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13
14 UNITED STATES DISTRICT COURT
15 SOUTHERN DISTRICT OF CALIFORNIA

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

20 Plaintiff-Petitioners,

21 v.

22 CHAD F. WOLF, Acting Secretary of
23 Homeland Security; *et al.*,

24 Defendant-Respondents.
25
26
27
28

Case No. 3:17-cv-00491-BAS-AHG

TIME: January 19, 2020

DATE: TBD

CTRM: 4B

Judge: Hon. Cynthia Bashant

NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT

**DEFENDANT-RESPONDENTS'
RESPONSE IN OPPOSITION TO
PLAINTIFF-PETITIONERS'
MOTION TO RECONSIDER
ORDER DISMISSING FOURTH
AMENDMENT CLAIMS**

I. INTRODUCTION

The Court should deny Plaintiffs’ Motion to Reconsider Orders Dismissing Fourth Amendment Claims (ECF No. 137), because the two decisions Plaintiffs rely on are not an “intervening change in the controlling law.” The Ninth Circuit’s recent opinion in *Gonzalez v. United States Immigration & Customs Enf’t*, 975 F.3d 788 (9th Cir. 2020) is consistent with this Court’s well-reasoned order dismissing Plaintiffs’ claims for lack of jurisdiction under 8 U.S.C. § 1252(b)(9). See Order Granting Defendants’ Motion to Dismiss the Complaint (“Dismissal Order”), ECF No. 49; see also Order Granting in Part and Denying in Part Motion for Reconsideration (“Reconsideration Order”), ECF No. 56. Moreover, the Supreme Court’s recent opinion in *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020), to the extent it is applicable here at all, only serves to reinforce this Court’s proper determination that, pursuant to 8 U.S.C. § 1252(g), it lacks jurisdiction to consider Plaintiff Gonzalez’s Fourth Amendment Claim. See Dismissal Order; Reconsideration Order.

In *Gonzalez*, the Ninth Circuit concluded that § 1252(b)(9) did not preclude a district court from exercising jurisdiction over a class of aliens challenging their detention pursuant to an immigration detainer under the Fourth Amendment. That case involved an entirely different class of aliens—those held in federal, state, or local law enforcement custody without on-going removal proceedings, and it dealt with fundamentally different Fourth Amendment claims regarding a completely different Government policy—the issuance and use of Department of Homeland Security (DHS) immigration detainers. The nature of apprehension and the employment of DHS detainers involved there are unique to the claims at issue in *Gonzalez* and differ markedly from the DHS detention and removal processes that Plaintiffs are attempting to improperly challenge in this case. As this Court previously noted, Plaintiffs’ Fourth Amendment claim directly relates to their removal proceedings and the removal process, and, thus, § 1252(b)(9) strips this Court of jurisdiction over that claim.

Moreover, in *Regents*, the Supreme Court concluded that a claim challenging the rescission of an immigration relief program was not subject to § 1252(g) because it did not constitute a challenge to the decision to commence (or not commence) removal proceedings at all. That is simply not true in this case, and this Court already properly determined that § 1252(g) precludes Plaintiff Gonzalez’s Fourth Amendment Claim because it is in actuality a *de facto* challenge to the initiation of his expedited removal proceedings.

Twice already, this Court has correctly determined that §§ 1252(b)(9) and (g) bar Plaintiffs’ Fourth Amendment claim, and neither *Gonzalez* nor *Regents* undermines this Court’s analysis. Because Plaintiffs have not identified an “intervening change in the controlling law,” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009), the Court should emphatically reject Plaintiffs’ third attempt to, yet again, bring claims that are not properly before this Court and deny Plaintiffs’ request to reconsider its Dismissal Order and Reconsideration Order.¹

II. BACKGROUND

Plaintiffs’ Fourth Amendment claim has not changed since the Complaint. As this Court previously described it, “[t]he basis of Plaintiffs’ Fourth Amendment claims is that DHS officers make decisions to keep immigrants in custody beyond 48 hours of initial apprehension without prompt judicial review by an immigration judge

¹ Notably, Plaintiffs’ instant motion consistently relies on case law that was available to them at the time of their 2018 reconsideration motion (ECF Nos. 50, 55) and/or that this Court already addressed in rejecting Plaintiffs’ prior arguments (ECF Nos. 49; 56). See ECF No. 137-1 at 7-11 (citing *Jennings v. Rodriguez*, 138 S. Ct. 830, 840 (2018); *Aguilar v. ICE*, 510 F.3d 1, 11 (1st Cir. 2007); *Hernández v. Gonzales*, 424 F.3d 42, 42–43 (1st Cir. 2005); *Alcala v. Holder*, 563 F.3d 1009, 1013 (9th Cir. 2009); *INS v. Chadha*, 462 U.S. 919, 938 (1983); *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975); *United States v. Crews*, 445 U.S. 463, 474 (1980); *Tejeda-Mata v. INS*, 626 F.2d 721, 725 (9th Cir. 1980); *Yiu Fong Cheung v. INS*, 418 F.2d 460, 463 (D.C. Cir. 1969)). See also ECF No. 137-1 at 13-14 (discussing *Sissoko v. Rocha*, 509 F.3d 947 (9th Cir. 2007)). Because these cases do not constitute “intervening change in the controlling law” that undermines the Court’s well-reasoned decision dismissing Plaintiffs’ Fourth Amendment claim, Defendants do not address Plaintiffs’ belated reliance on them.

1 of the justification for detention.” ECF No. 49 at 14 (citing ECF No. 1 at ¶¶ 4, 46, 81–
 2 84). And despite Plaintiffs’ assertions to the contrary in their latest motion, Plaintiffs’
 3 Fourth Amendment claim seeks relief in the form of a hearing “by which a detained
 4 individual’s removability from the United States is immediately reviewable by an
 5 [immigration judge].” ECF No. 56 at 13 (“[T]he relief Plaintiffs request is the premise
 6 of removal proceedings—assessing whether an individual is removable from the
 7 United States and the government’s evidence on that issue.”).

8 On February 8, 2018, this Court dismissed the Complaint after determining that
 9 it lacked jurisdiction over Plaintiffs’ claims under 8 U.S.C. §§ 1252(a)(5) and (b)(9).
 10 ECF No. 49. Based on *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), Plaintiffs asked
 11 the Court to reconsider its dismissal decision. ECF Nos. 50, 55. The Court affirmed
 12 that it lacked jurisdiction over Plaintiffs’ Fourth Amendment claim. ECF No. 56 at
 13 15. Now, Plaintiffs once again ask the Court to resurrect their Fourth Amendment
 14 claim. ECF No. 137.

15 III. ARGUMENT

16 A. Plaintiffs’ Fourth Amendment Claim Remains Barred by 8 U.S.C. 17 § 1252(b)(9).

18 Plaintiffs ask this Court to revive their Fourth Amendment claim because, they
 19 contend, the recent *Gonzalez* decision now provides district-court jurisdiction over
 20 this claim. ECF No. 137-1 at 3-5. But Plaintiffs’ reliance on *Gonzalez* is misplaced,
 21 as that case involved a differently-situated class of individuals bringing a
 22 fundamentally distinct Fourth Amendment claim. Instead, as this Court already
 23 concluded, Plaintiffs’ Fourth Amendment claim directly relates to their removal
 24 proceedings and, therefore, § 1252(b)(9) plainly precludes it.

25 1. *Gonzalez involved a different Fourth Amendment claim and does not* 26 *support Plaintiffs’ argument in this case.*

27 Plaintiffs’ Motion relies extensively on *Gonzalez* to argue that their previously-
 28 dismissed Fourth Amendment claim now falls outside the scope of § 1252(b)(9),

1 which provides that judicial review of “all questions of law and fact,” including
2 constitutional questions, “arising from any action taken or proceeding brought to
3 remove an alien from the United States” is only available via a petition for review of
4 a final order of removal. But Plaintiffs’ challenge here is factually and legally distinct
5 from the one at issue in *Gonzalez*. The *Gonzalez* plaintiffs were apprehended by law
6 enforcement for criminal offenses and were challenging their confinement pursuant
7 to an Immigration and Customs Enforcement (ICE) immigration detainer. A detainer
8 requests that a federal, state, or local law enforcement agency assist in transferring
9 custody of an alien whom officers have found probable cause of removability, by
10 temporarily maintaining custody over that alien to allow time for ICE officers to
11 arrive. *See Gonzalez*, 975 F.3d at 797; *see also* 8 C.F.R. § 287.7. That Fourth
12 Amendment challenge to the use of ICE detainers involved concerns unique to the
13 claims at issue in *Gonzalez* and raised legal and factual questions different from the
14 DHS removal processes that Plaintiffs are attempting to challenge in this case.

15 The Ninth Circuit concluded that the *Gonzalez* plaintiffs’ probable-cause claim
16 fell outside the claim-channeling provision of § 1252(b)(9). 975 F.3d at 810.
17 However, the Ninth Circuit explicitly based this conclusion on two key factors that
18 are not present here. First, the court noted that the plaintiffs were “not challenging
19 any removal proceedings” because the *Gonzalez* class explicitly excluded “any
20 individual subject to ongoing removal proceedings.” *Id.* at 810. Second, the court
21 noted that the plaintiffs were not challenging immigration detention in ICE custody.
22 Instead, they challenged confinement in the custody of a separate law enforcement
23 agency pursuant to an immigration detainer, which is distinct from an administrative
24 warrant for the arrest of an individual on civil immigration charges. *Id.* Indeed, the
25 court specifically referenced evidence indicating that up to 80% of individuals for
26 whom ICE issues immigration detainers are not ultimately taken into ICE custody. *Id.*
27 at 800. For these reasons, the Ninth Circuit determined that “claims challenging the
28 legality of detention pursuant to an immigration detainer are independent of the

1 removal process.” *Id.* at 810.² Thus, the Ninth Circuit concluded, § 1252(b)(9) was
 2 not a bar to jurisdiction over the *Gonzalez* class members’ claims, because none
 3 “ask[s] for review of an order of removal, the decision to seek removal, or the process
 4 by which removability will be determined.” *Id.* (citing *Regents*, 140 S. Ct. at 1907).

5 The opposite is true in this case. First, Plaintiffs here are individuals who were
 6 placed in removal proceedings or expedited removal proceedings and they seek to
 7 represent a class consisting solely of individuals who are or will be placed in such
 8 proceedings. ECF No. 1 ¶¶ 68, 69. Second, Plaintiffs here were detained in DHS
 9 custody, not in the custody of some other federal, state, or local law enforcement
 10 agency.³ Third, Plaintiffs here are not challenging their confinement pursuant to an
 11 immigration detainer but are instead seeking an immediate hearing to assess whether
 12 they are removable from the United States and DHS’s evidence on that issue.
 13 Plaintiffs assert that these differences amount to “a distinction without a difference,”
 14 ECF No. 137-1 at 10, but they are in fact distinctions that make a significant factual
 15 and legal difference. Plaintiffs fail to recognize that each of these differences
 16 contradicts the Ninth Circuit’s reasons for concluding that the Fourth Amendment

18 ² Citing dicta in *Gonzalez*, Plaintiffs assert that the court rendered an opinion on the
 19 preclusive effect of § 1252(b)(9) on non-detainer detention challenges. See ECF No.
 20 137-1 at 10-11. Plaintiffs rely on the court’s decision to remand the “*Gerstein* claim”
 21 for further consideration in light of a new DHS policy requiring that an immigration
 22 detainer must be accompanied by an administrative arrest warrant. *Gonzalez*, 975
 23 F.3d at 826 n.27. A closer read, however, reveals that the court explicitly declined
 24 to consider the issue because the district court had not addressed it. *Id.* (“Because
 25 we are a court of review and not first view . . . we decline to consider the issue
 26 here.”). Thus, the court certainly did not weigh in—much less issue a binding
 27 opinion—on the applicability of § 1252(b)(9) to claims challenging apprehension
 28 pursuant to an administrative warrant. Regardless, as discussed below, unlike in
Gonzalez, Plaintiffs’ claim here goes directly to the heart of their removal
 proceedings, the decision to seek removal, and the process by which their
 removability is determined. Consequently, Plaintiffs’ expansive interpretation of the
 remand instructions in *Gonzalez* is mistaken.

³ Indeed, the certified class in *Gonzalez* is in many ways the complete inverse of the
 class Plaintiffs currently seek to certify with respect to their Fifth Amendment claim,
 which explicitly *excludes* individuals in criminal law enforcement custody as well
 as those who were *not* placed in either removal proceedings or expedited removal
 proceedings. Compare *Gonzalez*, 975 F.3d at 801 & n.7 with ECF No. 125-1 at 20
 and ECF No. 140 at 10 n.3.

1 claims brought in *Gonzalez* were independent of and collateral to the removal process
 2 and thus outside § 1252(b)(9)’s scope. Unlike in *Gonzalez*, Plaintiffs seek to bring
 3 claims on behalf of individuals in removal proceedings and are raising a claim that
 4 goes directly to the heart of those removal proceedings, the decision to seek removal,
 5 and the process by which their removability is determined. Accordingly, Plaintiffs’
 6 attempt to use *Gonzalez* to revive their long-dismissed Fourth Amendment claim must
 7 fail.

8 ***2. This Court already properly determined that Plaintiffs’ Fourth***
 9 ***Amendment claim directly relates to their removal proceedings.***

10 In an attempt to bypass this Court’s prior holdings, Plaintiffs’ motion suggests
 11 that *Gonzalez* has narrowed § 1252(b)(9). But *Gonzalez* merely reiterated the existing
 12 rule that “claims that are independent of or collateral to the removal process do not
 13 fall within the scope of § 1252(b)(9).” *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1032 (9th
 14 Cir. 2016); *Gonzalez*, 975 F.3d at 810. And as this Court already determined, the
 15 probable cause hearing that Plaintiffs seek “cannot possibly occur without
 16 confirmation by an immigration judge of the charges of removability against an
 17 immigrant,” and “[t]hat confirmation inevitably bleeds into aspects of the initial
 18 removal hearing.” ECF No. 49 at 27 (citing 8 C.F.R. § 1240.10(c)); *id.* at 30, n.7
 19 (referencing the Ninth Circuit’s “independent or collateral” standard from *J.E.F.M.*).
 20 For this reason, this Court properly found “insufficient basis to conclude that
 21 Plaintiffs’ Fourth Amendment claims are independent of or collateral to removal
 22 proceedings.” *Id.* Put simply, unlike the claim at issue in *Gonzalez*—which did not
 23 involve individuals in ongoing removal proceedings and did not directly relate to the
 24 removal process—Plaintiffs’ Fourth Amendment claim here is a direct challenge to
 25 the heart of the removal process and both arises from and is inextricably linked with
 26 their removal proceedings. See ECF No. 56 at 13 (“Plaintiffs cannot tenably argue
 27 that the Court may grant a remedy for this claim ‘without impeding removal
 28 proceedings’ [. . .] the relief Plaintiffs request is the premise of removal proceedings—

1 assessing whether an individual is removable from the United States and the
 2 government's evidence on that issue. [. . .] This issue is clearly cognizable in the PFR
 3 process."). Stated differently, nothing in *Gonzalez* disturbs the Court's additional
 4 conclusion that § 1252(b)(9) bars Plaintiffs' claim because the remedy sought would
 5 "impede removal proceedings." *See id.* at 13 (citing *Delgado v. Quarantillo*, 643 F.3d
 6 52, 55 (2d Cir. 2011) ("[W]hether the district court has jurisdiction will turn on the
 7 substance of the relief that a plaintiff is seeking.")).

8 Accordingly, the Court already properly dismissed and refused to reinstate
 9 Plaintiffs' Fourth Amendment claim and should reject Plaintiffs' latest attempt to
 10 resurrect their improper challenge to the removal process.

11 **B. Plaintiff Gonzalez's Fourth Amendment Claim Remains Barred by 8**
 12 **U.S.C. § 1252(g).**

13 In a further attempt to resurrect their impermissible Fourth Amendment claim,
 14 Plaintiffs rely upon *Regents* to ask this Court to reconsider its prior determination that
 15 Plaintiff Gonzalez's Fourth Amendment claim constitutes a challenge to the decision
 16 to place him in expedited removal proceedings and is therefore barred by § 1252(g).
 17 ECF No. 137-1 at 9-12. But Plaintiffs' reliance on *Regents* is sorely misplaced. That
 18 case challenged the rescission of an immigration relief program and did not involve a
 19 challenge to removal proceedings or to any decision to commence proceedings,
 20 adjudicate a case, or execute a removal order. *Regents*, therefore, is not applicable to
 21 this case. To the extent *Regents* bears on this case at all, it only further reinforces this
 22 Court's proper conclusion that § 1252(g) bars Plaintiff Gonzalez's claim because he
 23 is in effect challenging the decision to commence expedited removal proceedings
 24 against him.

25 **1. *Regents* supports the Court's previous decision to dismiss Gonzalez's**
 26 ***Fourth Amendment claim.***

27 Plaintiff Gonzalez primarily relies on *Regents* to argue that his previously-
 28 dismissed Fourth Amendment claim now falls outside the scope of § 1252(g), which

1 provides that “no court shall have jurisdiction to hear any cause or claim by or on
2 behalf of any alien arising from the decision or action [. . .] to commence proceedings,
3 adjudicate cases, or execute removal orders against any alien.” But *Regents* is
4 inapplicable to this case because Plaintiff Gonzalez’s challenge here bears no relation
5 to the one at issue in *Regents*. Indeed, that case did not involve a Fourth Amendment
6 claim, a challenge to detention, or a challenge to the initiation of removal proceedings.
7 Instead, *Regents* involved an Administrative Procedure Act (APA) challenge to an
8 executive memorandum rescinding an immigration relief program known as Deferred
9 Action for Childhood Arrivals (DACA). That APA challenge to the rescission of an
10 immigration relief program involved a completely different kind of claim from the
11 challenge to expedited removal proceedings that Plaintiff Gonzalez seeks to bring in
12 this case.

13 Plaintiffs correctly note that the Supreme Court in *Regents* concluded that a
14 challenge related to the DACA program did not fall within the jurisdiction-limiting
15 provision of § 1252(g). ECF No. 137-1 at 13. But that conclusion flowed logically
16 from the Supreme Court’s finding that the DACA-rescission claim was *not* a
17 challenge to the decision to commence (or not commence) removal proceedings at all.
18 *Regents*, 140 S. Ct. at 1906-07. The Court reasoned that DACA is “more than simply
19 a non-enforcement policy”; rather, it is a “program for conferring affirmative
20 immigration relief.” *Id.* at 1906. In addition to the deferral of certain enforcement
21 actions (*e.g.*, removal proceedings), DACA recipients may receive authorization to
22 work in the United States and are eligible for Social Security and Medicare. *Id.* This
23 is a critical distinction, because—unlike the decision to take enforcement action—
24 “access to these types of benefits is an interest courts often are called upon to protect.”
25 *Id.* (internal citation omitted). For this reason, the “DACA rescission, which revokes
26 a deferred action program with associated benefits, is not a decision to ‘commence
27 proceedings,’ much less to ‘adjudicate’ a case or ‘execute’ a removal order.” *Id.* at
28 1907. Therefore, § 1252(g) did not bar the claim. *Id.*

1 This logic simply does not apply to Plaintiff Gonzalez’s claim here. Plaintiff
 2 Gonzalez does not challenge the rescission of DACA or any other executive program.
 3 He does not challenge the denial of Social Security or Medicare. He does not
 4 challenge the denial of work authorization or any immigration-related benefit. Rather,
 5 he challenges his mandatory detention for expedited removal proceedings, which
 6 arises directly from the decision to take an enforcement action against him by
 7 commencing immigration proceedings. And, accordingly, his claim squarely falls
 8 within § 1252(g)’s framework. Put simply, *Regents* did nothing to disturb the
 9 applicability of § 1252(g) to situations where—as with Plaintiff Gonzalez—a plaintiff
 10 seeks to bring a challenge directly arising from the decision to commence removal
 11 proceedings.

12 ***2. This Court already correctly determined that Gonzalez’s Fourth***
 13 ***Amendment claim is an improper challenge to the decision to***
 14 ***commence his expedited removal proceedings.***

15 In order to circumvent this Court’s prior decisions, Plaintiffs suggest that
 16 *Regents* has “[i]lluminated” the narrow scope of § 1252(g)’s jurisdictional limitation.
 17 But, contrary to Plaintiffs’ suggestions, *Regents* did not announce a new restraint on
 18 § 1252(g). Instead, the Supreme Court merely echoed its prior holdings that § 1252(g)
 19 is not “a general jurisdictional limitation” barring “all claims arising from deportation
 20 proceedings,” but does prohibit review of claims “arising from” the decision to
 21 commence proceedings, adjudicate cases, or execute removal orders. *Id.* at 1907
 22 (citing *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482
 23 (1999)). Because the DACA decision at issue in *Regents* rescinded an executive
 24 deferred action program with associated benefits, § 1252(g) simply did not apply. *Id.*
 25 Plaintiffs’ attempt to graft the *Regents* reasoning onto this case fails because, as this
 26 Court already properly concluded, Plaintiff Gonzalez’s Fourth Amendment Claim is
 27 clearly and necessarily a challenge to the decision to commence proceedings.

28 The Ninth Circuit has long interpreted § 1252(g) to preclude challenges to
 detention where the detention directly followed from the decision to commence

proceedings. *See Sissoko v. Rocha*, 509 F.3d 947 (9th Cir. 2007) (*Sissoko III*). That is precisely what happened here. Upon his apprehension, Plaintiff Gonzalez was initially placed in expedited removal proceedings. *See* ECF No. 28-2 Ex. N. Therefore, he was automatically subject to mandatory detention under 8 U.S.C. §§ 1225(b)(1) and (b)(2). *See* ECF No. 49 at 14-15. For that reason, this Court concluded that § 1252(g) barred Plaintiff Gonzalez’s Fourth Amendment claim because his “detention arose from [the] decision to commence expedited removal proceedings.” ECF No. 49 at 15 (quoting *Sissoko III*, 509 F.3d at 949). That is true for all individuals detained pursuant to 8 U.S.C. §§ 1225 and 1226(c), both of which *mandate* detention during certain administrative immigration proceedings. 8 U.S.C. §§ 1225(b)(1)(A)(i), 1225(b)(1)(B)(ii)-(iii), 1226(c)(1); 8 C.F.R. § 1003.19(h)(2)(i)(D). Nothing about the *Regents* opinion—which did not involve a challenge to detention, to the initiation of removal proceedings, or to expedited removal proceedings—alters this Court’s correct analysis of this issue. For Plaintiff Gonzalez, and all similarly situated individuals subject to mandatory detention, § 1252(g) prevents this Fourth Amendment claim because their initial detention arises directly from the decision to commence removal proceedings. Accordingly, the Court should deny Plaintiff Gonzalez’s latest attempt to resurrect his improper challenge to the decision to commence his expedited removal proceedings.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs have not demonstrated an “intervening change in the controlling law” that would justify reconsideration of this Court’s previous decision dismissing Plaintiffs’ Fourth Amendment Claims for lack of jurisdiction. Accordingly, Defendants respectfully request that this Court deny Plaintiffs’ motion to reconsider.

1 DATED: January 5, 2021

Respectfully Submitted,

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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 January 5, 2021 to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Civ. L.R. 5.4(d). Any other counsel of record will be served by U.S. mail or hand delivery.

DATED: January 5, 2021

s/ Matthew P. Seamon

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