See Coleman*, 754 F.2d at 724 (citing the Sixth Amendment, the Fifth Amendment right against self-incrimination, and the Eighth Amendment right to seek bail); *Hayes*, 388 at 673 (same).

In addition, the Ninth Circuit has already explained when a bond hearing is required based on due process constitutional avoidance concerns, and has determined that a bond hearing is required when detention becomes prolonged at six months. *See Rodriguez III*, 804 F.3d at 1079-81 ("[W]e conclude that class members are entitled to automatic bond hearings after six months of detention). Accordingly, the law does not support a statutory or constitutional requirement for a bond hearing before that time. Nonetheless, and as discussed herein, the regulations provide that an alien detained under 8 U.S.C. § 1226(a) who is denied bond by the examining officer can request a custody redetermination hearing conducted by an immigration judge at any time before the issuance of a final order of removal. 8 U.S.C. § 1226(a); 8 C.F.R. §§ 236.1(d)(1), 1003.19, 1236.1(d)(1). Thus the regulations already provide a mechanism to request a redetermination hearing before six months for certain detained aliens.

Moreover, an alien's right to certain advisals and information provided at an initial master calendar hearing are statutory and regulatory rights, not constitutional rights. *See* Defs. Mot. at 24-26. And, as discussed above, *supra*, to the extent that Plaintiffs claim they were deprived of any of the statutory or regulatory rights that are provided in an initial master calendar hearing such that it affected the fairness of their removal proceedings, Opp. at 24-25, such a claim "arises from" immigration removal proceedings and can only be brought through a petition for review in the federal courts of appeals. 8 U.S.C. §§ 1252(a)(5), 1252(b)(9); *J.E.F.M.*, 837 F.3d at 1029.

Therefore, the Court should not extend a fundamental due process right to prompt presentment in criminal proceedings to the civil immigration context. Plaintiffs' argument is not only "novel" which is reason enough to doubt that substantive due process sustains it, *see Flores*, 507 U.S. at 303, but it is also contrary to the courts' longstanding recognition that "immigration proceedings are civil, rather than criminal, in nature and their implementation fall primarily within the purview of the legislative and executive—not the judicial—branches." *Gonzalez*, 2017 WL 2559616, at * 8 (citations omitted).

b. **Procedural Due Process**

Likewise, procedural due process does not mandate the relief Plaintiffs seek. Plaintiffs incorrectly argue that, regardless of which statute provides detention authority, "Defendants violated due process in detaining Plaintiffs for one to three months or more without providing them any hearing," because "a delay of one to three months cannot be prompt under any standard." Opp. at 18; *id.* at 3 (same). Plaintiffs' attempt to frame the issue in this case as a question of what "prompt" entails misses the mark. The proper question for this Court is not how to define "prompt," but, rather, whether the existing procedures in place by statute and regulation satisfy the Due Process Clause.

Plaintiffs argue that the thirty days Cancino Castellar and Hernandez Aguas spent in custody prior to their initial hearing violated procedural due process, Opp. at 20-21, but Plaintiffs have failed to provide evidence that they were *unlawfully* detained because of a lack of additional process or that additional safeguards would reduce unlawful detention. First, there are a number of procedural safeguards already in place to ensure fundamental fairness to aliens detained for immigration purposes. Once an alien has been arrested without a warrant of arrest, an examining officer will determine if there is prima facie evidence that the arrested alien is in the United States in violation of the immigration laws. 8 C.F.R § 287.3(a)-(b). Except for aliens subject to expedited removal provisions of 8 U.S.C. § 1225(b)(1)(A), the examining officer will advise the alien "of the reasons for his or her arrest and the right to be represented at no expense to the Government," provide the alien "a list of the available free legal services provided by organizations and attorneys . . . located in the district where the hearing will be held," and "advise the alien that any statement made may be used against him or her in a subsequent hearing." 8 C.F.R. § 287.3(c). Moreover, the regulations provide that "a determination will be made within 48 hours of the arrest, except in the event of an emergency or other extraordinary circumstance . . . whether the alien will be continued in custody or released on bond." *Id.* § 287.3(d). An alien detained under 8 U.S.C. § 1226(a) who is denied bond by the examining officer may request a custody redetermination hearing conducted by an immigration judge at any time before the issuance of a final order of removal. 8 U.S.C. § 1226(a); 8 C.F.R. §§ 236.1(d)(1), 1003.19, 1236.1(d)(1). Indeed, both Plaintiffs Jose Orlando Cancino Castellar ("Cancino Castellar") and Ana Maria Hernandez Aguas ("Hernandez Aguas") availed themselves of this opportunity and checked this box upon their detention. Defs. Mot. at 9-10.

Plaintiffs argue that prompt presentment would reduce the risk of erroneous detention because, if there had been a bond hearing within the first thirty days, Cancino Castellar and Hernandez Aguas would have been released sooner. Opp. at 20-21 (noting that both spent over 30 days in custody "based solely on DHS's unilateral decision to deny release on bond"). However, both Cancino Castellar and Hernandez Aguas were released after bond hearings not because an immigration judge determined that their detention was *erroneous* because there was no probable cause to support their detention (i.e. the inquiry that would be conducted under Plaintiffs' requested probable cause hearing), but rather because the immigration judge determined they were not flight risks or a danger to the community. Plaintiffs have not pointed to any evidence to support their assertion that the lack of a "prompt" probable cause hearing or an initial master calendar hearing within a specific time causes "a significant risk of erroneous detention." Opp. at 20. Plaintiffs, therefore, are essentially requesting this court to impose the requirement of a bond hearing within, at most, thirty days. *See* Opp. at 19 ("[T]here is a significant risk of erroneous deprivation of physical liberty, because detainees who have legitimate claims to release are not given a hearing to assert them for one to three months."). However, and as discussed above, *supra*, thirty days in detention for aliens pending removal proceedings is not "prolonged detention" as defined by the Ninth Circuit. *See Rodriguez III*, 804 F.3d at 1079-81 (upholding *Rodriguez II*, and requiring a bond hearing for aliens detained under § 1226(a), § 1226(c), and § 1225(b) at the six month mark).

Moreover, requiring additional procedures such as a probable cause hearing would be burdensome to the government, especially because it will impact the immigration court's detained docket and interfere with immigration judges' ability to timely complete other detained cases. The procedures already in place are sufficient under the test laid out in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), *see* Defs. Mot. at 22-24; therefore, the Fifth Amendment's procedural due process clause does not mandate the relief Plaintiffs seek.

III. Plaintiffs fail to state a claim under the Administrative Procedure Act.

Finally, as discussed in Defendants' Motion to Dismiss, Defs. Mot. at 32-35, Plaintiffs' argument under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, likewise fails. Even assuming, *arguendo*, that Defendants' detention of Plaintiffs without a judicial determination of probable cause or a prompt initial master calendar hearing is "final agency action," *see* Defs. Mot. at 32-33 (discussing the requirements for APA review), Plaintiffs fail to demonstrate how such detention is unlawful under the APA. Congress has not provided aliens with a right to judicial review of DHS's probable cause determination or an initial hearing in immigration court within a specific timeframe. Congress explicitly omitted a probable cause hearing requirement for arrests made under 8 U.S.C. § 1357(a)(2), as evidenced by the contrast between 8 U.S.C. § 1357(a)(2) and 8 U.S.C. § 1357(a)(4). *See* Defs. Mot. at 32. Congress also set forth that removal proceedings (and not a probable cause hearing) are the sole and exclusive procedures for determining whether an alien is removable. *See* 8 U.S.C. § 1229a(a)(3). And Congress set a default that the first hearing should not be earlier than ten days after service of the NTA. *See* 8 U.S.C. § 1229(b). Indeed, there is no constitutional or statutory right to either an initial master calendar hearing within a specified time frame or a probable cause hearing before an immigration judge.

Therefore, Defendants' failure to provide such a hearing is not arbitrary, capricious, or an abuse of discretion in violation of the APA. *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004)) ("[T]he only agency action that can be compelled under the APA is action legally *required*.") (emphasis in original).

CONCLUSION

This Court should grant Defendants' Motion to Dismiss, under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The Constitution does not require ICE to obtain a probable cause determination from a neutral and detached magistrate nor does it require an initial master calendar hearing within a particular time frame. Taking the facts alleged in the complaint as true, Plaintiffs cannot establish that such a constitutional mandate exists.

DATED: July 3, 2017

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