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16 UNITED STATES DISTRICT COURT
17 SOUTHERN DISTRICT OF CALIFORNIA

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

21 Plaintiffs-Petitioners,

22 vs.
23

24 JOHN F. KELLY, Secretary of
25 Homeland Security, *et al.*,

26 Defendants-Respondents.
27
28

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

TIME: TBD

DATE: July 18, 2017

CTRM: 4B (Schwartz)

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

DEFENDANTS-RESPONDENTS'
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF THEIR
MOTION TO DISMISS COMPLAINT

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INTRODUCTION

In this immigration case, Plaintiffs ask the Court to fundamentally re-write the statutory and regulatory framework governing the detention of aliens that the Department of Homeland Security is seeking to remove from the United States. In so doing, Plaintiffs ask the Court to ignore decades of precedent recognizing the constitutional authority of immigration officers to detain aliens pending removal. Relatedly, Plaintiffs ask the Court to ignore the distinction between civil immigration proceedings and criminal proceedings, and attempt to improperly import the Fourth Amendment's criminal procedure requirements into immigration proceedings in a manner that at least one panel of the Ninth Circuit has explicitly rejected.

In essence, Plaintiffs contend that the Constitution requires that aliens who are detained for removal proceedings must be presented before an immigration judge for a probable cause hearing, or for an initial master calendar hearing, within 48 hours of detention. They bring claims based on the Fifth Amendment's Due Process Clause and the Fourth Amendment's prohibition against unreasonable seizures. They also argue that the lack of such presentment violates the Administrative Procedure Act (as "arbitrary and capricious"), 5 U.S.C. § 702, 706(1), (2)(A)-(D). Complaint ("Compl."), ECF No. 1.

This Court should dismiss this case in its entirety for several reasons. First, this Court lacks jurisdiction because Congress clearly stated its intent to foreclose district court adjudication of constitutional claims arising from removal proceedings through the jurisdiction channeling provisions of the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1252(a)(5), (b)(9), and (g). Plaintiffs have a perfectly adequate forum in which to raise their claims, the Ninth Circuit Court of Appeals, and the INA precludes this Court from hearing these claims in the first instance.

Second, even if this Court is inclined to adjudicate the case on the merits, there is no statutory or constitutional right for detained aliens to receive a probable cause determination by a judicial officer or immigration judge within 48 hours of their detention. Immigration detention is civil, not criminal, in nature. The law regarding civil immigration detention is

1 fundamentally distinct from the law regarding criminal detention. Civil immigration
 2 detention serves an entirely different purpose from criminal detention. Therefore, in the
 3 context of immigration detention, the Constitution does not require presentment before a
 4 neutral judicial officer to determine probable cause for detention within 48 hours. Rather,
 5 the existing statutory and regulatory framework of U.S. immigration law, which, among
 6 other provisions, gives immigration officers the authority to apprehend, inspect, and detain
 7 aliens, provides Plaintiffs with the protections to which they are due under the Fourth and
 8 Fifth Amendments to the Constitution.

9 Finally, there is no statutory or constitutional right for detained aliens to receive an
 10 initial master calendar hearing within 48 hours of detention. Indeed, the INA explicitly
 11 states that an initial hearing should not normally take place within 10 days after service of
 12 a notice to appear, regardless of whether an alien is in detention, in order for the alien to
 13 obtain counsel.

14 BACKGROUND

15 I. PROCEDURAL BACKGROUND

16 On March 9, 2017, Plaintiffs filed their complaint, which challenges Defendants'
 17 policy of detaining aliens without presenting them for an initial master calendar hearing
 18 before an immigration judge or without obtaining “judicial review”¹ of probable cause for
 19 their detention within 48 hours. Compl. at ¶¶ 1-4. Specifically, they claim that being
 20 detained for more than 48 hours without receiving an initial master calendar hearing
 21 “prevent[s] them from receiving [] important protections and advisals” such as information
 22 about their status, custody, the charges against them, and their rights. *Id.* at ¶ 3. They also
 23 claim that being detained for more than 48 hours without judicial review of probable cause
 24 “results in unreasonable extended detention” for Plaintiffs. *Id.* at ¶ 7.

25 Plaintiffs also filed a motion for class certification. Motion for Class Cert., ECF No.
 26 2. Plaintiffs seek to represent “[a]ll individuals in the Southern District of California, other

27 ¹ Plaintiffs’ clarify that the “judicial review” they seek includes review by an immigration
 28 judge. Compl. at ¶ 4.

than those with final removal orders, who are or will be detained by DHS more than 48 hours without a hearing before an immigration judge or judicial review of whether their detention is justified by probable cause.” Compl. at ¶ 68. Plaintiffs are detained under one of two general immigration detention statutes that govern the detention of aliens without final orders of removal. *See* 8 U.S.C. § 1225(b) (authorizing mandatory detention of aliens seeking admission) (Plaintiff Gonzalez); 8 U.S.C. § 1226(a) (authorizing detention of aliens pending a determination of removability) (Plaintiffs Cancino Castellar and Hernandez Aguas). *See* Compl. at ¶¶ 47-49, 68.

II. STATUTORY AND REGULATORY BACKGROUND

For nearly a century, the immigration laws have authorized immigration officials to charge aliens as removable from the country, to arrest aliens subject to removal, and to detain aliens for removal proceedings without securing a judicial warrant or judicial review of probable cause of removability. *See Abel v. United States*, 362 U.S. 217, 232-37 (1960) (discussing longstanding administrative arrest procedures in deportation cases). Under the INA, DHS’s authority to detain aliens who have not yet been ordered removed² stems primarily from two sections of Title 8: section 1225, which governs the detention of inadmissible arriving aliens; and section 1226, which allows for the detention of any alien in removal proceedings.³ As described below, the time that any particular alien spends detained prior to appearing before an immigration judge may vary greatly depending on the statute authorizing detention, and the facts of each individual alien’s case.

A. *DHS’s Authority to Arrest*

Immigration officials are empowered to perform the warrantless arrest of:

[A]ny alien in the United States, if he has reason to believe 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, but the alien arrestee shall be taken without unnecessary delay . . . before an officer of the

² Section 1231 of Title 8 governs the detention of aliens who have been ordered removed.

³ Some aliens are also detained under 8 U.S.C. § 1228 (providing for expedited removal of aliens convicted of committing aggravated felonies).

1 Service having authority to examine aliens as to their right to enter or remain
2 in the United States.

3 8 U.S.C. § 1357(a)(2). “Reason to believe” has been equated with the constitutional
4 requirement of probable cause. *See Tejeda-Mata v. I.N.S.*, 626 F.2d 721, 725 (9th Cir. 1980)
5 (internal citations omitted).

6 The regulations implementing this statute explain that “an alien arrested without a
7 warrant of arrest . . . will be examined by an officer other than the arresting officer.” 8
8 C.F.R. § 287.3(a). “If the examining officer is satisfied that there is prima facie evidence
9 that the arrested alien . . . is present in the United States in violation of the immigration
10 laws, the officer will either refer the case to an immigration judge for further inquiry . . . ,
11 order the alien removed . . . , or take whatever other action may be appropriate or required
12 under the laws or regulations applicable to the particular case. *Id.* at § 287.3(a)-(b). DHS
13 ordinarily will make an initial determination within 48 hours of the apprehension whether
14 the alien will remain in custody, be paroled, be released on bond or released on
15 recognizance.⁴ 8 C.F.R. § 287.3(d).

16 ***B. Detention of aliens under section 1225***

17 Section 1225 applies to aliens seeking admission to the United States, including
18 arriving aliens and those subject to expedited removal 8 U.S.C. § 1225(b); 8 C.F.R.
19 § 235.3(b). If an immigration officer determines that an alien seeking admission lacks valid
20 documents or is inadmissible due to fraud or misrepresentation, the officer “shall order the
21 alien removed from the United States without further hearing.” 8 U.S.C. § 1225(b)(1)(A)(i);
22 *see also* 8 §§ U.S.C. 1182(a)(6)(C) and (7). If the alien indicates an intention to apply for
23 asylum or expresses a fear of persecution or torture, an asylum officer must determine
24 whether the alien has a credible fear. 8 U.S.C. § 1225(b)(1)(A)(ii) and (B); 8 C.F.R.

25
26
27 ⁴ A custody determination is made within 48 hours of the arrest “except in the event of an
28 emergency or other extraordinary circumstances in which case a determination will be made
within an additional reasonable period of time.” 8 C.F.R. § 287.3(d)

§§ 208.30, 235.3(b)(4). If such an alien is found to lack (or never asserts) a credible fear, he “shall be detained” until removed. 8 U.S.C. § 1225(b)(1)(A)(i), (B)(iii). If he is found to have a credible fear, he “shall be detained for further consideration of the application for asylum” by an immigration judge. *Id.* § 1225(b)(1)(B)(ii).⁵

C. Detention of aliens under section 1226

The general detention authority for aliens in removal proceedings is governed by 8 U.S.C. § 1226(a). Under this section, “an alien may be arrested and detained,” on issuance of a warrant, “pending a decision on whether the alien is to be removed from the United States.” 8 U.S.C. § 1226(a). Aliens detained under 8 U.S.C. § 1226(a) are automatically assessed for bond eligibility, and may be released on bond if “the alien. . . demonstrate[s] to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding.” 8 C.F.R. § 236.1(c)(8). An alien who is denied bond may request a custody redetermination hearing conducted by an immigration judge at any time before the final order of removal is issued. 8 U.S.C. § 1226(a); 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1), 1003.19; *see also Matter of Sanchez*, 20 I. & N. Dec. 223, 225 (BIA 1990).

Certain criminal and terrorist aliens are held pursuant to 8 U.S.C. 1226(c),⁶ which prohibits their release during their removal proceedings. Congress enacted this mandate

⁵ Immigration judges do not have authority to release aliens arriving at a port of entry on bond, although these aliens may be eligible for parole, pursuant to 8 U.S.C. § 1182(b)(5). *See* 8 C.F.R. § 1003.19(h)(2)(i)(B) (“[A]n immigration judge may not redetermine conditions of custody imposed by [DHS] with respect to . . . [a]rriving aliens in removal proceedings.”); *but see Rodriguez v. Robbins* (“*Rodriguez III*”), 804 F.3d 1060, 1082-84 (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*”) and requiring a bond hearing for aliens detained under § 1225(b) at the six month mark).

⁶ None of the named plaintiffs are detained under 8 U.S.C. § 1226(c). However, Plaintiffs’ proposed class includes “all individuals . . . other than those with final removal orders, who are or will be detained by DHS more than 48 hours without a hearing before an immigration judge . . .” Compl. at ¶ 68.

1 “justifiably concerned that deportable criminal aliens who are not detained continue to
 2 engage in crime and fail to appear for their removal hearings in large numbers.” *Demore v.*
 3 *Kim*, 538 U.S. 510, 513 (2003). An individual detained under § 1226(c) may ask an
 4 immigration judge to reconsider whether the mandatory detention provision applies to him.
 5 See 8 C.F.R. § 1003.19(h)(2)(ii). At this hearing, called a “Joseph hearing,” a detainee “may
 6 avoid mandatory detention by demonstrating that he is not an alien, was not convicted of
 7 the predicate crime, or that the [DHS] is otherwise substantially unlikely to establish that
 8 he is in fact subject to mandatory detention.” *Demore*, 538 U.S. at 514 n. 3; see also *Matter*
 9 *of Joseph*, 22 I. & N. Dec. 799 (BIA 1999). Immigration judges, however, do not have
 10 authority to release aliens detained under § 1226(c) on bond. See 8 C.F.R.
 11 § 1003.19(h)(2)(i)(D) (“[A]n immigration judge may not redetermine conditions of custody
 12 imposed by [DHS] with respect to . . . [a]liens in removal proceedings subject to section
 13 236(c)(1) of the Act”); but see *Rodriguez v. Robbins* (“*Rodriguez III*”), 804 F.3d 1060,
 14 1079-81 (9th Cir. 2015), cert. granted sub nom. *Jennings v. Rodriguez*, 136 S. Ct. 2489
 15 (June 20, 2016) (No. 15-1204), (upholding *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir.
 16 2013) (“*Rodriguez II*”), and requiring a bond hearing for aliens detained under § 1226(c)
 17 at the six month mark).

18 **D. Removal Proceedings before an Immigration Judge**

19 With certain exceptions, such as expedited removal proceedings, removal
 20 proceedings under section 240 of the INA, 8 U.S.C. § 1229a, provide the “sole and exclusive
 21 procedure” for determining whether an alien may be removed from the United States. 8
 22 U.S.C. § 1229a(a)(3). Every removal proceeding conducted under this section is
 23 commenced by DHS’s filing of a notice to appear (“NTA”) with the immigration court,
 24 which is part of the U.S. Department of Justice Executive Office for Immigration Review
 25 (“EOIR”). 8 C.F.R. § 1239.1(a).

26 The first removal hearing in immigration court is referred to as the “initial master
 27 calendar hearing.” By statute, “in order to allow the alien time to obtain representation . . .
 28 the first hearing date in proceedings under section 240 . . . shall not be scheduled earlier

than 10 days after the service of the notice to appear, unless the alien requests an earlier hearing date.” 8 U.S.C. § 1229(b)(1). Likewise, if an alien is *pro se* and requests more time to obtain the assistance of an attorney at the initial master calendar hearing, the immigration judge must grant a continuance. *Matter of C-B-*, 25 I. & N. Dec. 888, 889 (BIA 2012); *cf. Criollo v. Lynch*, 647 F. App’x 731, 732 (9th Cir. 2016) (agreeing with the BIA’s holding in *Matter of C-B-* that an immigration judge must advise a respondent of forms of relief to which he is eligible, such as voluntary departure). “The immigration judge shall require the [alien] to plead to the notice to appear by stating whether he or she admits or denies the factual allegations and his or her removability under the charges contained therein.” 8 C.F.R. § 1240.10(c). When an “immigration judge does not accept an admission of removability, he or she shall direct a hearing on the issues.” *Id.* A separate hearing called a merits hearing is conducted to determine any issues of removability and to hear any application for relief or protection from removal filed by the alien.

III. THE NAMED PLAINTIFFS⁷

A. *Jose Orlando Cancino Castellar*

Jose Orlando Cancino Castellar (“Cancino Castellar”) is a native and citizen of Mexico. Compl. at ¶ 9. On February 17, 2017, he was taken into ICE custody. *Id.* at ¶ 47. He was detained in the Otay Mesa Regional Detention Facility on February 18, 2017.⁸ *Id.* On February 21, 2017, DHS executed a warrant for arrest and issued a notice of custody determination (Form I-286), on which Cancino Castellar marked the box to request an Immigration Judge (“IJ”) custody review. *Id.*; *see also* Exhibit (“Exh.”) D, Form I-286. Also on February 21, 2017, ICE issued an NTA charging Cancino Castellar with removability as

⁷ Plaintiffs Cancino Castellar and Hernandez Aguas are aliens detained under § 1226(a). Plaintiff Gonzalez is an arriving alien seeking admission who is detained pursuant to 8 U.S.C. § 1225(b). These distinctions are one of the many reasons class certification is not appropriate here. *See* Opposition to Mot. for Class Certification, at 23-25.

⁸ Cancino Castellar was held at Otay Mesa as a “Room and Board” from Friday Feb. 17 through Tuesday Feb. 21 because it was a holiday weekend. He was processed with a NTA on the 1st business day following apprehension, Feb 21, 2017. Exh. A, NTA.

1 an alien present in the United States without being admitted or paroled, under 8 U.S.C.
 2 § 1182(a)(6)(A)(i). Exh. A, NTA. Cancino Castellar also signed a “Detainee Calendar
 3 Screening Questionnaire” indicating, among other things, that he speaks English, that he
 4 received a copy of the NTA, that he was not afraid to return to his home country, that he
 5 was not a permanent or temporary resident of the United States, and that he did not have a
 6 pending petition for legal status. Exh. B, Questionnaire. ICE filed the NTA with the
 7 immigration court on February 24, 2017. Exh. A, NTA.

8 On March 8, 2017, before this lawsuit was filed, the Otay Mesa Immigration Court
 9 scheduled his initial master calendar hearing, which was held on March 23, 2017. Exh. C,
 10 Notice of Hearing. He had a bond hearing on March 27, 2017 and was released on bond on
 11 March 28, 2017. Exh. E, Proof of Release.

12 **B. Ana Maria Hernandez Aguas**

13 Ana Maria Hernandez Aguas (“Hernandez Aguas”) is a native and citizen of Mexico.
 14 Compl. at ¶ 10. On February 7, 2017, CBP took Hernandez Aguas into custody. *Id.* at ¶ 48;
 15 Exh. F, Warrant for Arrest. CBP executed a warrant for her arrest and issued an I-286, on
 16 which Hernandez Aguas marked the box to request an immigration judge custody review.
 17 Exh. F, Warrant; Exh G, I-286. She also signed a “Detainee Calendar Screening
 18 Questionnaire” on that date indicating, among other things, that she wanted time to obtain
 19 an attorney. Exh. H, Detainee Questionnaire. On February 7, 2017, she was issued an NTA,
 20 which charged her with removability as an alien present in the United States without being
 21 admitted or paroled, under 8 U.S.C. § 1182(a)(6)(A)(i). Exh I, NTA. The NTA was filed
 22 with the immigration court on February 21, 2017. *Id.*

23 Hernandez Aguas was detained in Chula Vista, California, until February 12, 2017.
 24 Compl. at ¶ 48. On February 12, 2017, Hernandez Aguas was transferred to San Luis,
 25 Arizona. *Id.* There, a DHS officer completed a second “Detainee Calendar Screening
 26 Questionnaire” that indicated, among other things, that Hernandez received a copy of the
 27 NTA, again wanted time to obtain an attorney, was not a permanent resident of the United
 28 States, and did not have a pending petition for legal status. Exh. K, Detainee Questionnaire.

Hernandez Aguas was transferred to Otay Mesa Regional Detention Facility on February 15, 2017. Compl. at ¶ 48. On February 16, 2017, the immigration court issued a notice scheduling a custody redetermination hearing to be held on March 13, 2017. *Id.*

At the custody determination hearing on March 13, 2017, the immigration judge granted Hernandez Aguas's request for bond in the amount of \$2,500. Exh L, Bond Order. She was released from custody on March 14, 2017. Exh. M, Notice of Release. Hernandez Aguas's next removal proceeding is scheduled for July 19, 2017. Exh J, Hearing Notice.

C. **Michael Gonzalez**

Michael Gonzalez claims to be a United States citizen, which DHS disputes.⁹ Compl. at ¶ 49. He was most recently encountered as an arriving alien on November 17, 2016, at the San Ysidro port of entry. *Id.* Gonzalez expressed a fear of persecution in Mexico. *Id.* CBP served him with an I-860 Notice and Order of Expedited Removal on November 18, 2016. Exh. N, I-860. On November 23, 2016, Gonzalez was detained at the Otay Mesa Regional Detention Facility. Compl. at ¶ 49.

On December 16, 2016, a USCIS officer found that Gonzalez had a credible fear. Compl. at ¶ 49. On January 9, 2017, ICE revoked Gonzalez's order of expedited removal and served him with a NTA, charging him as removable as an immigrant not in possession of a valid visa or entry document, under 8 U.S.C. § 1182(a)(7)(A)(i). Exh. O, NTA. The NTA was filed with the immigration court on January 19, 2017. *Id.*

Gonzalez's initial master calendar hearing on March 14, 2017, was continued so Gonzalez could obtain counsel. Exh. R, Transcript of 3/14/2017 Hearing, at 3-7 (102:7-106:16). At a second master calendar hearing on March 27, 2017, Gonzalez represented himself. Exh. S, Transcript of 3/27/17 Hearing, at 2-3 (107:15- 108:13). Gonzalez claimed

⁹ On June 13, 1989, Gonzalez was convicted of a violation of 8 U.S.C. § 1326 in the Eastern District of California in case number CR-S-89-080-EJG under the name Michael Gonzalez Banuelos. Exh. P, 1989 Conviction. On September 21, 1992, he was again convicted of the same, illegal re-entry, in the Eastern District of New York in case number 92CR 00101-001-S under the name Fernando Hernandez Valdivia, a/k/a/ Michael Gonzalez Banuelos. Exh. Q, 1992 Conviction.

1 to be a United States citizen, and DHS requested additional time to obtain an original birth
 2 certificate from Jalisco, Mexico. *Id.* at 5 (110:22). At the March 27, 2017 hearing, the
 3 immigration judge noted Gonzalez's multiple prior removal proceedings as well as at least
 4 two prior convictions and jail time for illegal reentry. *Id.* at 7 (124:10-20). At DHS's request,
 5 the immigration judge continued the case to April 6, 2017. *Id.* at 5-6 (115:15, 119:1-12). At
 6 the April 6, 2017 hearing, the immigration judge rejected Gonzalez's claim to U.S.
 7 citizenship, based on his prior convictions in federal court for illegal reentry and a certified
 8 document from the El Paso, Texas, Clerk's office stating that it had no record of him being
 9 born in El Paso, Texas. Exh. T, Transcript of 4/6/17 Hearing, at 4 (149:21-24) (referring to
 10 142:15-143:4). The immigration judge sustained the removal charges against Gonzalez. *Id.*
 11 He is scheduled for an individual merits hearing on his application for relief on July 24,
 12 2017, at the Otay Mesa immigration court. Exh. U, Hearing Notice.

13 STANDARD OF REVIEW

14 A motion to dismiss under Rule 12(b)(1) tests the subject-matter jurisdiction of the
 15 Court. *See, e.g., Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039-40 (9th Cir.
 16 2003), *cert. denied*, 541 U.S. 1009 (2004). Plaintiffs bear the burden of proving the
 17 existence of the court's subject matter jurisdiction, and the Court must dismiss the case
 18 absent such a showing. *See Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir. 1996).

19 Moreover, a party may move to dismiss for failure to state a claim upon which relief
 20 may be granted under Federal Rule of Civil Procedure 12(b)(6). In deciding a Rule 12(b)(6)
 21 motion, the court must assume allegations in the challenged complaint are true, and construe
 22 the complaint in the light most favorable to the non-moving party. *See Cahill v. Liberty*
 23 *Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). "To survive a motion to dismiss, a
 24 complaint must contain sufficient factual matter, accepted as true, to 'state a claim that is
 25 plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic*
 26 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). A court need not accept as true unreasonable
 27 inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form
 28 of factual allegations. *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

Dismissal is appropriate where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

ARGUMENT

I. This Court should dismiss this action under Rule 12(b)(1) for lack of subject-matter jurisdiction because 8 U.S.C. 1252 places exclusive jurisdiction over these claims in the Court of Appeals.

Congress has specifically stripped federal district courts of jurisdiction to hear the claims that Plaintiffs make in this class action case. In 1996, as part of the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), Pub. L. No. 104-208, Tit. III, § 302(a), 110 Stat. 3009-579, Congress passed several amendments to the INA circumscribing the availability of judicial review. The REAL ID Act of 2005 further unequivocally clarified the sweeping nature of Congress’s decision to preclude district court jurisdiction over claims seeking to challenge certain Executive Branch decisions in the immigration context. Pub. L. 109-13, 119 Stat. 231 (May 11, 2005).

A. Pursuant to 8 U.S.C. § 1252(a)(5) and (b)(9), the Court of Appeals has exclusive jurisdiction to consider Plaintiffs’ individual claims that the time they spent detained prior to appearing before an immigration judge violated their constitutional rights.

Pursuant to the INA, “[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). 8 U.S.C. § 1252(b)(9) expressly precludes district court review “by habeas corpus . . . or by any other provision of law (statutory or nonstatutory)” of an order of removal or “questions of law or fact, including interpretation and application of constitutional provisions” arising from any action taken or proceeding brought to remove

1 an alien from the United States.

2 The Supreme Court has made clear that § 1252(b)(9) is “the unmistakable ‘zipper’
3 clause,” channeling “judicial review of all” “decisions and *actions leading up to or*
4 *consequent upon final orders of deportation*,” including “*non-final order[s]*,” into one
5 proceeding exclusively before a court of appeals. *Reno v. Am.-Arab Anti-Discrimination*
6 *Com.*, 525 U.S. 471, 483, 485 (1999) (emphasis added). When a claim by an alien, “however
7 it is framed, challenges the procedure and substance of an agency determination that is
8 ‘inextricably linked’ to the order of removal, it is prohibited by section 1252(a)(5) [and
9 (b)(9)].” *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1032 (9th Cir. 2016) (citing *Martinez v.*
10 *Napolitano*, 704 F.3d 620, 623 (9th Cir. 2012)) (applying this principle in the context of a
11 claim brought under the Administrative Procedure Act).¹⁰

12 Here, Plaintiffs’ claim that an initial master calendar hearing within 48 hours is
13 constitutionally required to vindicate certain rights secured by the INA, *see* Compl. at ¶¶ 1,
14 3, 29-34, is barred from review by this Court by 8 U.S.C. § 1252(b)(9). Plaintiffs assert that
15 the initial master calendar hearing must occur within 48 hours because at such a hearing
16 “detainees can learn the charges against them; receive important advisals about their rights;
17 contest threshold allegations about their status, custody or bond; request the evidence the
18 government intends to use against them; and improve chances of securing pro bono
19

20 ¹⁰ The only claims that are excluded from the petition for review process are claims that are
21 collateral to the removal process. *See J.E.F.M.*, 837 F.3d at 1032 (discussing this concept).
22 The Ninth Circuit has recognized essentially three categories of such claims: (i) a claim to
23 ineffective assistance of counsel that “occurred *after* the issuance of the final order of
24 removal,” *Singh v. Gonzalez*, 499 F.3d 969, 979 (9th Cir. 2007) (explaining that such a
25 claim necessarily could not have been brought before the IJ) (emphasis in original); (ii) a
26 claim for unconstitutionally prolonged detention, *see Nadarajah v. Gonzalez*, 443 F.3d
27 1069, 1075-76 (9th Cir. 2006) (holding that challenge to five-year detention “without any
28 established timeline for . . . when he may be released” following the grant of immigration
relief could be brought in district court); and (iii) certain claims challenging bond
procedures, *see Singh v. Holder*, 638 F.3d 1196, 1202 (9th Cir. 2011) (“Although § 1226(e)
restricts jurisdiction in the federal courts in some respects, it does not limit habeas
jurisdiction over constitutional claims or questions of law”). None of these circumstances
are applicable to the present action, for the reasons discussed herein.

counsel.” *Id.* at ¶ 3. These rights, however, are inextricably linked to removal proceedings because they are “part and parcel of the removal proceeding itself. . . .” *Aguilar v. U.S. Immigration and Customs Enforcement*, 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.”). Likewise, Plaintiffs’ claim that presentment before an immigration judge for a probable cause hearing within 48 hours is constitutionally required is barred by 8 U.S.C. § 1252(b)(9), because the “action taken” – detaining them in anticipation of issuing an NTA – is an action taken to remove them that is inextricably linked to their removal proceedings. *See J.E.F.M.*, 837 F.3d at 1029-31.

Critically, “section 1252(b)(9) is a judicial channeling provision, not a claim-barring one.” *Aguilar*, 510 F.3d at 18. The INA makes it quite clear that “[n]othing . . . in any other provision of this chapter . . . shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate *court of appeals* in accordance with this section.” 8 U.S.C. § 1252(a)(2)(D) (emphasis added). Plaintiffs may raise their claim – that their detention of over 48 hours without presentment to an immigration judge violates statutory and regulatory rights governing removal proceedings – before an immigration judge, and again to the BIA, and ultimately, may seek review of all constitutional and statutory claims – the very basis of their complaint – in the Ninth Circuit. Accordingly, section 1252(b)(9) forecloses district court jurisdiction over these claims.

B. This Court lacks subject matter jurisdiction under 8 U.S.C. § 1252(g).

Plaintiffs are similarly barred by 8 U.S.C. § 1252(g) from raising their constitutional claims in district court. 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); *see also INS v. St. Cyr*, 533 U.S. 289, 311 n.34 (2001).

1 Here, Plaintiffs' claims – which challenge their detention for more than 48 hours
2 without a judicial probable cause determination or an initial master calendar hearing – arise
3 directly from the decision by an immigration officer to detain them and place them in
4 removal proceedings based on prima facie evidence that they are inadmissible or removable.
5 See 8 U.S.C. § 1357(a)(2).

6 Defendants acknowledge that the Ninth Circuit has held that, because the decision to
7 commence removal proceedings occurs at the time of the issuance of the NTA or order of
8 expedited removal, section 1252(g) “does not bar review of actions that occurred *prior* to
9 any decision to ‘commence proceedings.’” *Wong v. United States*, 373 F.3d 952, 965 (9th
10 Cir. 2004). However, the actions at issue in *Wong*, “such as the INS officials’ allegedly
11 discriminatory decisions regarding advance parole, adjustment of status, and revocation of
12 parole,” are easily divorced from the decision to commence removal proceedings, whereas
13 detention by DHS based on prima facie evidence that an alien is inadmissible or removable
14 from the United States, 8 U.S.C. § 1357(a)(2); 8 C.F.R. § 287.3(b), cannot be divorced from
15 the decision to commence proceedings and indeed arises from the decision to “commence
16 proceedings”.

17 The 9th Circuit’s decision in *Sissoko v. Mukasey*, 509 F.3d 947 (9th Cir. 2007)
18 (“*Sissoko III*”), is illuminative. In *Sissoko III*, the plaintiff had overstayed his visa and then
19 traveled outside of the United States. *Sissoko v. Mukasey*, 440 F.3d 1145 (9th Cir. 2006)
20 (“*Sissoko II*”) *withdrawn*, 509 F.3d 947. Upon his return to the United States, he was taken
21 into custody as an arriving alien. *Id.* An immigration officer initiated expedited removal
22 proceedings against plaintiff, but later issued an NTA and placed plaintiff in regular removal
23 proceedings. *Sissoko III* at 949. Plaintiff was subject to mandatory detention for nearly three
24 months during the pendency of his removal proceedings, but was later released when an
25 immigration judge found that he had been improperly classified as an arriving alien and
26 was, in fact, eligible for bond. *Sissoko II* at 1149. Plaintiff brought a number of claims,
27 including a Fourth Amendment-based damages claim for false arrest against the arresting
28 immigration officer. *Sissoko III* at 948-49. The Ninth Circuit noted that an immigration

1 officer had initiated expedited removal proceedings against the plaintiff, and that the
 2 plaintiff's detention was mandated as a result of that process. *Id.* at 949. The court therefore
 3 determined that "Sissoko's detention arose from [the DHS officer's] decision to commence
 4 expedited removal proceedings," and therefore plaintiff's false arrest claim was barred by
 5 Section 1252(g).¹¹ *Id.*

6 Like *Sissoko III*, Plaintiff Gonzalez is an arriving alien initially placed in expedited
 7 removal proceedings and subject to detention under 8 U.S.C. § 1225(b)(1) and (b)(2).¹²
 8 Because his detention was a necessary legal consequence of DHS's decision to commence
 9 proceedings, his claims are barred from review by § 1252(g). *See Sissoko III* at 949-51; *see*
 10 *also Wang v. United States*, No. cv 10-0383, 2010 WL 11463156, at *6 (C.D. Cal. Aug. 18,
 11 2010) (holding that Section 1252(g) divested the district court of subject-matter jurisdiction
 12 to hear Plaintiff's false imprisonment claim because his detention as an arriving alien
 13 "necessarily [arose] from the decision to initiate removal proceedings against him").
 14

15 ¹¹ The district court rested its decision, in part, on 8 U.S.C. § 1252(e)(2), which provided
 16 another avenue for plaintiff to challenge his detention. *Sissoko*, 509 F.3d at 949-50 (noting
 17 that because plaintiff was never issued an expedited removal order, a habeas petition under
 18 section 1252(e)(2) could have been successful, but expressly noting that "[w]e do not decide
 19 whether 8 U.S.C. § 1252(g) would apply if Sissoko had been ordered removed after an
 20 adverse credible fear determination, thereby eliminating his habeas avenue of relief"). *Id.* at
 21 n. 4.

22 ¹² To the extent the proposed class includes applicants for admission subject to expedited
 23 removal proceedings, such persons can only seek limited review through habeas corpus
 24 proceedings. 8 U.S.C. §§ 1252(e)(2), (e)(5) ("There shall be no review of whether the alien
 25 is actually inadmissible or entitled to any relief from removal."). "Thus, '[b]y the clear
 26 operation of these statutes,' federal courts 'are jurisdictionally barred' from hearing direct
 27 challenges to expedited removal orders." *Torre-Flores v. Napolitano*, No. 11-CV-2698-IEG
 28 WVG, 2012 WL 3060923, at *2 (S.D. Cal. July 25, 2012), *aff'd*, 567 F. App'x 523, 2014
 WL 1378746 (9th Cir. 2014) (citing *Garcia de Rincon v. Dept. of Homeland Sec.*, 539 F.3d
 1133, 1139 (9th Cir. 2008)); *see also Lorenzo v. Mukasey*, 508 F.3d 1278, 1282 (10th
 Cir. 2007) ("Petitioner's 1998 removal order was issued pursuant to § 1225(b)(1). As a
 result, we lack jurisdiction to review any constitutional or statutory claims related to the
 underlying removal order in this case.").

Likewise, Plaintiffs Cancino Castellar and Hernandez Aguas' pre-hearing detentions under § 1226(a) necessarily flowed from DHS' determination that they were removable and subject to removal proceedings. To put it differently, Plaintiffs would not have been detained were it not for DHS's determination that they were present in the United States in violation of law and therefore removable. *See* 8 U.S.C. § 1357(a)(2); *see also MacDonald v. U.S.*, No. 11-cv-1088, 2011 WL 6783327, *1-2 (S.D. Cal. Dec. 23, 2011) (where plaintiff was taken into DHS custody and subsequently served with an NTA, section 1252(g) divested the court of jurisdiction, because a "Fourth Amendment challenge to confinement during removal proceedings . . . stems directly from the Attorney General's decision to commence the removal proceedings"). In this case, Cancino Castellar and Hernandez Aguas were issued an NTA promptly after their detention (Cancino Castellar: four days between detention and issuance of the NTA; Hernandez Aguas: issued NTA and detained on same day). This decision to detain Plaintiffs, even when made prior to the issuance of the NTA, cannot be divorced from the decision to commence removal proceedings for purposes of 1252(g). Thus, 8 U.S.C. § 1252(g) requires that this Court dismiss the Complaint.

II. This Court should dismiss this action under Federal Rule of Civil Procedure 12(b)(6) because Plaintiffs have failed to state a cognizable claim for relief under either the INA or the Constitution.

A. The Fifth Amendment does not require defendants to present individuals for an initial hearing or for judicial review of probable cause for detention within 48 hours.

Even assuming, *arguendo*, that this Court has subject-matter jurisdiction over the claims, the Fifth Amendment does not provide the type of protections that plaintiffs demand here. Plaintiffs argue that Defendants' failure to present immigration detainees without a final order of removal to an immigration judge within 48 hours of detention violates procedural due process because "the risk of erroneous detention is significant" and "results in unreasonable extended detention" for Plaintiffs and others in detention. Compl. at ¶¶ 7, 40. Plaintiffs also argue that defendants' policy of detaining individuals without obtaining

1 judicial review of probable cause for detention or presenting them for an initial master
 2 calendar hearing before an immigration judge within 48 hours violates their substantive due
 3 process rights. Compl. at ¶¶ 41-44, 75-80.

4 **1. As an alien seeking admission, Gonzalez does not have due process**
 5 **rights beyond those which Congress provides him.**

6 As an initial matter, Gonzalez is an alien seeking admission, and, therefore, he has
 7 no constitutional rights to any procedures regarding his admission beyond those provided
 8 by Congress. *See, e.g., Castro v. United States Dept. of Homeland Sec.*, 835 F.3d 422, 445-
 9 46 (3d Cir. 2016) (because petitioners were aliens seeking initial admission to the United
 10 States who were apprehended within hours of entering the United States, they “cannot
 11 invoke the Constitution . . . in an effort to force judicial review beyond what Congress has
 12 already granted them”). Congress has plenary power to admit aliens to the United States or
 13 to bar them. *Kleindienst v. Mandel*, 408 U.S. 753 (1972). Section 1225(b) is the most recent
 14 iteration of a statutory framework that, for a century, has provided for the exclusion of
 15 inadmissible aliens arriving at the nation’s borders. The Supreme Court has “long
 16 recognized [that] the power to expel or exclude aliens [i]s a fundamental sovereign attribute
 17 exercised by the Government’s political departments largely immune from judicial control.”
 18 *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy v. United States ex re. Mezei*,
 19 345 U.S. 206, 210 (1953)); *see also Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012).
 20 The Supreme Court has also long recognized that “detention during deportation proceedings
 21 [i]s a constitutionally valid aspect of the deportation process.” *Demore*, 538 U.S. at 523.

22 Likewise, “[t]he Supreme Court has consistently recognized that our immigration
 23 laws have long made a distinction between those aliens who have come to our shores
 24 seeking admission and those who are within the United States after an entry, irrespective of
 25 its legality.” *Alvarez-Garcia v. Ashcroft*, 378 F.3d 1094, 1097 (9th Cir. 2004); *Barrera-*
 26 *Echavarria*, 44 F.3d 1441, 1450 (9th Cir. 1995) (en banc). This fundamental “distinction
 27 between an alien who has effected an entry into the United States and one who has never
 28 entered” runs throughout immigration law. *See Zadvydas v. Davis*, 533 U.S. 678, 693

(2001); *see also United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (“[A]liens receive constitutional protections when they come within the territory of the United States and developed substantial connections with this country.”) (citations omitted).

This distinction is significant because aliens “standing on the threshold of entry” are “not entitled to the constitutional protections provided to those within the territorial jurisdiction of the United States” and who have developed substantial connections to the country.¹³ *Alvarez-Garcia*, 378 F.3d at 1097 (citing *Ma v. Ashcroft*, 257 F.3d 1095, 1107 (9th Cir. 2001)); *see also Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (“[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.”).

Therefore, “immigration laws can constitutionally treat aliens who are already on our soil (and who are therefore deportable) more favorably than aliens who are merely seeking admittance (and who are therefore excludable).” *Alvarez-Garcia*, 378 F.3d at 1097 (quoting *Servin-Espinoza v. Ashcroft*, 309 F.3d 1193, 1198 (9th Cir. 2002)). Thus, an alien seeking admission and standing on the threshold of initial entry has no procedural due process rights regarding admission or exclusion beyond those provided by statute: “whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.” *Mezei*, 345 U.S. at 212 (quoting *United States ex rel. Knauff v. Shaughnessy*,

¹³ Aliens apprehended between the ports of entry and subject to expedited removal also fall within the so-called “entry fiction.” *See Castro*, 835 F.3d at 445-46. That is, although aliens seeking admission into the United States who lack such connections “may physically be allowed within its borders pending a determination of admissibility, such aliens are legally considered to be detained at the border and hence as never having effected entry into this country.” *Am. Immigration Lawyers Ass’n v. Reno*, 18 F. Supp. 2d 38, 59 (D.D.C. 1998). *See, e.g., Mezei*, 345 U.S. at 212 (“an alien on the threshold of initial entry stands on a different footing: ‘Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.’”); *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 175 (1993) (discussing entry fiction); *Kaplan v. Tod*, 267 U.S. 228, 230 (1925) (though present in the United States, excluded alien “was still in theory of law at the boundary line and had gained no foothold in the United States”).

338 U.S. 537, 544 (1950)); *see also Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); *Castro*, 835 F.3d at 445-46.

Simply put, aliens seeking admission such as Gonzalez “do not have an equal protection right to the same procedural mechanisms afforded to deportable aliens [with more substantial connections to the United States]. . . .” *Alvarez-Garcia*, 378 F.3d at 1099. As a result, it is firmly settled law that the Due Process Clause affords an excludable alien no procedural protection beyond the procedure explicitly authorized by Congress, nor any substantive right to be free from immigration detention. *See Mezei*, 345 U.S. at 212; *Barrera*, 44 F.3d at 1450; *see also Wong Wing v. United States*, 163 U.S. 228, 235 (1896) (providing that it is “clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid”).

Here, Gonzalez’s detention is statutorily required under 8 U.S.C. § 1225(b)(2), and, with one exception not applicable here,¹⁴ an immigration judge has no authority to release him from detention. *See* 8 C.F.R. § 1003.19(h)(2)(i)(B) (“[A]n immigration judge may not redetermine conditions of custody imposed by [DHS] with respect to . . . [a]rriving aliens in removal proceedings.”). Gonzalez does not argue that the INA and its implementing regulations provide him a right to a probable cause hearing or an initial master calendar hearing within 48 hours of his detention. Indeed, the statutory framework and implementing regulations provide no such right. Rather, ignoring both the plain language of the statute and the implementing regulations, Gonzalez in essence asks this Court to find the statute unconstitutional as drafted. However, the Ninth Circuit has held that 8 U.S.C. § 1225(b) is clearly constitutional as applied to aliens like Gonzalez who have been detained for less than 180 days. *See, e.g., Rodriguez III*, 804 F.3d at 1082.

Even if this Court were to conclude against the weight of longstanding precedent that

¹⁴ Pursuant to *Rodriguez III*, 804 F.3d 1060, Gonzalez is entitled to a bond hearing before an immigration judge if his detention lasts more than 180 days after the issuance of a final order of removal.

aliens seeking admission could not be detained for more than 48 hours without presentment before a judicial officer in compliance with due process, it cannot grant the relief Plaintiffs seek. To do so would require the Court to either strike down the law in its entirety as unconstitutional, or create in place of section 1225(b) a judicially-crafted system of detention and presentment not contemplated by Congress. Therefore, this Court should dismiss all claims challenging detention for over 48 hours without presentment under 8 U.S.C. § 1225(b).

2. Procedural Due Process

It is well established that aliens are entitled to due process of law in deportation proceedings. *See, e.g., Reno v. Flores*, 507 U.S. 292, 307 (1993). The Supreme Court has recognized, however, that “[t]he fact that all persons, aliens and citizens alike are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification.” *Mathews v. Diaz*, 426 U.S. 67, 78 (1976). Indeed, “[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.” *Id.* at 79-80. “Due Process is flexible and calls for such procedural protections as the particular situation demands.” *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

Plaintiffs have no statutory right to judicial review of a probable cause determination or to an initial master calendar hearing within 48 hours. Accordingly, Plaintiffs ask this Court to find that the statute is unconstitutional. However, Plaintiffs have a constitutional right to a hearing before an immigration judge within 48 hours “only if [this Court is] persuaded that Congress was wrong to omit it from the adjudicative scheme it created.” *United States v. Peralta-Sanchez*, 847 F.3d 1124, 1134 (9th Cir. 2017).

“The constitutional sufficiency of procedures Congress provided . . . is determined by application of the balancing test articulated in *Mathews v. Eldridge*.” *Peralta-Sanchez*, 847 F.3d at 1135. In *Mathews*, the Supreme Court identified three factors to be considered

1 in determining whether additional due process is required in a particular situation: “(1) the
 2 nature of the private interest that will be affected; (2) the comparative risk of an erroneous
 3 deprivation of that interest with and without additional or substitute procedural safeguards;
 4 and (3) the Government’s interest, including the function involved and the fiscal and
 5 administrative burdens that the additional or substitute requirement would entail.” *Mathews*
 6 *v. Eldridge*, 424 U.S. 319, 335 (1976).

7 Contrary to their blanket assertions, Plaintiffs have not pointed to any evidence that
 8 a requirement of presentment to an immigration judge within 48 hours would meaningfully
 9 reduce the risk of erroneous detention. Indeed, a requirement for judicial review of probable
 10 cause within 48 hours could have the opposite effect, as aliens may not have adequate time
 11 to obtain an attorney or collect documentation and evidence to support the alien’s request
 12 for release on bond. This fact could prove detrimental to the alien, because, among other
 13 things, once an alien receives a bond hearing, they must prove a change in circumstances in
 14 order to receive a new bond hearing. 8 C.F.R. § 1003.19(e) (“After an initial bond
 15 redetermination, an alien’s request for a subsequent bond determination . . . shall be
 16 considered only upon a showing that the alien’s circumstances have changed materially
 17 since the prior bond redetermination.”).

18 Under the second *Mathews* factor, the courts consider “the fairness and reliability of
 19 the existing . . . procedures, and the probative value, if any, of additional procedural
 20 safeguards.” *Mathews*, 424 U.S. at 343. The Court must look “to the process given
 21 [Plaintiffs] in this case, as well as the process generally given” to aliens detained prior to an
 22 initial immigration court hearing, and evaluate the likelihood of the Government making an
 23 erroneous deprivation. *Buckingham v. U.S. Dep’t of Agric.*, 603 F.3d 1073, 1082 (9th Cir.
 24 2010). Here, there are a number of procedural safeguards already in place to ensure
 25 fundamental fairness to aliens detained for immigration purposes. As discussed above, once
 26 an alien has been arrested without a warrant of arrest, an examining officer will determine
 27 if there is prima facie evidence that the arrested alien is in the United States in violation of
 28 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.” *Id.* § 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). Plaintiffs have failed to provide any evidence that aliens are being wrongfully detained because of a lack of additional process.

Finally, the government’s interest is extensive. Mandating a requirement of presentment before an immigration judge within 48 hours would have a ripple effect throughout the removal process, from the initial apprehension of the alien (whether at the border or in the United States), to the actual hearing before an immigration judge. The additional burden of providing probable cause or initial master calendar hearings within 48 hours would needlessly take time away from immigration judges’ ability to provide prompt hearings (including subsequent master calendar and merits hearings) for other detained aliens. Also, such a requirement could lead to other detained aliens being detained for longer periods of time pending resolution of their cases. Ultimately, Plaintiffs fail to show that, under *Mathews*, their detention of over 48 hours without a hearing before an immigration judge or judicial review of their detention violates procedural due process.

3. Substantive Due Process

Removal proceedings are without doubt civil proceedings and “the full trappings of legal protections that are accorded to criminal defendants are not necessarily

1 constitutionally required in deportation proceedings.” *Dor v. I.N.S.*, 891 F.2d 997, 1003 (2d
 2 Cir. 1989). Nonetheless, Plaintiffs assert that “[t]he first hearing before an immigration
 3 judge, like a first appearance in criminal court, is critical to ensuring due process[, because]
 4 it ensures that detainees can learn the charges against them; receive important advisals about
 5 their rights; contest threshold allegations about their status, custody or bond; request the
 6 evidence the government intends to use against them; and improve chances of securing pro
 7 bono counsel.” Compl. at ¶ 3. But an alien’s right to certain advisals and information
 8 provided at an initial master calendar hearing are statutory and regulatory rights, not
 9 constitutional rights. Therefore, Plaintiffs reliance on *Coleman v. Frantz*, 754 F.2d 719, 724
 10 (7th Cir. 1985) and *Hayes v. Faulkner Cty.*, 388 F.3d 669, 673 (8th Cir. 2004) are misplaced,
 11 because those cases found a Fifth Amendment right to a prompt initial hearing necessary to
 12 protect certain *constitutional* rights that apply exclusively in the criminal context. See
 13 *Coleman*, 754 F.2d at 724 (citing the Sixth Amendment, the Fifth Amendment right against
 14 self-incrimination, and the Eighth Amendment right to seek bail); *Hayes*, 388 at 673 (same).
 15 Moreover, and as discussed above, *supra*, to the extent that Plaintiffs claim they were
 16 deprived of any of the statutory or regulatory rights that are provided in an initial master
 17 calendar hearing such that it affected the fairness of their removal proceedings, such a claim
 18 “arises from” immigration removal proceedings and can only be brought through a petition
 19 for review in the federal courts of appeals. 8 U.S.C. §§ 1252(a)(5), 1252(b)(9); *J.E.F.M.*,
 20 837 F.3d at 1029.

21 Additionally, no federal court has ever extended the due process right to prompt
 22 presentment in criminal proceedings to the civil immigration context. Yet that is exactly
 23 what Plaintiffs seek in this case. See *generally* Compl. “The mere novelty of [Plaintiffs’]
 24 claim is reason enough to doubt that substantive due process sustains it.” *Flores*, 507 U.S.
 25 at 303; see also *Rochin v. California*, 342 U.S. 165, 172 (1952) (noting that substantive due
 26 process precludes the government from engaging in conduct that “shocks the conscience,”
 27 or interferes with rights implicit in the concept of ordered liberty).

28 The Supreme Court has rejected the argument that immigration detention necessarily

violates an alien’s substantive due process rights because there is no set time period within which the Government must present the alien for a hearing before an immigration judge. *Flores*, 507 U.S. at 309. In fact, the Supreme Court found that aliens were not entitled to “automatic review by an immigration judge of the initial deportability and custody determinations” made by immigration officers, specifically reversing the Ninth Circuit’s *en banc* ruling that applied *Gerstein v. Pugh*, 420 U.S. 103, 125-26 (1975), to civil immigration detention. *Id.*

Creating a new constitutional right that would guarantee all aliens a hearing before an immigration judge within 48 hours of detention for civil removal proceedings would ignore decades of Supreme Court precedent that has repeatedly held that the purpose of immigration detention is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984).

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

Plaintiffs’ next claim, that the “Fourth Amendment does not permit the government to detain individuals without prompt judicial determination of whether probable cause justifies their detention,” Compl. at ¶¶ 45-46, 81-84, likewise fails. The core problem with Plaintiffs arguments on this matter is that they ask this Court to import criminal procedural requirements into the civil administrative processes of deporting removable aliens.

As an initial matter, Plaintiffs do not allege that DHS’s conduct violates the INA or regulations governing the detention of aliens pending removal proceedings. To the contrary, the detention of Plaintiffs complied with the INA and its implementing regulations. *See, e.g.*, 8 U.S.C. §§ 1225(b)(1)(B)(ii), 1357(a)(2), and 1226(a). Nothing in these statutes requires judicial review of probable cause within 48 hours of an alien’s arrest to sustain the alien’s detention pending removal proceedings. 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*

1 *Abel*, 362 U.S. at 217 (discussing long-standing administrative arrest procedures in
2 deportation cases).

3 In the criminal context, the Fourth Amendment requires a neutral and detached
4 magistrate to determine whether probable cause exists for an arrest. This must either occur
5 before the arrest (via a warrant), or promptly after a warrantless arrest, which generally
6 means 48 hours. *See Gerstein*, 420 U.S. at 125; *County of Riverside v. McLaughlin*, 500
7 U.S. 44, 57-59 (1991). However, Plaintiffs cite to no authority for their claim that the Fourth
8 Amendment’s probable cause hearing requirement applies in civil removal proceedings.

9 Indeed, Plaintiff’s argument to the contrary ignores the distinction between criminal
10 detention – which is not at issue here – and civil immigration detention. The analysis has
11 *always* been different in the immigration context. *See Lopez-Mendoza*, 468 U.S. at 1038
12 (“A deportation proceeding is a purely civil action to determine eligibility to remain in this
13 country, not to punish an unlawful entry, though entering or remaining unlawfully in this
14 country is itself a crime.”).

15 Statutes providing for deportation have historically authorized the arrest and
16 detention of deportable aliens on the determination of an executive official.¹⁵ *See, e.g., Act*

17
18 ¹⁵ DHS and the legacy Immigration and Naturalization Service (“INS”) exercise the United
19 States’ long-recognized and unquestioned power as a sovereign nation to police its borders
20 and exclude or remove aliens. “[T]he right to exclude or to expel aliens, or any class of
21 aliens, absolutely or upon certain conditions, in war or in peace, is an inherent and
22 inalienable right of every sovereign and independent nation.” *Wong Wing*, 163 U.S. at 231.
23 Moreover, “[f]ederal authority to regulate the status of aliens” derives from numerous
24 sources, including “the Federal Government’s power to establish a uniform Rule of
25 Naturalization, U.S. Const., Art. I, § 8, cl. 4, its power to regulate Commerce with foreign
26 Nations, *id.*, cl. 3, and its broad authority over foreign affairs” *Toll v. Moreno*, 458
27 U.S. 1, 10 (1982) (internal quotation marks and alterations omitted).

28 Congress codified and consolidated these powers in the Immigration and Nationality
Act (“INA”) of 1952. Immigration and Nationality Act of 1952 (“INA”), as amended, 8
U.S.C. §§ 1101 *et seq.* Today, the INA (1) provides the Secretary of Homeland Security
“the power and duty to control and guard the borders and boundaries of the United States
against the illegal entry of aliens,” 8 U.S.C. § 1103(a)(5); (2) establishes certain categories
of aliens who are barred from admission to the United States, 8 U.S.C. § 1182, or who may
be removed from the United States after their admission, 8 U.S.C. § 1227; (3) grants

of June 25, 1798, ch. 58, § 1, 1 Stat. 571 (signed by President John Adams) (authorizing the President to expel “all such aliens as he shall judge dangerous to the peace and safety of the United States”); Act of Oct. 19, 1888, ch. 1210, 25 Stat. 566 (authorizing the Secretary of the Treasury to arrest and deport certain aliens unlawfully within the United States); Act of Mar. 3, 1903, ch. 1012, § 21, 32 Stat. 1218 (authorizing the Secretary of the Treasury to arrest and deport certain aliens found to be unlawfully within the United States); Act of Feb. 20, 1907, ch. 1134, § 20, 34 Stat. 904 (authorizing the Secretary of Commerce and Labor to arrest and deport certain aliens found to be unlawfully within the United States); Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 889 (authorizing the Secretary of Labor to arrest and deport certain aliens unlawfully in the United States); Act of Oct. 16, 1918, ch. 186, § 2, 40 Stat. 1012 (authorizing the Secretary of Labor to arrest and deport aliens within the United States unlawfully); Act of May 10, 1920, ch. 174, 41 Stat. 593 (authorizing the Secretary of Labor to arrest and deport certain aliens unlawfully in the United States); Internal Security Act of 1950, ch. 1024, Title I, § 22, 64 Stat. 1008 (authorizing the Attorney General to arrest and deport certain aliens illegally in the United States). 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; *Tejeda-Mata*, 626 F.2d at 725 (citing 8 U.S.C. § 1357(a)(2)).

The critical question, therefore, is whether the Fourth Amendment requires judicial review of probable cause for detention in civil immigration proceedings. In *Abel*, the Court addressed this same type of argument by the defendant – a Soviet spy who was interrogated by the Federal Bureau of Investigation in his Manhattan hotel room based on an administrative immigration arrest warrant. 362 U.S. at 230-34. Defendant was detained for

immigration officials broad discretion as to their enforcement priorities, 8 U.S.C. § 1252; (4) instructs the Secretary of Homeland Security to “establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority” under the INA, 8 U.S.C. § 1103(a)(3); and (5) provides specific authority to arrest and detain aliens, 8 U.S.C. §§ 1225, 1226, 1231, 1357.

several weeks at a detention center in Texas until he was arrested on criminal charges. *Id.* at 225. Addressing the argument that the defendant’s arrest, incidental search, and weeks-long immigration detention was invalid because it was never sanctioned by a neutral magistrate, Justice Frankfurter’s opinion for the Court devoted five pages to rejecting this claim. *Id.* at 230-34 (rejecting Defendant’s claim after addressing the “constitutional validity of [the] long-standing administrative arrest procedure in deportation cases”).

In their Complaint, Plaintiffs argue that they are entitled to protections under *Gerstein* and *County of Riverside*. Compl. at ¶ 45. These cases, however, involve criminal, rather than civil immigration, arrests, and they are, therefore, not applicable here. *See, e.g., Rhoden v. United States*, 55 F.3d 428, 432 n.7 (9th Cir. 1995) (per curiam) (distinguishing the Fourth Amendment analysis for detention “[i]n the context of a criminal arrest” from the analysis involved for civil immigration detentions) (citing *Cnty. of Riverside*, 500 U.S. at 56-58). Even the *Gerstein* decision clarifies that its requirement for a neutral and detached magistrate is not easily transferable to civil proceedings. *See Gerstein*, 420 U.S. at 125 n.27. In *Gerstein*, the Supreme Court explicitly limited its analysis to the criminal context. The Court explained that “the Fourth Amendment was tailored explicitly for the criminal justice system,” 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.*; *Cf. Aquino v. Nicolas*, No. C 09-0042, 2010 WL 2196134, at *1, *6-9 (D.N. Mar. I. May 27, 2010) (rejecting claim under *Gerstein*, that alien who did not contest deportability should still have been brought before a magistrate when her criminal custody was reclassified as immigration detention).

The concerns that animated the Supreme Court’s decision in *Gerstein* – safeguarding the rights of those accused of criminal conduct – are not applicable to civil removal proceedings, because a removal hearing “is in no proper sense a trial and sentence for a crime or offence . . . It is but a method of enforcing the return to his own country of an alien

1 who has not complied with the conditions upon the performance of which the government
 2 of the nation, acting within its constitutional authority . . . has determined his continuing to
 3 reside here shall depend.” *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893). For
 4 example, DHS does not have to prove removability beyond a reasonable doubt, *see Woodby*
 5 *v. INS*, 385 U.S. 276, 286 (1966) (“[n]o deportation order may be entered unless it is found
 6 by clear, unequivocal, and convincing evidence that the facts alleged as grounds for
 7 deportation are true.”); *Cortez-Acosta v INS*, 234 F.3d 476, 480 (9th Cir. 2000), there is no
 8 Sixth Amendment right to counsel in a civil removal proceedings, *see Morales-Izquierdo v.*
 9 *Gonzalez*, 486 F.3d 484, 497 (9th Cir. 2007) (en banc), and the Speedy Trial Act does not
 10 apply, *see United States v. Cepeda-Luna*, 989 F.2d 353, 355-56 (9th Cir. 1993) (holding that
 11 because deportation proceedings are civil rather than criminal proceedings, the thirty-day
 12 indictment requirement of the Speedy Trial Act does not apply).

13 In short, courts have “frequently . . . upheld administrative deportation proceedings
 14 shown . . . to have been begun by arrests pursuant to” an administrative process. *Abel*, 362
 15 U.S. at 233-34. This “impressive historical evidence of acceptance of the validity of statutes
 16 providing for administrative deportation arrest from almost the beginning of the Nation”
 17 confirms that courts have never understood the Fourth Amendment to require what
 18 Plaintiffs now insist must be the case. *Id.* at 234; *see also id.* at 230 (“Statutes authorizing
 19 administrative arrest to achieve detention pending deportation proceedings have the
 20 sanction of time. It would emphasize the disregard for the presumptive respect the Court
 21 owes to the validity of Acts of Congress, especially when confirmed by uncontested
 22 historical legitimacy, to bring into question for the first time such a long-sanctioned practice
 23 of government”).

24 Under Plaintiffs’ aspirational framework, DHS must obtain a determination of
 25 probable cause of removability from an immigration judge before an individual can be
 26 detained beyond 48 hours. But Plaintiffs’ argument for a judicial determination of probable
 27 cause or an initial master calendar hearing within 48 hours, in essence, seeks to read a 48-
 28 hour requirement into 8 U.S.C. § 1357(a)(2). Section 1357(a)(2) requires only that the alien

1 be taken promptly before another immigration officer, rather than an immigration judge or
 2 magistrate. *See e.g. United States v. Sotoj-Lopez*, 603 F.2d 789, 790 (9th Cir. 1979) (holding
 3 that, in the context of arrests for civil removal proceedings, § 1357(a)(2) relaxes the
 4 constitutional requirement codified in Fed. R. Crim. P. 5(a) that a “person making an arrest
 5 within the United States must take the defendant without unnecessary delay before a
 6 magistrate judge,”); *United States v. Encarnacion*, 239 F.3d 395, 400 (1st Cir.
 7 2001)(explaining that because defendant’s warrantless arrest was civil, rather than criminal,
 8 the court had “little trouble” holding that his subsequent eight-day detention prior to being
 9 allowed to appear before a federal magistrate was not unlawful under 8 U.S.C. §
 10 1357(a)(2)); *United States v. Tejada*, 255 F.3d 1, 3-4 (1st Cir. 2001) (holding that alien
 11 arrested and detained pursuant to § 1357(a)(2) is subject to civil detention, which “does not
 12 trigger the protections of [Federal rule of Criminal Procedure] 5(a),” and, accordingly,
 13 “[t]he requirement that a magistrate evaluate his detention within 48 hours of his arrest is
 14 therefore inapplicable.”).

15 Congress is fully aware of the U.S. Constitution, *Gerstein*, and, in general, the
 16 concepts of “probable cause” and “prompt presentment.” *See generally Vimar Seguros y*
 17 *Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 554 (1995) (“Congress is presumed to
 18 know the law”). Therefore, Congress directed that, following a warrantless arrest for an
 19 immigration violation, “the alien arrested shall be taken without unnecessary delay for
 20 examination before an officer of the Service having authority to examine aliens as to their
 21 right to enter or remain in the United States,” rather than an immigration judge or a
 22 magistrate. 8 U.S.C. § 1357(a)(2). As noted, *supra*, courts – including the Supreme Court –
 23 have already affirmed the validity of the process envisioned by this statute. *See Flores*, 507
 24 U.S. at 307 (noting, without setting a time frame, that “due process is satisfied by giving
 25 the detained alien juveniles the *right* to a hearing before an immigration judge.”) (emphasis
 26 in original); *see also Tejada*, 255 F.3d at 3-4 (civil detention following 8 U.S.C.
 27 § 1357(a)(2) arrest does not implicate requirement that a magistrate evaluate detention
 28 within 48 hours of arrest); *Buquer v. City of Indianapolis*, No. 1:11-cv-00708-SEB, 2013

1 WL 1332158 (S.D. Ind. Mar. 28, 2013), at *8.

2 Accordingly, given the “impressive historical evidence” of the constitutional validity
3 of immigration detention without presentment to a judicial officer, Plaintiffs’ Fourth
4 Amendment claim must fail. *Abel*, 362 U.S. at 232, 234 (suggesting, in dicta, that the
5 procedures, substantially similar to those in place today, that govern the initial arrest of
6 aliens and their subsequent detention are a constitutionally valid aspect of civil removal
7 proceedings).

8 ***a. Plaintiffs fail to state a claim under the Administrative***
9 ***Procedure Act.***

10 Finally, Plaintiffs’ argument under the Administrative Procedure Act (“APA”), 5
11 U.S.C. § 702, Compl. at ¶¶ 85-90, fails. Plaintiffs ask this Court both to compel delayed
12 action and to find Defendants’ inaction unlawful under the APA. *Id.* However, this Court
13 lacks jurisdiction over Plaintiffs’ APA claims because, as discussed above, the INA
14 precludes judicial review of Plaintiffs’ claims. In addition, the Court lacks jurisdiction
15 because there is no final agency action over which the Court could exercise review.
16 Moreover, even if this Court were to find it had jurisdiction over the APA claims, Plaintiffs
17 fail to state a claim upon which relief can be granted because there is no constitutional or
18 statutory right to either an initial master calendar hearing or a probable cause hearing before
19 an immigration judge within 48 hours. Therefore, Defendants’ failure to provide such a
20 hearing is not arbitrary, capricious, or an abuse of discretion.

21 **1. Plaintiffs fail to establish this Court’s subject-matter jurisdiction**
22 **over their APA claim.**

23 This Court lacks jurisdiction over Plaintiffs’ APA claim. The APA does not apply to
24 (1) claims that are precluded from judicial review by statute, (2) claims that are committed
25 to agency discretion, or (3) claims that seek review of a non-final decision. *See* 5 U.S.C.
26 §§ 701(a), 704; *see also Ardestani v. INS*, 502 U.S. 129, 1333 (1991) (“Congress intended
27 the provisions of the [INA], as amended, 8 U.S.C. 1101 *et seq.*, to supplant the APA in
28 immigration proceedings.”); *Califano v. Sanders*, 430 U.S. 99, 107 (1977). First, as

discussed above, *see supra* Sections I.A. and I.B., the INA specifically precludes judicial review of Plaintiff’s claims in the district court, *see 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.”). Accordingly the INA precludes these claims from judicial review, and the APA does not apply. 5 U.S.C. § 701(a).

Moreover, because the APA provides for federal court jurisdiction *only* over “action[s] made reviewable by statute and *final agency action for which there is no other adequate remedy in a court*,” 5 U.S.C. § 704 (emphasis added), this Court lacks jurisdiction over Plaintiffs’ claims. An agency action is final when the action both “1) marks the consummation of the agency’s decisionmaking process, and 2) . . . is one by which rights or obligations have been determined, or from which legal consequences will flow.” *Defenders of Wildlife v. Tuggle*, 607 F. Supp. 2d 1095, 1099 (D. Ariz. 2009) (citing *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). “Plaintiffs have the burden of identifying specific federal conduct and explaining how it is ‘final agency action’ . . . , and identifying a discrete agency action that the federal agency was legally required to take but failed to do so” *Id.* (citing *Lujan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 882 (1990)). Plaintiffs have done neither. Plaintiffs challenge their detention for over 48 hours without either a probable cause hearing or an initial master calendar hearing before an immigration judge. However, Defendants’ detention of plaintiffs’ for over 48 hours without a hearing before an immigration judge is not the consummation of the administrative decisionmaking process. In contrast, it is just the first of many steps in the process. Plaintiffs have provided no explanation for how this detention is the sort of government action that is reviewable under the APA.

2. Plaintiffs fail to state a claim for relief under the APA.

Even if this Court were to find it has jurisdiction over Plaintiff’s APA claims, the claims fail. To the extent that Plaintiffs request this Court to compel agency action unreasonably delayed, *see* Compl. at ¶ 87 (citing 5 U.S.C. § 706(1)), “a court only has

1 jurisdiction to compel an agency to act within a certain time period under the APA when
2 the agency is compelled by law to act within a certain time period,” *Li v. Chertoff*, 482 F.
3 Supp. 2d 1172, 1178 (S.D. Cal. 2007) (citing *Norton v. Southern Utah Wilderness Alliance*,
4 542 U.S. 55, 65 (2004)). Here, neither the INA nor its implementing regulations provide a
5 right to an initial master calendar hearing within 48 hours. To the contrary, by statute, “the
6 first hearing date in proceedings under section 240 . . . shall not be scheduled earlier than
7 10 days after the service of the notice to appear, unless the alien requests in writing an earlier
8 hearing date.” 8 U.S.C. § 1229(b)(1).

9 Moreover, to the extent Plaintiffs ask this Court to find unlawful Defendants’ failure
10 to provide detainees with a hearing before an immigration judge within 48 hours under 5
11 U.S.C. § 706(2), *see* Compl. at ¶ 88, such a claim also fails. Section 706(2)(A) requires a
12 reviewing court to uphold agency action unless it is “arbitrary, capricious, an abuse of
13 discretion, or otherwise not in accordance with the law.” However, “the only agency action
14 that can be compelled under the APA is action legally *required*.” *Norton*, 542 U.S. at 63
15 (emphasis in original). The INA does not require the relief that Plaintiffs seek – a probable
16 cause hearing or an initial master calendar hearing before an immigration judge within 48
17 hours. Indeed, nothing in the INA requires an immigration judge to conduct a probable
18 cause hearing to sustain DHS’s arrest of an alien. To the contrary, § 1357(a)(2) requires
19 only that an alien is brought without unnecessary delay for examination by a separate
20 immigration officer to determine if there is *prima facie* evidence to institute removal
21 proceedings against the alien. *See also* 8 C.F.R. 237.3(a), (b). Notably, Congress explicitly
22 omitted a probable cause hearing requirement for arrests made under § 1357(a)(2), as
23 evidenced by 8 U.S.C. § 1357(a)(4), which, in contrast to § 1357(a)(2), requires DHS to
24 take aliens arrested for immigration-related felonies before a United States magistrate judge
25 without unnecessary delay. Moreover, nothing in either § 1225 or § 1226 requires or
26 authorizes immigration judges to conduct a judicial review of probable cause within 48
27 hours of an alien’s arrest to sustain the alien’s detention pending removal proceedings. The
28 APA does not provide additional rights to aliens in removal proceedings beyond those

1 provided in the INA and its implementing regulations. *See, e.g., Peralta-Sanchez*, 847 F.3d
2 at 1133.

3 Finally, as discussed above, *see supra* II.A. and II. B., there is no constitutional right
4 to a probable cause hearing or an initial master calendar hearing before an immigration
5 judge within 48 hours. Accordingly, Plaintiffs have failed to demonstrate how Defendants'
6 failure to provide such a hearing is arbitrary, capricious, or an abuse of discretion. Plaintiff's
7 APA claims, therefore, must fail.

8 CONCLUSION

9 This Court should dismiss this case for lack of subject-matter jurisdiction under Fed.
10 R. Civ. P. 12(b)(1) and failure to state a claim under Fed. R. Civ. P. 12(b)(6). First, the
11 Court lacks subject-matter jurisdiction because of the jurisdiction stripping provisions of
12 the INA. Second, the law regarding civil immigration detention is fundamentally distinct
13 from criminal detention because civil immigration detention serves an entirely different
14 purpose, so constitutional criminal law analyses do not apply. Finally, this Court lacks
15 jurisdiction over Plaintiffs' APA claims, and even if there were jurisdiction, Plaintiffs fail
16 to state a claim upon which relief can be granted because there is no constitutional or
17 statutory right to either an initial master calendar hearing or a probable cause hearing before
18 an immigration judge within 48 hours.

1 DATED: May 22, 2017

Respectfully Submitted,

2 CHAD A. READLER
3 Acting Assistant Attorney General
4 Civil Division, U.S. Dep't of Justice

5 WILLIAM C. PEACHEY
6 Director
7 Office of Immigration Litigation (OIL)

8 COLIN A. KISOR
9 Deputy Director, OIL

10 ELIANIS N. PEREZ
11 Senior Litigation Counsel, OIL

12 SARAH L. VUONG
13 Senior Litigation Counsel, OIL

14 C. FREDERICK SHEFFIELD
15 Trial Attorney, OIL

16 s/ Kathleen A. Connolly
17 KATHLEEN A. CONNOLLY
18 Senior Litigation Counsel, OIL

19 ALANA W. ROBINSON
20 Acting United States Attorney
21 Southern District of California

22 SAMUEL W. BETTWY
23 Assistant U.S. Attorney

24 Attorneys for Defendants-Respondents
25
26
27
28

EXHIBIT INDEX

Jose Orlando Cancino Castellar, et al.,

v.

John F. Kelly, Secretary of Homeland Security, et al.,

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

Exhibit A:	Cancino Castellar, Notice to Appear
Exhibit B:	Cancino Castellar, Detainee Calendar Screening Questionnaire (February 21, 2017)
Exhibit C:	Cancino Castellar, Notice of Hearing (March 8, 2017)
Exhibit D:	Cancino Castellar, Form I-286, Notice of Custody Determination
Exhibit E:	Cancino Castellar, Proof of Release from Custody
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Exhibit J:	Hernandez Aguas, Hearing Notice (March 23, 2017)
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- Exhibit N: Gonzalez, Form I-860, Notice and Order of Expedited Removal
- Exhibit O: Gonzalez, Notice to Appear
- Exhibit P: Judgment, *U.S. v. Miguel Gonzalez-Banuelos*, CR S-89-080 (E.D. Cal. June 12, 1989)
- Exhibit Q: Judgment, *U.S. v. Fernando Hernandez-Valdivia a/k/a Miguel Gonzalez-Banuelos*, CR S-92-00107 (W.D.N.Y. Sept. 16, 1992)
- Exhibit R: Excerpts from EOIR Transcript, In the Matter of Michael Gonzalez, Hearing Date: March 14, 2017
- Exhibit S: Excerpts from EOIR Transcript, In the Matter of Michael Gonzalez, Hearing Date: March 27, 2017
- Exhibit T: Excerpts from EOIR Transcript, In the Matter of Michael Gonzalez, Hearing Date: April 6, 2017
- Exhibit U: Gonzalez, Hearing Notice (April 20, 2017)

EXHIBIT A

U.S. Department of Homeland Security

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act:

Subject ID: [REDACTED]

FINS: [REDACTED]

File No: [REDACTED] 413

DOB: [REDACTED] 1999

Event No: [REDACTED]

In the Matter of:

Respondent: JOSE ORLANDO CANCINO CASTELLAR AKA: CASTELLAR, JOSE CANCINO

currently residing at:

7488 Calzada de la Fuente SAN DIEGO, CALIFORNIA, 92154

(Number, street, city and ZIP code)

(Area code and phone number)

- ☐ 1. You are an arriving alien.
- ☒ 2. You are an alien present in the United States who has not been admitted or paroled.
- ☐ 3. You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:

1. You are not a citizen or national of the United States;
2. You are a native of MEXICO and a citizen of MEXICO;
3. You entered the United States at or near SAN YSIDRO, CALIFORNIA, on or about April 5, 2004;
4. You were not then admitted or paroled after inspection by an Immigration Officer.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended, in that you are an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

- ☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.
- ☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8CFR 208.30(f)(2) ☐ 8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

7488 Calzada de la Fuente, San Diego, California 92154.

(Complete Address of Immigration Court, including Room Number, if any)

on To be set. at To be set. to show why you should not be removed from the United States based on the

(Date) (Time)

charge(s) set forth above.

M 3029 CARRIZOSA

SDDO

(Signature and Title of Issuing Officer)

Date: February 21, 2017

SAN DIEGO, CALIFORNIA

(City and State)

SCANNED

FEB 24

SND

Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents, which you desire to have considered in connection with your case. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or removable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear of any relief from removal for which you may appear eligible including the privilege of departure voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the DHS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the DHS.

Mandatory Duty to Surrender for Removal: If you become subject to a final order of removal, you must surrender for removal to one of the offices listed in 8 CFR 241.16(a). Specific addresses on locations for surrender can be obtained from your local DHS office or over the internet at <http://www.ice.gov/about/dro/contact.htm>. You must surrender within 30 days from the date the order becomes administratively final, unless you obtain an order from a Federal court, immigration court, or the Board of Immigration Appeals staying execution of the removal order. Immigration regulations at 8 CFR 241.1 define when the removal order becomes administratively final. If you are granted voluntary departure and fail to depart the United States as required, fail to post a bond in connection with voluntary departure, or fail to comply with any other condition or term in connection with voluntary departure, you must surrender for removal on the next business day thereafter. If you do not surrender for removal as required, you will be ineligible for all forms of discretionary relief for as long as you remain in the United States and for ten years after departure or removal. This means you will be ineligible for asylum, cancellation of removal, voluntary departure, adjustment of status, change of nonimmigrant status, registry, and related waivers for this period. If you do not surrender for removal as required, you may also be criminally prosecuted under section 243 of the Act.

Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to a 10-day period prior to appearing before an immigration judge.

Before:

CONNY DEPORTATION OFFICER
(Signature and Title of Immigration Officer)

REFUSED TO SIGN
(Signature of Respondent)

Date: 2/21/17

Certificate of Service

This Notice To Appear was served on the respondent by me on February 21, 2017, in the following manner and in compliance with section 239(a)(1)(F) of the Act.

- ☒ in person ☐ by certified mail, returned receipt requested ☐ by regular mail
☐ Attached is a credible fear worksheet.
☒ Attached is a list of organization and attorneys which provide free legal services.

The alien was provided oral notice in the ENGLISH language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

REFUSED TO SIGN
(Signature of Respondent if Personally Served)

CONNY
C 2919-ORTIZ Deportation Officer
(Signature and Title of officer)

EXHIBIT B

DETAINEE CALENDAR SCREENING QUESTIONNAIRE

ALIEN'S NAME: CANCINO-Castellar, Jose OrlandoA Number: [REDACTED] 413YOU SPEAK: ☒ ENGLISH ☐ SPANISH ☐ OTHER (Include Dialects):VD. HABLA: ☐ ENGLÉS ☐ ESPAÑOL ☐ OTRA (Incluye Dialectos):

- | | | | |
|----|--|--|---|
| 1. | DID YOU RECEIVE A COPY OF THE I-862?
RECIBIO COPIA DEL I-862? | ☒ YES
SI | ☐ NO
NO |
| 2. | DO YOU WANT TIME TO OBTAIN AN ATTORNEY?
QUIERE TIEMPO PARA OBTENER UN ABOGADO? | YES
SI | ☒ NO
NO |
| 3. | ARE YOU AFRAID TO RETURN TO YOUR HOME COUNTRY?
TIENE USTED MIEDO DE REGRESAR A SU PAIS? | YES
SI | ☒ NO
NO |
| 4. | DO YOU WANT TO FIGHT YOUR REMOVAL CASE?
QUIERE USTED PELEAR SU CASO DE EXPULSION? | ☒ YES
SI | ☐ NO
NO |
| 5. | DO YOU WANT A PRIVATE REMOVAL HEARING?
QUIERE UNA AUDIENCIA DE EXPULSION EN PRIVADO? | YES
SI | ☒ NO
NO |
| 6. | ARE YOU A PERMANENT OR TEMPORARY RESIDENT THE U.S.?
ES RESIDENTE PERMANENTE O TEMPORAL DE LOS E.E.U.U.? | YES
SI | ☒ NO
NO |
| 7. | DO YOU HAVE A PETITION FOR LEGAL STATUS PENDING?
TIENE UNA PETICION PENDIENTE CON INMIGRACION? | YES
SI | ☒ NO
NO |
| 8. | DO YOU HAVE ANY OF THE FOLLOWING (AIDS, HEPATITIS, TUBERCULOSIS)?
PADECE DE LO SIGUIENTE (AIDS, HEPATITIS, TUBERCULOSIS)? | YES
SI | ☒ NO
NO |

A RESPONSE OF YES TO QUESTIONS 2, 3 OR 4, RENDERS THE DETAINEE INELIGIBLE FOR A NON-CONTESTED HEARING.

J. C.
ALIEN'S SIGNATURE

I CERTIFY THAT I HAVE EXPLAINED THE ABOVE QUESTIONS

TO: RESPONDENT IN THE ENGLISH/SPANISH LANGUAGE.

Ortiz DEPORTATION OFFICER
OFFICER'S SIGNATURE & TITLE

2/2/17
DATE

Effective date of this form is April 26, 2007 (all earlier versions of this questionnaire are obsolete and will be rejected by the Court)

BLP

EXHIBIT C

NOTICE OF HEARING IN REMOVAL PROCEEDINGS
IMMIGRATION COURT
7488 CALZADA DE LA FUENTE
SAN DIEGO, CA 92154

RE: CANCINO CASTELLAR, JOSE ORLANDO
FILE: A [REDACTED] 413

DATE: Mar 8, 2017

TO:

CANCINO CASTELLAR, JOSE ORLANDO
C/O JOE GREEN
7488 Calzada de la Fuente
SAN DIEGO, CA 92154

Please take notice that the above captioned case has been scheduled for a MASTER hearing before the Immigration Court on Mar 23, 2017 at 1:00 P.M. at:

7488 CALZADA DE LA FUENTE
SAN DIEGO, CA 92154

You may be represented in these proceedings, at no expense to the Government, by an attorney or other individual who is authorized and qualified to represent persons before an Immigration Court. Your hearing date has not been scheduled earlier than 10 days from the date of service of the Notice to Appear in order to permit you the opportunity to obtain an attorney or representative. If you wish to be represented, your attorney or representative must appear with you at the hearing prepared to proceed. You can request an earlier hearing in writing.

Failure to appear at your hearing except for exceptional circumstances may result in one or more of the following actions: (1) You may be taken into custody by the Department of Homeland Security and held for further action. OR (2) Your hearing may be held in your absence under section 240(b)(5) of the Immigration and Nationality Act. An order of removal will be entered against you if the Department of Homeland Security established by clear, unequivocal and convincing evidence that a) you or your attorney has been provided this notice and b) you are removable.

IF YOUR ADDRESS IS NOT LISTED ON THE NOTICE TO APPEAR, OR IF IT IS NOT CORRECT, WITHIN FIVE DAYS OF THIS NOTICE YOU MUST PROVIDE TO THE IMMIGRATION COURT SAN DIEGO, CA THE ATTACHED FORM EOIR-33 WITH YOUR ADDRESS AND/OR TELEPHONE NUMBER AT WHICH YOU CAN BE CONTACTED REGARDING THESE PROCEEDINGS. EVERYTIME YOU CHANGE YOUR ADDRESS AND/OR TELEPHONE NUMBER, YOU MUST INFORM THE COURT OF YOUR NEW ADDRESS AND/OR TELEPHONE NUMBER WITHIN 5 DAYS OF THE CHANGE ON THE ATTACHED FORM EOIR-33. ADDITIONAL FORMS EOIR-33 CAN BE OBTAINED FROM THE COURT WHERE YOU ARE SCHEDULED TO APPEAR. IN THE EVENT YOU ARE UNABLE TO OBTAIN A FORM EOIR-33, YOU MAY PROVIDE THE COURT IN WRITING WITH YOUR NEW ADDRESS AND/OR TELEPHONE NUMBER BUT YOU MUST CLEARLY MARK THE ENVELOPE "CHANGE OF ADDRESS." CORRESPONDENCE FROM THE COURT, INCLUDING HEARING NOTICES, WILL BE SENT TO THE MOST RECENT ADDRESS YOU HAVE PROVIDED, AND WILL BE CONSIDERED SUFFICIENT NOTICE TO YOU AND THESE PROCEEDINGS CAN GO FORWARD IN YOUR ABSENCE.

A list of free legal service providers has been given to you. For information regarding the status of your case, call toll free 1-800-898-7180 or 240-314-1500. For information on Immigration Court procedures, please consult the Immigration Court Practice Manual, available at www.usdoj.gov/eoir.

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: ☐ ALIEN ☒ ALIEN c/o Custodial Officer ☐ ALIEN's ATT/REP ☐ DHS
DATE: 3/8/17 BY: COURT STAFF V3
Attachments: ☐ EOIR-33 ☐ EOIR-28 ☐ Legal Services List ☐ Other

EXHIBIT D

DEPARTMENT OF HOMELAND SECURITY
NOTICE OF CUSTODY DETERMINATION

Alien's Name: CANCINO CASTELLAR, JOSE ORLANDO

A-File Number: 413

Date: 02/21/2017

Event ID:

Subject ID:

Pursuant to the authority contained in section 236 of the Immigration and Nationality Act and part 236 of title 8, Code of Federal Regulations, I have determined that, pending a final administrative determination in your case, you will be:

- ☒ Detained by the Department of Homeland Security.
- ☐ Released (check all that apply):
- ☐ Under bond in the amount of \$
- ☐ On your own recognizance.
- ☐ Under other conditions. [Additional document(s) will be provided.]

CARRIZOSA, M 3029

[Signature]
 Name and Signature of Authorized Officer

02/21/2017 08:23 AM

Date and Time of Custody Determination

SDDO

Title

ICE ENFORCEMENT AND REMOVAL OPERATIONS 880 FRONT STREET #2242
 SAN DIEGO, CA US 92101

Office Location/Address

You may request a review of this custody determination by an immigration judge.

- ☒ I acknowledge receipt of this notification, and
- ☒ I **do** request an immigration judge review of this custody determination.
- ☐ I **do not** request an immigration judge review of this custody determination.

J.C.
 Signature of Alien

2/21/17
 Date

The contents of this notice were read to See I-831 in the ENGLISH language.
 (Name of Alien) (Name of Language)

ORTIZ, C 2919

[Signature]
 Name and Signature of Officer

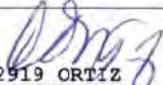
N/A
 Name or Number of Interpreter (if applicable)

Deportation Officer

Title

U.S. Department of Homeland Security

Continuation Page for Form I-286

Alien's Name CANCINO CASTELLAR, JOSE ORLANDO	File Number [REDACTED] 413 Event No: SND [REDACTED]	Date 02/21/2017
THE CONTENTS OF THIS NOTICE WERE READ TO ----- CANCINO CASTELLAR, JOSE ORLANDO		
Signature  C. 2919 ORTIZ	Title Deportation Officer	

2 of 2 Pages

Exhibit D

Page 2

EXHIBIT E

Hurwitz Holt, APLC
409 Camino Del Rio South, Suite 300
San Diego, CA 92108
Tel: (619) 239-7855
Fax: (619) 238-5544

Matthew G. Holt, Esq.
Cal State Bar # 253399
PRO BONO Attorney for Respondent

NOT DETAINED
DEPARTMENT
OF HOMELAND SECURITY
U.S. IMMIGRATION
AND CUSTOMS ENFORCEMENT
APR 11 2017
OFFICE OF CHIEF COUNSEL
SAN DIEGO, CA

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN DIEGO, CALIFORNIA**

In the Matter of:

Jose O. Cancino Castellar,

In removal proceedings.

)
)
) A [REDACTED] 413
)
)

Immigration Judge: TBD

MCH: Apr. 13, 2017 at 8am

COPY

Proof of Release from Custody



Notice of Release and Proof of Service

To: CANCINO CASTELLAR, JOSE ORLANDO

Date: 03/28/2017

File: A [REDACTED] 413

Bond Number: SND- [REDACTED]

Amount: \$3,500.00

You have been released from service custody pending a final decision in your exclusion/deportation hearing. It is understood that you will be residing at the above address. The law requires you notify the Immigration Judge (at the address shown below) of any address correction or address change. When doing so, be sure to include your name and the File Number shown above in your written communication. The attached form, EOIR-33 can be used for this purpose.

Office of the Immigration Judge
401 West A Street, Suite 800
San Diego, CA 92101

If you have already appeared before the Immigration Judge, you have been told when to appear for a further hearing. If you have yet to appear before the Judge, a notice of hearing will soon be sent to you at the above address. If you do not appear for the hearing, three (3) actions can be taken in your case:

1. Your deportation hearing may be held in your absence.
2. If a bond has been paid, it may be breached.
3. A warrant for your arrest may be issued.

I certify that the address listed above, furnished by me to the Service, is correct, and that a copy of this notice has been received by me this date

J. A.
CANCINO CASTELLAR, JOSE ORLANDO
03/28/2017

Signature of Respondent

Date

PROOF OF SERVICE

I certify that, on this date, I served the attached Form I-830 and release notice on the respondent by the following method (as checked):

☒ Hand delivery.

☐ By first class mail, postage prepaid, to the following address:

☐ Service by mail on respondent's counsel of record at the following address:

F. CRUZ/DO *[Signature]* 03/28/2017

Signature and Title of ICE Employee

Date

DRO May 22, 2002 Distribution: A-File; EOIR; Alien: CANCINO CASTELLAR, JOSE ORLANDO

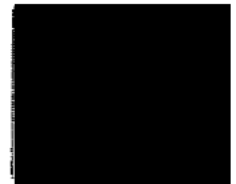


Exhibit E

Page 2

U.S. Department of Homeland Security
U. S. Immigration and Customs Enforcement

Notice to EOIR: Alien Address

Date: 03/28/2017

File No: A 413

To: Office of the Immigration Judge
Executive Office for Immigration Review
401 West A Street, Suite 800
San Diego, CA 92101 PH: 619-557-6052

From: Office of the Field Director
U. S. Immigration and Customs Enforcement
880 Front Street, Room 2242
San Diego, CA 92101 PH: 619-557-6117

Respondent: CANCINO CASTELLAR, JOSE ORLANDO

This is to notify you that this respondent is:

☐ Currently incarcerated by other than ICE. A charging document has been served on the respondent, and an Immigration Detainer-Notice of Action by the ICE (Form I-247) has been filed with the institution shown below. He/she is incarcerated at:

His/her anticipated release date is:

☐ Currently detained by ICE at:

☐ Currently detained by ICE and transferred this date to a new location:

ICE Motion for Change of Venue attached. ☐ Yes ☒ NO

☒ Released from ICE custody on the following condition(s):

☐ Personal Recognizance

☐ Order of Recognizance (Form I-240A)

☒ Bond in the amount of \$ 3,500.00 ☐ Surety bond ☒ Cash bond

☐ Other

☒ Upon release from ICE custody, the respondent reported his/her address and telephone number will be:

x PH:

☒ Upon release from ICE custody, the respondent was reminded of the requirements contained in Section 239 (a)(1)(F)(ii) of the Immigration and Nationality Act and was provided with an EOIR change of address form (EOIR-33).

Signature ICE Officer

F. CRUZ/DO

Printed Name of ICE Officer

Deportation Officer

Title-ICE Officer

San Diego, CA

Location

Hurwitz Holt, APLC
409 Camino Del Rio South, Suite 300
San Diego, CA 92108
Tel: (619) 239-7855
Fax: (619) 238-5544

NOT DETAINED

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN DIEGO, CALIFORNIA**

In the Matter of:)
Jose O. Cancino Castellar,) **Proof of Service**
In removal proceedings.) **[REDACTED] 413**

This is to certify that I have this day served the following parties a true copy of the documents listed below for the above captioned alien, the originals of which are attached hereto:

- **Cover Page**
- **Proof of Release From Custody Documents:**
 - ✓ Notice of Release and Proof of Service
 - ✓ Form I-830

I served the forgoing documents by first class mail upon the Deputy Chief Counsel, Office of the Principal Legal Advisor, for Department of Homeland Security at the following address:

880 Front Street, Suite 2246, San Diego, CA 92101

Executed April 7, 2017 at San Diego, California.


Matthew G. Holt, Esq.
FOR: Hurwitz Holt, APLC

EXHIBIT F

U.S. Department of Homeland Security

Warrant for Arrest of Alien

File No. A [REDACTED] 903

Event No: MUR [REDACTED]

Date: February 07, 2017

FINS #: [REDACTED]

To any officer delegated authority pursuant to Section 287 of the Immigration and Nationality Act:

From evidence submitted to me, it appears that:
ANA MARIA HERNANDEZ-AGUAS

(Full name of alien)

an alien who entered the United States at or near TECATE, CALIFORNIA on March 30, 2000 is within the country in violation of the immigration laws and is

(Port)

(Date)

therefore liable to being taken into custody as authorized by section 236 of the Immigration and Nationality Act.

By virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I command you to take the above-named alien into custody for proceedings in accordance with the applicable provisions of the immigration laws and regulations.


(Signature of Designated Immigration Officer)
JASON G. POTTS
(Print name of Designated Immigration Officer)

(CA) WATCH COMMANDER

(Title)

Certificate of Service

Served by me at San Diego, California on February 07, 2017 at 06:08 PM.
I certify that following such service, the alien was advised concerning his or her right to counsel and was furnished a copy of this warrant.

NOE PERAZA


(Signature of officer serving warrant)

BORDER PATROL AGENT

(Title of officer serving warrant)

Form I-200 (Rev. 02/01/07) N

EXHIBIT G

**DEPARTMENT OF HOMELAND SECURITY
NOTICE OF CUSTODY DETERMINATION**

Alien's Name: ANA MARIA HERNANDEZ-AGUASA-File Number: A [REDACTED] 903Date: 02/07/2017Event ID: MUR [REDACTED]Subject ID: [REDACTED]FIN: [REDACTED]

Pursuant to the authority contained in section 236 of the Immigration and Nationality Act and part 236 of title 8, Code of Federal Regulations, I have determined that, pending a final administrative determination in your case, you will be:

- ☒ Detained by the Department of Homeland Security.
- ☐ Released (check all that apply):
- ☐ Under bond in the amount of \$ _____
- ☐ On your own recognizance.
- ☐ Under other conditions. [Additional document(s) will be provided.]

JASON G. PORTAS

Name and Signature of Authorized Officer

02/07/2017 1808

Date and Time of Custody Determination

(A) WATCH COMMANDER

Title

San Diego, California

Office Location/Address

You may request a review of this custody determination by an immigration judge.

- ☒ I acknowledge receipt of this notification, and
- ☒ I do request an immigration judge review of this custody determination.
- ☐ I do not request an immigration judge review of this custody determination.

X Ana Maria Hernandez

Signature of Alien

Feb 7, 2017

Date

The contents of this notice were read to ANA MARIA HERNANDEZ-AGUAS in the Spanish language.

(Name of Alien) (Name of Language)

NOE PERAZA

Name and Signature of Officer

Name or Number of Interpreter (if applicable)

BORDER PATROL AGENT

Title

EXHIBIT H

DETAINEE CALENDAR SCREENING QUESTIONNAIRE

ALIEN'S NAME: HERNANDEZ-Aguas, Ana MariaA Number: A 903 Subject ID #: FINS:

YOU SPEAK: () ENGLISH (X) SPANISH () OTHER (Include Dialects):

VD. HABLA: () ENGLÉS (X) ESPAÑOL () OTRA (Incluye Dialectos):

- | | | | |
|----|--|--|---|
| 1. | DID YOU RECEIVE A COPY OF THE I-862?
RECIBIO COPIA DEL I-862? | ☒ YES
SI | ☐ NO
NO |
| 2. | DO YOU WANT TIME TO OBTAIN AN ATTORNEY?
QUIERE TIEMPO PARA OBTENER UN ABOGADO? | ☒ YES
SI | ☐ NO
NO |
| 3. | ARE YOU AFRAID TO RETURN TO YOUR HOME COUNTRY?
TIENE USTED MIEDO DE REGRESAR A SU PAIS? | YES
SI | ☒ NO
NO |
| 4. | DO YOU WANT TO FIGHT YOUR REMOVAL CASE?
QUIERE USTED PELEAR SU CASO DE EXPULSION? | ☒ YES
SI | ☐ NO
NO |
| 5. | DO YOU WANT A PRIVATE REMOVAL HEARING?
QUIERE UNA AUDIENCIA DE EXPULSION EN PRIVADO? | ☒ YES
SI | ☐ NO
NO |
| 6. | ARE YOU A PERMANENT OR TEMPORARY RESIDENT THE U.S.?
ES RESIDENTE PERMANENTE O TEMPORAL DE LOS E.E.U.U.? | YES
SI | ☒ NO
NO |
| 7. | DO YOU HAVE A PETITION FOR LEGAL STATUS PENDING?
TIENE UNA PETICION PENDIENTE CON INMIGRACION? | YES
SI | ☒ NO
NO |
| 8. | DO YOU HAVE ANY OF THE FOLLOWING (AIDS, HEPATITIS, TUBERCULOSIS)?
PADECE DE LO SIGUIENTE (AIDS, HEPATITIS, TUBERCULOSIS)? | YES
SI | ☒ NO
NO |

A RESPONSE OF YES TO QUESTIONS 2, 3 OR 4, RENDERS THE DETAINEE INELIGIBLE FOR A NON-CONTESTED HEARING.

X Ana Maria Hernandez
ALIEN'S SIGNATURE

I CERTIFY THAT I HAVE EXPLAINED THE ABOVE QUESTIONS

TO: RESPONDENT IN THE ENGLISH / SPANISH LANGUAGE.

OFFICER'S SIGNATURE & TITLE

2/7/2017
DATE

Effective date of this form is April 26, 2007 (all earlier versions of this questionnaire are obsolete and will be rejected by the Court)

BLP

EXHIBIT I

U.S. Department of Homeland Security

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act:

Subject ID: [REDACTED] FINS #: [REDACTED] File No: A [REDACTED] 903
 DOB: [REDACTED] 1983 Event No: MUR [REDACTED]

In the Matter of:

Respondent: ANA MARIA HERNANDEZ-AGUAS currently residing at:

IN DHS CUSTODY UNITED STATES

(Number, street, city and ZIP code)

(Area code and phone number)

DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW

FEB 21 2017

OTAY MESA, CA
IMMIGRATION COURT
SP

- ☐ 1. You are an arriving alien.
☒ 2. You are an alien present in the United States who has not been admitted or paroled.
☐ 3. You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:

1. You are not a citizen or national of the United States;
2. You are a native of MEXICO and a citizen of MEXICO ;
3. You arrived in the United States at or near TECATE, CALIFORNIA, on or about March 30, 2000;
4. You were not then admitted or paroled after inspection by an Immigration Officer.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended, in that you are an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

- ☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.
☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8CFR 208.30(f)(2) ☐ 8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:
 A PLACE TO BE SET

on a date to be set at a time to be set to show why you should not be removed from the United States based on the
 (Date) (Time)

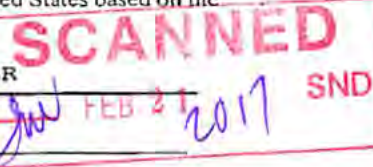
charge(s) set forth above.

Date: February 07, 2017San Diego, California

(Signature and Title of Issuing Officer)

(City and State)

CH) WATCH COMMANDER



See reverse for important information

Form I-862 (Rev. 08/01/07) N

Exhibit I

Page 1

EXHIBIT J

NOTICE OF HEARING IN REMOVAL PROCEEDINGS
IMMIGRATION COURT
401 WEST A STREET, SUITE #800
SAN DIEGO, CA 92101

RE: HERNANDEZ-AGUAS, ANA MARIA
FILE: A [REDACTED] 903

DATE: Mar 23, 2017

TO:

HERNANDEZ-AGUAS, ANA MARIA
[REDACTED]

Please take notice that the above captioned case has been scheduled for a MASTER hearing before the Immigration Court on Jul 19, 2017 at 1:00 P.M. at:

401 WEST A STREET, SUITE #800
SAN DIEGO, CA 92101

You may be represented in these proceedings, at no expense to the Government, by an attorney or other individual who is authorized and qualified to represent persons before an Immigration Court. Your hearing date has not been scheduled earlier than 10 days from the date of service of the Notice to Appear in order to permit you the opportunity to obtain an attorney or representative. If you wish to be represented, your attorney or representative must appear with you at the hearing prepared to proceed. You can request an earlier hearing in writing.

Failure to appear at your hearing except for exceptional circumstances may result in one or more of the following actions: (1) You may be taken into custody by the Department of Homeland Security and held for further action. OR (2) Your hearing may be held in your absence under section 240(b)(5) of the Immigration and Nationality Act. An order of removal will be entered against you if the Department of Homeland Security established by clear, unequivocal and convincing evidence that a) you or your attorney has been provided this notice and b) you are removable.

IF YOUR ADDRESS IS NOT LISTED ON THE NOTICE TO APPEAR, OR IF IT IS NOT CORRECT, WITHIN FIVE DAYS OF THIS NOTICE YOU MUST PROVIDE TO THE IMMIGRATION COURT SAN DIEGO, CA THE ATTACHED FORM EOIR-33 WITH YOUR ADDRESS AND/OR TELEPHONE NUMBER AT WHICH YOU CAN BE CONTACTED REGARDING THESE PROCEEDINGS. EVERYTIME YOU CHANGE YOUR ADDRESS AND/OR TELEPHONE NUMBER, YOU MUST INFORM THE COURT OF YOUR NEW ADDRESS AND/OR TELEPHONE NUMBER WITHIN 5 DAYS OF THE CHANGE ON THE ATTACHED FORM EOIR-33. ADDITIONAL FORMS EOIR-33 CAN BE OBTAINED FROM THE COURT WHERE YOU ARE SCHEDULED TO APPEAR. IN THE EVENT YOU ARE UNABLE TO OBTAIN A FORM EOIR-33, YOU MAY PROVIDE THE COURT IN WRITING WITH YOUR NEW ADDRESS AND/OR TELEPHONE NUMBER BUT YOU MUST CLEARLY MARK THE ENVELOPE "CHANGE OF ADDRESS." CORRESPONDENCE FROM THE COURT, INCLUDING HEARING NOTICES, WILL BE SENT TO THE MOST RECENT ADDRESS YOU HAVE PROVIDED, AND WILL BE CONSIDERED SUFFICIENT NOTICE TO YOU AND THESE PROCEEDINGS CAN GO FORWARD IN YOUR ABSENCE.

A list of free legal service providers has been given to you. For information regarding the status of your case, call toll free 1-800-898-7180 or 240-314-1500. For information on Immigration Court procedures, please consult the Immigration Court Practice Manual, available at www.usdoj.gov/eoir.

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL ☒ (M) PERSONAL SERVICE ☒ (P)
TO: ☒ ALIEN ☐ ALIEN c/o Custodial Officer ☐ ALIEN's ATT/REP ☒ DHS
DATE: 3-23-17 BY: COURT STAFF [Signature] V3
Attachments: ☐ EOIR-33 ☐ EOIR-28 ☐ Legal Services List ☐ Other

EXHIBIT K

D ETAINEE CALENDAR SCREENING QUESTIONNAIRE**ALIEN'S NAME: HERNANDEZ-AGUEAS, ANA MARIA****A Number: A [REDACTED] 903**

YOU SPEAK: () ENGLISH (X) SPANISH () OTHER (Include Dialects):
VD. HABLA: () ENGLÉS (X) ESPAÑOL () OTRA (Incluye Dialectos):

- | | | | |
|----|--|-------------------------|------------------------|
| 1. | DID YOU RECEIVE A COPY OF THE I-862?
RECIBIO COPIA DEL I-862? | YES
SI | NO
NO |
| 2. | DO YOU WANT TIME TO OBTAIN AN ATTORNEY?
QUIERE TIEMPO PARA OBTENER UN ABOGADO? | YES
SI | NO
NO |
| 3. | ARE YOU AFRAID TO RETURN TO YOUR HOME COUNTRY?
TIENE USTED MIEDO DE REGRESAR A SU PAIS? | YES
SI | NO
NO |
| 4. | DO YOU WANT TO FIGHT YOUR REMOVAL CASE?
QUIERE USTED PELEAR SU CASO DE EXPULSION? | YES
SI | NO
NO |
| 5. | DO YOU WANT A PRIVATE REMOVAL HEARING?
QUIERE UNA AUDIENCIA DE EXPULSION EN PRIVADO? | YES
SI | NO
NO |
| 6. | ARE YOU A PERMANENT OR TEMPORARY RESIDENT THE U.S.?
ES RESIDENTE PERMANENTE O TEMPORAL DE LOS E.E.U.U.? | YES
SI | NO
NO |
| 7. | DO YOU HAVE A PETITION FOR LEGAL STATUS PENDING?
TIENE UNA PETICION PENDIENTE CON INMIGRACION? | YES
SI | NO
NO |
| 8. | DO YOU HAVE ANY OF THE FOLLOWING (AIDS, HEPATITIS, TUBERCULOSIS)?
PADECE DE LO SIGUIENTE (AIDS, HEPATITIS, TUBERCULOSIS)? | YES
SI | NO
NO |

A RESPONSE OF YES TO QUESTIONS 2, 3 OR 4, RENDERS THE DETAINEE INELIGIBLE FOR A NON-CONTESTED HEARING.

refuse to sign
ALIEN'S SIGNATURE

I CERTIFY THAT I HAVE EXPLAINED THE ABOVE QUESTIONS

TO: RESPONDENT IN THE ENGLISH/SPANISH LANGUAGE.

[Signature]
OFFICER'S SIGNATURE & TITLE

2/12/2007
DATE

Effective date of this form is April 26, 2007 (all earlier versions of this questionnaire are obsolete and will be rejected by the Court)

BLP

EXHIBIT L

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN DIEGO, CA

FILE: A [REDACTED] 903

IN THE MATTER OF:

HERNANDEZ AGUAS, ANA MARIA

RESPONDENT

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE
WITH RESPECT TO CUSTODY
AMENDED ORDER

Request having been made for a change in the custody status of respondent pursuant to 8 CFR 236.1(c), and full consideration having been given to the representations of the Department of Homeland Security and the respondent, it is hereby

_____ ORDERED that the request for a change in custody status be denied.

☒ ORDERED that the request be granted and that respondent be:

_____ released from custody on his own recognizance

☒ released from custody under bond of \$2,500

_____ OTHER _____

Copy of this decision has been served on the respondent and the Department of Homeland Security.

APPEAL: *Boh* waived -- reserved

SAN DIEGO -- OTAY MESA DETENTION CENTER

Date: Mar 13, 2017


HENRY P. IPEMA
Immigration Judge

XS

EXHIBIT M



Notice of Release and Proof of Service

To: HERNANDEZ-AGUAS, ANA MARIA

Date: 03/14/2017

File: A [REDACTED] 903

Bond Number: SND-[REDACTED]

Amount: \$2,500.00

You have been released from service custody pending a final decision in your exclusion/deportation hearing. It is understood that you will be residing at the above address. The law requires you notify the Immigration Judge (at the address shown below) of any address correction or address change. When doing so, be sure to include your name and the File Number shown above in your written communication. The attached form, EOIR-33 can be used for this purpose.

Office of the Immigration Judge
401 West A Street, Suite 800
San Diego, CA 92101

If you have already appeared before the Immigration Judge, you have been told when to appear for a further hearing. If you have yet to appear before the Judge, a notice of hearing will soon be sent to you at the above address. If you do not appear for the hearing, three (3) actions can be taken in your case:

1. Your deportation hearing may be held in your absence.
2. If a bond has been paid, it may be breached.
3. A warrant for your arrest may be issued.

I certify that the address listed above, furnished by me to the Service, is correct, and that a copy of this notice has been received by me this date

HERNANDEZ-AGUAS, ANA MARIA

03/14/2017 Ana Maria Hernandez

Signature of Respondent

Date

PROOF OF SERVICE

I certify that, on this date, I served the attached Form I-830 and release notice on the respondent by the following method (as checked):

☒ Hand delivery.

☐ By first class mail, postage prepaid, to the following address:

☐ Service by mail on respondent's counsel of record at the following address:



R. RICHMOND/DO

03/14/2017

Signature and Title of ICE Employee

Date

DRG May 22, 2002 Distribution: A-File EOIR; Alien: HERNANDEZ-AGUAS, ANA MARIA

RECEIVED
MAR 15 A 7:51
DEPT OF JUSTICE
IMMIGRATION COURT
SAN DIEGO (EAST HALL)

EXHIBIT N

U.S. Department of Homeland Security

Notice and Order of Expedited Removal

DETERMINATION OF INADMISSIBILITY

Event Number :SYS1711001633 File No: A [REDACTED] 708

SIGMA Event: 8825980

Date: November 18, 2016

In the Matter of: MICHAEL GONZALEZ

Pursuant to section 235(b)(1) of the Immigration and Nationality Act (Act), (8 U.S.C. 1225(b)(1)), the Department of Homeland Security has determined that you are inadmissible to the United States under section(s) 212(a) ☐ (6)(C)(i); ☒ (6)(C)(ii); ☒ (7)(A)(i)(I); ☐ (7)(A)(i)(II); ☐ (7)(B)(i)(I); and/or ☐ (7)(B)(i)(II) of the Act, as amended, and therefore are subject to removal, in that:

1) 1) You are not a citizen or national of the United States

2) You are a native of Mexico and a citizen of Mexico.

3) On or about November 17, 2016, you applied for admission into the United States from Mexico at the San Ysidro Port of Entry, and verbally declared yourself to being a United States Citizen.

4) You are an immigrant not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document as required by the Immigration and Nationality Act.

... (CONTINUED ON I-831)

AGAPE ANDERSON
CBP Officer

Name and title of immigration officer (Print)



Signature of immigration officer

ORDER OF REMOVAL UNDER SECTION 235(b)(1) OF THE ACT

Based upon the determination set forth above and evidence presented during inspection or examination pursuant to section 235 of the Act, and by the authority contained in section 235(b)(1) of the Act, you are found to be inadmissible as charged and ordered removed from the United States.

Name and title of immigration officer (Print)

Signature of immigration officer

Name and title of supervisor (Print)

Signature of supervisor, if available

☐ Check here if supervisory concurrence was obtained by telephone or other means (no supervisor on duty).

CERTIFICATE OF SERVICE

I personally served the original of this notice upon the above-named person on _____ (Date)

Signature of immigration officer

Form I-860 (Rev. 08/01/07)

Done

U.S. Department of Homeland Security

Continuation Page for Form I-860

Alien's Name
MICHAEL GONZALEZ

File Number A [REDACTED] 708
SIGMA Event: [REDACTED]
Event No: SYS [REDACTED]

Date
November 18, 2016

ON THE BASIS OF THE FOREGOING, IT IS CHARGED THAT YOU ARE SUBJECT TO REMOVAL FROM THE UNITED STATES PURSUANT TO THE FOLLOWING PROVISION(S) OF LAW:

Section 212(a)(6)(C)(ii) of the Immigration and Nationality Act (Act), as amended, as an alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for a purpose or benefit under the Act (including section 274A) or any other Federal or State law.

212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (Act), as amended, as an immigrant who, at the time of application for admission, is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality as required under the regulations issued by the Attorney General under section 211(a) of the Act.

Signature


AGAPE ANDERSON

Title

CBP Officer

2 of 2 Pages

EXHIBIT O

DEPARTMENT OF HOMELAND SECURITY

NOTICE TO APPEAR

A-file R6410

In removal proceedings under section 240 of the Immigration and Nationality Act:

File No: A [REDACTED] 712

In the Matter of:

Respondent: GONZALEZ, MICHAEL AKA: BANUELOS ROSALES, ANGEL; HERNANDEZ VALDIVIA, FERNANDO; HERNANDEZ-VALDI, FERNANDO; GONZALEZ, MICHAEL; GONZALEZ BANUELOS, MIGUEL currently residing at:

c/o DHS Otay Mesa Detention Center/OMDC, 7488 Calzada de la Fuente, San Diego, CA 92158

(619) 661-3800

(Number, street, city and ZIP code)

(Area code and phone number)

☒ You are an arriving alien.☐ You are an alien present in the United States who has not been admitted or paroled.☐ You have been admitted to the United States, but are removable for the reasons stated below.
The Department of Homeland Security alleges that you:

1. You are not a citizen or national of the United States;
2. You are a native of Mexico and a citizen of Mexico;
3. You applied for admission to the United States at the San Ysidro, CA port of entry on or about 11/17/2016;
4. You did not then possess or present a valid immigrant visa, reentry permit, border crossing identification card, or other valid entry document.

RECEIVED
2017 JAN 19 A 9:19
DEPT OF JUSTICE
IMMIGRATION COURT
SAN DIEGO (EAST MESA) CA

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (Act), as amended, as an immigrant who at the time of application for admission, is not in the possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act, or who is not in possession of a valid unexpired passport, or other suitable document, or identity and nationality document if such document is required by regulations issued by the Attorney General pursuant to Section 211(a) of the Act.

☒ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8CFR 208.30 ☐ 8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

EOIR, site to be determined in San Diego

(Complete Address of Immigration Court, including Room Number, if any)

On _____ to be set _____ at _____ to be set _____ to show why you should not be removed from the United States based on the
(Date) (Time)

charge(s) set forth above.

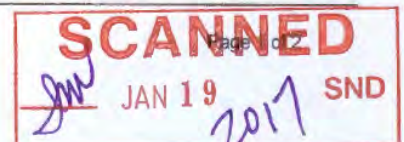
(Signature and Title of Issuing Officer)

Date: JAN 09 2017

Anaheim, CA
(City and State)

DHS Form I-862 (5/11)

See reverse for important information



Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 1003.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents, which you desire to have considered in connection with your case. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or removable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear of any relief from removal for which you may appear eligible including the privilege of departure voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the DHS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court and the Department of Homeland Security immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the DHS.

Mandatory Duty to Surrender for Removal: If you become subject to a final order of removal, you must surrender for removal to your local DHS office, listed on the internet at <http://www.ice.gov/contact/ero>, as directed by DHS and required by statute and regulation. Immigration regulations at 8 CFR 1241.1 define when the removal order becomes administratively final. If you are granted voluntary departure and fail to depart the United States as required, fail to post a bond in connection with voluntary departure, or fail to comply with any other condition or term in connection with voluntary departure, you must surrender for removal on the next business day thereafter. If you do not surrender for removal as required, you will be ineligible for all forms of discretionary relief for as long as you remain in the United States and for ten years after departure or removal. This means you will be ineligible for asylum, cancellation of removal, voluntary departure, adjustment of status, change of nonimmigrant status, registry, and related waivers for this period. If you do not surrender for removal as required, you may also be criminally prosecuted under section 243 of the Immigration and Nationality Act (the Act).

Request for Prompt Hearing

To expedite a determination in my case, I request this Notice to Appear be filed with the Executive Office of Immigration Review as soon as possible. I waive my right to a 10-day period prior to appearing before an immigration judge and request my hearing be scheduled.

Before:

(Signature of Respondent)

Date: _____

(Signature and Title of Immigration Officer)

Certificate of Service

JAN 05 2017

This Notice To Appear was served on the respondent by me on _____, in the following manner and in compliance with section 239(a)(1) of the Act.

☒ in person ☐ by certified mail, returned receipt # _____ requested ☐ by regular mail

☒ Attached is a credible fear worksheet.

☒ Attached is a list of organization and attorneys which provide free legal services.

The alien was provided oral notice in the Spanish language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

(Signature of Respondent if Personally Served)

(Signature and Title of officer)

- * Non Profit Organization
- ** Referral Service
- *** Private Attorney

List of Pro Bono Legal Service Providers

Updated October 2016

<http://www.justice.gov/eoir/list-pro-bono-legal-service-providers>

San Diego Immigration Court

San Diego, California	
ABA Immigration Justice Project* 2727 Camino del Rio South, Suite 223 San Diego, CA 92108 (619) 655-8817 - Refer limited detained and non-detained cases to Pro Bono Attorneys - Offer legal orientations to individuals in removal proceedings at the San Diego Immigration Court, Wednesdays 8:30 am - 10:00 am (English and Espanol). Call for more information.	Casa Cornelia Law Center* 2760 Fifth Avenue, Suite 200 San Diego, CA 92103 Tel: 1-855-271-2272 Fax: 619-231-7784 LawCenter@CasaCornelia.org
Legal Aid Society of San Diego* 110 South Euclid Ave. San Diego, CA 92114 1-877 Legal Aid (877-534-2524), Toll Free - No charge. - Will not represent asylum cases.	- No Charge - Will represent detained and non-detained aliens in asylum cases - Will represent detained and non-detained unaccompanied children in deportation or removal proceedings
Mari Kleven, Esq.*** 964 Fifth Avenue, Suite 214 San Diego, CA 92101 marikleven@gmail.com Tel: 619-752-4646 Fax: 619-564-7717	Ali Golchin, Esq.*** Golchin and Associates 1251 Third Ave., Ste. 203 Chula Vista, Ca 91911 (619) 325-7555 - Will not represent aliens in asylum cases. - Representation limited to the San Diego district

Disclaimer: As required by 8 C.F.R. § 1003.61, the Executive Office for Immigration Review (EOIR), Office of the Director, Office of Legal Access Programs maintains a list of organizations and attorneys qualified under the regulations who provide pro bono or free legal services. The information posted on this list is provided to EOIR by the Providers. EOIR does not endorse any of these organizations or attorneys. Additionally, EOIR does not participate in, nor is it responsible for, the representation decisions or performance of these organizations or attorneys.

EXHIBIT P

AO 245 S (3/88) Sheet 1 - Judgment Including Sentence Under the Sentencing Reform Act

United States District Court

EASTERN

District of

CALIFORNIA

UNITED STATES OF AMERICA

V.

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

MIGUEL GONZALEZ-BANUELOS

Case Number CR S-89-080 EJJ

(Name of Defendant)

Carl Larson

Defendant's Attorney

THE DEFENDANT:

- ☒ pleaded guilty to count(s) One
☐ was found guilty on count(s) _____ after a
 plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
18:1326	Deported Alien Found in the U. S.	I

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).
☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.
☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
☐ It is ordered that the defendant shall pay to the United States a special assessment of \$ _____, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:

unknown

Defendant's mailing address:

unknown

Defendant's residence address:

unknown

June 12, 1989

Date of Imposition of Sentence

Signature of Judicial Officer

EDWARD J. GARCIA, JUDGE

Name & Title of Judicial Officer

June 17, 1989

Date

Exhibit P

Page 1

AO 245 S (3/88) Sheet 2 - Imprisonment

Defendant: **MIGUEL GONZALEZ-BANUELOS**
Case Number: **CR S-89-080 EJG**

Judgment—Page 2 of 4

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWELVE (12) MONTHS.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district,

☐ at _____ a.m.
☐ at _____ p.m. on _____.

☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____ at _____
_____, with a certified copy of this Judgment.

United States Marshal

By _____ Exhibit P

Deputy Marshal

Judgment—Page 3 of 4

Defendant: MIGUEL GONZALEZ-BANUELOS
Case Number: CR S-89-080 EJG

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of _____

ONE (1) YEAR.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

- ☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

In addition to the conditions of release set forth on page four of this judgment, IT IS FURTHER ORDERED that: (1) Defendant shall obey all local, state & Federal laws and (2) Defendant shall not re-enter the United States without the written permission of the U. S. Attorney General.

Judgment—Page 4 of 4

Defendant: **MIGUEL GONZALEZ-BANUELOS**
Case Number: **CR S-89-0809 EJG**

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

- 1) The defendant shall not commit another Federal, state or local crime;
- 2) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 5) the defendant shall support his or her dependents and meet other family responsibilities;
- 6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
- 8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- 9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

See page three of this judgment.

REFER TO _____
SACRAMENTO, CALIF
JUN 14 11 01 AM '89
RECEIVED
U.S. ATTORNEY

FILED

FEB 24 4 16 PM '89

CLERK OF COURT
EASTERN DISTRICT OF CALIF.
AT SACRAMENTO

BY _____
DEPUTY

1 DAVID F. LEVI
United States Attorney
2 GLYNDELL E. WILLIAMS
Special Assistant U.S. Attorney
3 3305 Federal Building
650 Capitol Mall
4 Sacramento, California 95814
Telephone: (916) 551-2700
5
6
7
8

9 IN THE UNITED STATES DISTRICT COURT FOR THE
10 EASTERN DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA,
12 Plaintiff,
13

14 v.

15 MIGUEL GONZALES-BANUELOS,
16 Defendant.

UN. 89-080 EJG
CR. NO.

VIOLATION: 8 U.S.C. §
1326 - Deported Alien Found
In United States

17 I N D I C T M E N T

18 [8 U.S.C. § 1326]

19 The Grand Jury charges: T H A T

20 MIGUEL GONZALES-BANUELOS,

21 defendant herein, an alien, on or about March 10, 1988, was
22 arrested and deported from the United States in pursuance of law;
23 and thereafter on or about November 3, 1988, the defendant was
24 found in the State and Eastern District of California, the
25 Attorney General of the United States not theretofore having

26 ///

27 ///

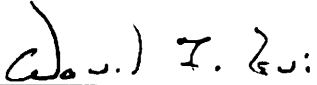
28 ///

1 expressly consented to a reapplication by the defendant for
2 admission into the United States, in violation of Title 8, United
3 States Code, Section 1326.

4
5 A TRUE BILL.

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FOREPERSON

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DAVID F. LEVI
United States Attorney

EXHIBIT Q

AO 245 S (Rev. 4/90) Sheet 1 - Judgment in a Criminal Case

WRK:ams

United States District Court

WESTERN

District of

NEW YORK

FILED
92 SEP 22 PM 1:44

UNITED STATES OF AMERICA

V.

U.S. DISTRICT COURT

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

FERNANDO HERNANDEZ-VALDIVIA Case Number: 92 CR 00107 001 S

(Name of Defendant)

Robert Riordan

Defendant's Attorney

THE DEFENDANT:

- ☒ pleaded guilty to count(s) I
- ☐ was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
8 U.S.C. Section 1326(b)(1)	ILLEGAL RE-ENTRY INTO THE UNITED STATES	04/03/92	I

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).
- ☒ Count(s) II (is)(are) dismissed on the motion of the United States.
- ☒ It is ordered that the defendant shall pay a special assessment of \$ 50, for count(s) I, which shall be due ☒ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: -8936Defendant's Date of Birth: 52

Defendant's Mailing Address:

Bureau of Prisons

Defendant's Residence Address:

No permanent address

ATTEST: A TRUE COPY WILLIAM M. SKRETNY, U.S. District Judge

U.S. DISTRICT COURT, WONY
RODNEY C. EARLY, CLERK

Name & Title of Judicial Officer

By

Deputy Clerk

Original Filed

September 21, 1992

Date

AO 245 S (Rev. 4/90) Sheet 2 - Imprisonment

Defendant: **FERNANDO HERNANDEZ-VALDIVIA**
Case Number: **92-CR 00107 001 S**

Judgment—Page 2 of 4

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **sixty (60) months**.

☒ The court makes the following recommendations to the Bureau of Prisons:

The defendant should be placed near his family members in California.

☒ The defendant is remanded to the custody of the United States marshal.

☐ The defendant shall surrender to the United States marshal for this district,

☐ at _____ a.m.
_____ p.m. on _____.

☐ as notified by the United States marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

☐ before 2 p.m. on _____.

☐ as notified by the United States marshal.

☐ as notified by the probation office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at

_____, with a certified copy of this judgment.

United States Marshal

By _____
Deputy Marshal

★ U.S.GPO:1990-722-448/10286

Defendant: **FERNANDO HERNANDEZ-VALDIVIA**
 Case Number: **'92 CR 00107 001 S**

Judgment—Page **3** of **4**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of _____
three (3) years unsupervised

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

- ☐ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
- ☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.
- ☒ The defendant shall not possess a firearm or destructive device.

The defendant shall not re-enter the United States without permission of the Attorney General.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

15) The defendant shall be prohibited from possessing a firearm or other dangerous weapon.

AQ 245.S (Rev. 4/90) Sheet 7 - Statement of Reasons

Defendant: **FERNANDO HERNANDEZ-VALDIVIA**
Case Number: **92 CR 00107 001 S**

Judgment — Page **4** of **4**

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 24

Criminal History Category: VI

Imprisonment Range: 100 to 125 months (5 year statutory maximum)

Supervised Release Range: 2 to 3 years

Fine Range: \$ 10,000 to \$ 100,000

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: \$ _____

☐ Full restitution is not ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☒ for the following reason(s):

Pursuant to 5G1.1, since the maximum term of imprisonment is 60 months by statute, the statutorily maximum sentence of 60 months becomes the guideline sentence.

ATTEST: A TRUE COPY
U.S. DISTRICT COURT, WDNY
RODNEY C. EARLY, CLERK

By Rodney C. Early
Deputy Clerk
Original Filed 5/12/92

IN THE DISTRICT COURT OF THE UNITED STATES

For the Western District of New York

OCTOBER 1990 GRAND JURY
(Empaneled 10/2/90)

THE UNITED STATES OF AMERICA

-vs-

FERNANDO HERNANDEZ-VALDIVIA
A/K/A MIGUEL GONZALEZ BANUELOS

CR-92 00107A

Violation:

Title 8, United
States Code,
Section 1326 and
Title 18, United
States Code,
Section 1001

COUNT I

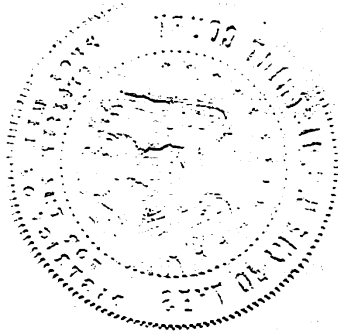
The Grand Jury Charges:

On or about April 3, 1992, in the Western District of New York, the defendant, FERNANDO HERNANDEZ-VALDIVIA, did knowingly, willfully and unlawfully attempt to enter the United States after having been deported from the United States at El Paso, Texas on May 23, 1990, subsequent to being convicted of a felony, without first obtaining permission from the Attorney General of the United States to reapply for entry into the United States; all in violation of Title 8, United States Code, Section 1326.

COUNT II

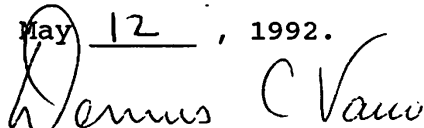
The Grand Jury Further Charges That:

On or about April 3, 1992, in the Western District of New

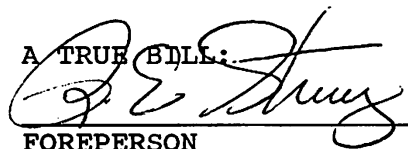


York, the defendant, FERNANDO HERNANDEZ-VALDIVIA, in a matter within the jurisdiction of the U.S. Border Patrol, an agency of the United States, did knowingly and willfully make a false, fraudulent and fictitious material statement and representation; that is, that he was FERNANDO HERNANDEZ-VALDIVIA, a citizen of the United States, whereas he was not a citizen of the United States; all in violation of Title 18, United States Code, Section 1001.

DATED: Buffalo, New York, May 12, 1992.


DENNIS C. VACCO
United States Attorney

A TRUE BILL:


FOREPERSON

No. _____

UNITED STATES DISTRICT COURT

WESTERN

District of NEW YORK

Division

THE UNITED STATES OF AMERICA

DS

FERNANDO HERNANDEZ-VALDIVIA

DEFENDANT

INDICTMENT

DENNIS C. VACCO
UNITED STATES ATTORNEY
WILLIAM M. FLYNN
ASSISTANT U.S. ATTORNEY

A true bill.

e bill. *G. E. H.*

Foreword

Filed in open court this _____ day

of _____, A.D. 19_____

Clerk.

Bail, \$ - - - - -

GPO 863 525

[illegible]

81-0117 21 JAN 95

6974

EXHIBIT R

U.S. Department of Justice
Executive Office for Immigration Review
United States Immigration Court

In the Matter of

File: A [REDACTED]-712

MICHAEL GONZALEZ

a/k/a FERNANDO HERNANDEZ-VALDIVIA

RESPONDENT

)
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)

IN REMOVAL PROCEEDINGS

Transcript of Hearing

Before HENRY IPEMA, JR., Immigration Judge

Date: March 14, 2017

Place: OTAY MESA, CALIFORNIA

Transcribed by FREE STATE REPORTING, Inc.-2

Official Interpreter:

Language:

Appearances:

For the RESPONDENT: PRO SE

For the DHS: SHANNON M. GOING

1 JUDGE TO MR. GONZALEZ

2 Sir, what language do you speak and understand the best?

3 MR. GONZALEZ TO JUDGE

4 English.

5 JUDGE FOR THE RECORD

6 English is the language of choice. This is Immigration Judge Henry Ipema, I P E

7 M A, and I'm presiding over the detained docket of the Otay Mesa, California

8 Immigration Court on March 14, 2017. This next case is a removal proceeding, file [REDACTED]

9 [REDACTED] 712. Name on the Notice to Appear, Michael Gonzalez. Respondent is present.

10 He does not appear to be represented by counsel.

11 JUDGE TO MS. GOING

12 And representing the Government today?

13 MS. GOING TO JUDGE

14 Shannon Going on behalf of the Department.

15 JUDGE TO MR. GONZALEZ

16 Thank you.

17 JUDGE TO MR. GONZALEZ

18 Sir, if you'll please stand for a moment, raise your right hand. Do you swear or

19 affirm to tell the whole truth and nothing but the truth?

20 MR. GONZALEZ TO JUDGE

21 Yes.

22 JUDGE TO MR. GONZALEZ

23 Please be seated and state your full and true name for the record.

24 MR. GONZALEZ TO JUDGE

25 My name is Michael Gonzalez.

1 JUDGE TO MR. GONZALEZ

2 Now, sir, the purpose of these proceedings is to determine if you have the right to
3 remain in the United States, do you understand?

4 MR. GONZALEZ TO JUDGE

5 Yes.

6 JUDGE TO MR. GONZALEZ

7 In these proceedings, you have the right to be represented by an attorney or
8 qualified representative of your own choosing, but at no expense to the United States
9 Government. We also have a list of legal aid organizations that may be willing to help
10 you for little or no money in the event that you cannot hire a lawyer on your own. Did
11 you receive a copy of the list?

12 MR. GONZALEZ TO JUDGE

13 I did.

14 JUDGE TO MR. GONZALEZ

15 Okay. And would you like more time to try to find a lawyer to help you?

16 MR. GONZALEZ TO JUDGE

17 Well, I don't know if we want to see these papers here. I got somebody already
18 helping me, but you exchange the date of the court.

19 JUDGE TO MR. GONZALEZ

20 Okay.

21 MR. GONZALEZ TO JUDGE

22 He supposed to be there 5th of April and today's 14 of March.

23 JUDGE TO MR. GONZALEZ

24 Looks like your case was originally set for the 5th of April.

25 MR. GONZALEZ TO JUDGE

1 Yeah.

2 JUDGE TO MR. GONZALEZ

3 And then a notice was sent out that was marked the date of your hearing has
4 been changed to March 14, 2017, so your case was moved up, right.

5 MR. GONZALEZ TO JUDGE

6 Yeah.

7 JUDGE TO MR. GONZALEZ

8 So are you working with a lawyer?

9 MR. GONZALEZ TO JUDGE

10 Well, if you want to read some papers --

11 JUDGE TO MR. GONZALEZ

12 I can't read anything until we decide whether you're going to have some more
13 time to try to get a lawyer.

14 MR. GONZALEZ TO JUDGE

15 Well, I think I already do have a lawyer.

16 JUDGE TO MR. GONZALEZ

17 Oh, you already have a lawyer. Why was your lawyer not able to come today, do
18 you know?

19 MR. GONZALEZ TO JUDGE

20 Like I told you, you change the date.

21 JUDGE TO MR. GONZALEZ

22 Okay. So your lawyer was planning --

23 MR. GONZALEZ TO JUDGE

24 This is the, the day that's supposed to be for the 5th of April --

25 JUDGE TO MR. GONZALEZ

1 Okay. So your lawyer was planning to come on the 5th of April, but then when it
2 was moved up, your lawyer was not able to come to the new date?

3 MR. GONZALEZ TO JUDGE

4 Well, I don't know about that, but some people from American Civil Liberty Union
5 is helping me.

6 JUDGE TO MR. GONZALEZ

7 Okay.

8 MR. GONZALEZ TO JUDGE

9 And I believe they already send some papers to you guys.

10 JUDGE TO MR. GONZALEZ

11 Well, sir, I have not --

12 MR. GONZALEZ TO JUDGE

13 That's why I trying to show you these papers right here.

14 JUDGE TO MR. GONZALEZ

15 Okay. I haven't received any papers from any attorney in your case. When an
16 attorney represents someone in these proceedings, the attorney has to file a form. It's
17 called a Notice of Entry of Appearance as attorney of record. I have not received any
18 such form in your case, so it may be that you're working with a lawyer and that you've
19 already chosen your lawyer, but until that lawyer enters an appearance, I cannot
20 recognize them as the attorney of record, and I certainly don't want to review any
21 paperwork in your case until you've had a fair chance to appear with your counsel of
22 choice. So it appears that your attorney was unable to come to the rescheduled
23 hearing, so why don't I give you a little more time to work out coming back with your
24 lawyer of choice. The next available date that I have is March 27 at 1. You want to
25 come back with your lawyer then?

1 MR. GONZALEZ TO JUDGE

2 Well, I'm not sure about that, because --

3 JUDGE TO MR. GONZALEZ

4 Well, if the lawyer's not able to come on that date, the lawyer can file the Notice
5 of Entry of Appearance and ask for a different date.

6 MR. GONZALEZ TO JUDGE

7 Yeah, but this is only the arraignment thing, so can I represent myself?

8 JUDGE TO MR. GONZALEZ

9 This is a civil matter, sir.

10 MR. GONZALEZ TO JUDGE

11 I mean, I'm too old.

12 JUDGE TO MR. GONZALEZ

13 This is not an arraignment.

14 MR. GONZALEZ TO JUDGE

15 Pardon?

16 JUDGE TO MR. GONZALEZ

17 This is a civil matter, not a criminal matter.

18 MR. GONZALEZ TO JUDGE

19 I know, but, you see --

20 JUDGE TO MR. GONZALEZ

21 I can understand that it's frustrating to be in detention and that you thought your
22 hearing was going to be on April 5, but since there was an earlier date available, the
23 Court moved it up, because it doesn't want people to be in detention any longer than is
24 necessary. But it also is quite common for a case to be continued to give respondent
25 an opportunity to solidify their choice, with respect to counsel, so we'll go ahead and do

1 that in your case. I'll set it to the very next available date for you to come back with your
2 lawyer of choice, which is March 27 at 1. So if it is at all, at all possible for you to come
3 back with your attorney at that time, great. If the attorney cannot come back at that
4 time, the attorney can enter a Notice of Appearance and file a request to change the
5 date.

6 MR. GONZALEZ TO JUDGE

7 Okay.

8 JUDGE TO MR. GONZALEZ

9 All right. So March 27 at 1. And remember, there's no attorney who has entered
10 an appearance in your case, so you would have to tell the attorney of the next hearing
11 date, right, March 27 at 1. Go ahead and call your attorney and say the next hearing is
12 March 27 at 1, okay?

13 MR. GONZALEZ TO JUDGE

14 [Indiscernible].

15 JUDGE TO MR. GONZALEZ

16 All right, thanks.

17 HEARING CONTINUED

CERTIFICATE PAGE

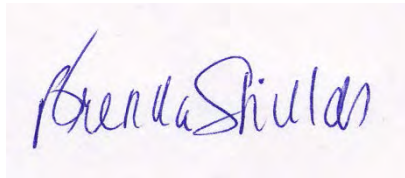
I hereby certify that the attached proceeding before JUDGE MUNISH SHARDA,
in the matter of:

MICHAEL GONZALEZ

A [REDACTED] 712

OTAY MESA, CALIFORNIA

was held as herein appears, and that this is the original transcript thereof for the file of
the Executive Office for Immigration Review.



BRENDA SHIELDS (Transcriber)

FREE STATE REPORTING, Inc.-2

MAY 4, 2017

(Completion Date)

EXHIBIT S

U.S. Department of Justice
Executive Office for Immigration Review
United States Immigration Court

In the Matter of

File: A [REDACTED]-712

MICHAEL GONZALEZ

a/k/a FERNANDO HERNANDEZ-VALDIVIA

RESPONDENT

)

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)

IN REMOVAL PROCEEDINGS

Transcript of Hearing

Before MUNISH SHARDA, Immigration Judge

Date: March 27, 2017

Place: OTAY MESA, CALIFORNIA

Transcribed by FREE STATE REPORTING, Inc.-2

Official Interpreter:

Language:

Appearances:

For the RESPONDENT: PRO SE

For the DHS: ABRAHAM L. BURGESS

1 JUDGE TO MR. GONZALEZ

2 We're on the record in continued removal proceedings in a detained Master
3 Calendar docket for file number [REDACTED] 712. This is Immigration Judge Munish
4 Sharda sitting in Otay Mesa, California. Today's date is March 27, 2017. Department of
5 Homeland Security is present and represented by Mr. Abe Burgess. The respondent is
6 present. He's unrepresented and he is an English speaker.

7 JUDGE TO MR. GONZALEZ

8 Sir, do you understand you're still under oath?

9 MR. GONZALEZ TO JUDGE

10 Yes, sir.

11 JUDGE TO MR. GONZALEZ

12 You have to speak up, please.

13 MR. GONZALEZ TO JUDGE

14 Yes, I do.

15 JUDGE TO MR. GONZALEZ

16 And the case was continued from March 14, 2017, for you to get an attorney.
17 What have you done to get a lawyer?

18 MR. GONZALEZ TO JUDGE

19 Well, I was going to get a lawyer on the 5th of April. That was the, that was the
20 day I had before this date. But the -- I already talk to these people in the American Civil
21 Liberties Union and they told me I can go ahead and represent myself.

22 JUDGE TO MR. GONZALEZ

23 So do you want to represent yourself?

24 MR. GONZALEZ TO JUDGE

25 I guess, until I can get a lawyer.

1 JUDGE TO MR. GONZALEZ

2 Well, I mean --

3 MR. GONZALEZ TO JUDGE

4 I'm represent myself, man. I'm --

5 JUDGE TO MR. GONZALEZ

6 Okay, we --

7 MR. GONZALEZ TO JUDGE

8 -- holding off.

9 JUDGE TO MR. GONZALEZ

10 Well, sir, you said I guess. I needed to make sure that you want to still represent
11 yourself, so I need a positive or negative response. Do you want to represent yourself?

12 MR. GONZALEZ TO JUDGE

13 Yes.

14 JUDGE TO MR. GONZALEZ

15 The Government served a copy of the Notice to Appear on you on January 5th,
16 2017, is that correct?

17 MR. GONZALEZ TO JUDGE

18 Yeah, according to you.

19 JUDGE TO MR. GONZALEZ

20 But you signed for it. Did you -- I'm asking you, sir. I, I wasn't present when you
21 signed for it. That's why I'm asking you if you got a copy of it and was it served on you
22 on that day.

23 MR. GONZALEZ TO JUDGE

24 No --

25 JUDGE TO MR. BURGESS

1 JUDGE TO MR. GONZALEZ

2 Yes, it looks like the Notice to Appear, correct.

3 MR. GONZALEZ TO JUDGE

4 Yeah, but --

5 JUDGE TO MR. GONZALEZ

6 So you got it, correct?

7 MR. GONZALEZ TO JUDGE

8 I got it, but --

9 JUDGE TO MR. GONZALEZ

10 And you got a copy of the credible fear interview that's attached to that Notice to
11 Appear, correct?

12 MR. GONZALEZ TO JUDGE

13 Yes.

14 JUDGE TO MR. GONZALEZ

15 I have some questions as it relates to your Notice to Appear. The Government
16 says that you are not a native and citizen of United States. Is that true?

17 MR. GONZALEZ TO JUDGE

18 False.

19 JUDGE TO MR. GONZALEZ

20 You are a U.S. citizen?

21 MR. GONZALEZ TO JUDGE

22 I'm a U.S. citizen.

23 JUDGE TO MR. GONZALEZ

24 Okay. Why do you think you're a U.S. citizen?

25 MR. GONZALEZ TO JUDGE

1 Okay. And you said when, Mr. Burgess, he's been in and out of proceedings
2 since?

3 MR. BURGESS TO JUDGE

4 First time was in 2014.

5 JUDGE TO MR. BURGESS

6 Okay. And has -- he has been claiming citizenship since then?

7 MR. BURGESS TO JUDGE

8 Yes, sir.

9 JUDGE TO MR. BURGESS

10 And you are in the process, through ERO, to obtain his actual birth certificate
11 through Jalisco, Texas [sic]?

12 MR. BURGESS TO JUDGE

13 Yes, sir.

14 JUDGE TO MR. BURGESS

15 Is the Government seeking any continuance to be able to get that document?

16 MR. BURGESS TO JUDGE

17 Yes, sir, we'd like a brief continuance to reset for a contested removability
18 hearing.

19 JUDGE TO MR. BURGESS

20 How long do you think you would need?

21 MR. BURGESS TO JUDGE

22 A week, sir?

23 JUDGE FOR THE RECORD

24 Let me go off the record for a moment.

25 [OFF THE RECORD]

1 MR. BURGESS TO JUDGE

2 April 6th would be preferred, sir.

3 JUDGE TO MR. BURGESS

4 Okay.

5 JUDGE TO MR. GONZALEZ

6 Sir, I'm going to continue your case to April 6th, 2017, at 8 a.m. Any documents
7 you want to provide to the Court to demonstrate you were born in El Paso, Texas you
8 may do so. The Government -- it's their burden to show that you were -- you're a native
9 and citizen -- you're not a native and citizen of the United States. They're going to
10 provide those documents to me at the next hearing and I will decide whether or not to
11 sustain the charge against you or not and the facts against you. Do you have any
12 questions, sir?

13 MR. GONZALEZ TO JUDGE

14 Will I be release before from Immigration Courts in several occasions from like
15 San Francisco and, and I would like to ask you to release me, man.

16 JUDGE TO MR. GONZALEZ

17 Well, sir, I'm not going to release you unless you -- you have to --

18 MR. GONZALEZ TO JUDGE

19 Well, the reason is in this --

20 JUDGE TO MR. GONZALEZ

21 Sir, this is the third time you've cut me off. You need to let me finish, please.
22 You need to write a letter to me if you want to get released on bond. There is now --
23 right now a -- the Government is contesting that they don't agree with you. From what
24 they've provided to you and to me, you have been claiming that you have been a United
25 States citizen since 2014. It appears that the Government has obtained documentation

1 JUDGE TO MR. GONZALEZ

2 Okay. Sir, in 1989, you were convicted of violating Title 8 United States Code
3 1326, as an alien who had previously been removed from the United States. You were
4 sentenced to 12 months in prison and one year a supervised release. In 1992, you
5 have a second offense for illegal reentry after deportation. You were sentenced to 60
6 months --

7 MR. GONZALEZ TO JUDGE

8 That's not true.

9 JUDGE TO MR. GONZALEZ

10 -- prison and three -- sir, let me finish. This is the fourth time I've asked you to let
11 me finish. I've not cut you off. Please don't cut me off. You were then convicted in
12 1992 of illegal reentry after deportation and were sentenced to 90 days and that's when
13 you also got in '06 a DUI conviction. Three Federal felony convictions where you
14 admitted to being illegally in the United States. The purpose of the next hearing is for
15 the Government to prove that you were not born in the United States, but were born in
16 Jalisco, Mexico. That's when we will be at the next hearing. We will take your
17 testimony as well, sir, at that next hearing. If you would like to testify about where you
18 were born, you can have anybody come testify, if you would like. They can also provide
19 documentary evidence, if you would like, at that next hearing. Do you have any
20 questions?

21 MR. GONZALEZ TO JUDGE

22 Yes, I don't like to continue playing with this game. You know what? Because
23 I'm getting old and I can't be spending days in Mesa jail just because these guys wanted
24 to keep continuing. This is --

25 JUDGE TO MR. GONZALEZ

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE MUNISH SHARDA,
in the matter of:

MICHAEL GONZALEZ

A [REDACTED]-712

OTAY MESA, CALIFORNIA

was held as herein appears, and that this is the original transcript thereof for the file of
the Executive Office for Immigration Review.



BRENDA SHIELDS (Transcriber)

FREE STATE REPORTING, Inc.-2

MAY 4, 2017

(Completion Date)

EXHIBIT T

U.S. Department of Justice
Executive Office for Immigration Review
United States Immigration Court

In the Matter of

File: A [REDACTED]-712

MICHAEL GONZALEZ

a/k/a FERNANDO HERNANDEZ-VALDIVIA

RESPONDENT

)
)
)
)
)

IN REMOVAL PROCEEDINGS

Transcript of Hearing

Before MUNISH SHARDA, Immigration Judge

Date: APRIL 6, 2017

Place: OTAY MESA, CALIFORNIA

Transcribed by FREE STATE REPORTING, Inc.-2

Official Interpreter:

Language:

Appearances:

For the RESPONDENT: PRO SE

For the DHS: ROBERT LUNDBERG

1 Jalisco was a fake birth certificate because your mother wanted you not to be drafted in
2 the draft in Vietnam, and so she wanted to make it seem like you were a Mexican
3 national when you were not.

4 MR. GONZALEZ TO JUDGE

5 Yeah.

6 JUDGE TO MR. GONZALEZ

7 Is that, is that correct?

8 MR. GONZALEZ TO JUDGE

9 Yeah, she, because that was he intentions.

10 JUDGE TO MR. GONZALEZ

11 Okay. And that's what, and that's what your claim is, right?

12 MR. GONZALEZ TO JUDGE

13 Yeah.

14 MR. LUNDBERG TO JUDGE

15 Your Honor, I don't, I don't see any notes here. I wasn't at the last hearing, but I
16 would submit, Your Honor, that the Department has in this submission submitted clear
17 and convincing evidence of the respondent's alienage, including two convictions under
18 1326. And again, one of the elements is the respondent is not a citizen or national of
19 the United States. The respondent twice pled guilty of violating, to violating that statute.
20 The respondent testified just now that he did in fact make those deals, those plea
21 agreements, he did in fact admit he is an alien. The respondent's, or the Department's
22 burden here is to prove, to submit clear and convincing evidence of foreign birth. The
23 burden then shifts to the respondent to establish he was born in the United States. The
24 Department asked El Paso, Texas to search its records for any record of the
25 respondent's birth or the birth of his parents. The Department submitted a letter from El

1 Paso, Texas saying they searched the record, have no, their records, and have no
2 record of the respondent's birth of his parents birth in the United States. So the
3 Department would ask the Court to sustain the charges on the NTA and move forward
4 with removal in this case.

5 JUDGE TO MR. LUNDBERG

6 Mr. Lundberg, maybe I missed it. What page is that letter on, in the submission?
7 My apologies.

8 MR. LUNDBERG TO JUDGE

9 No problem. I'm looking at a digital copy here, so I'm just going to go back to the
10 envelope contents. Give me, give me a moment. Tab C, page 18, Your Honor.

11 JUDGE TO MR. LUNDBERG

12 Thank you.

13 JUDGE TO MR. GONZALEZ

14 So, Mr. Gonzalez, do you have any additional documents you want me to
15 consider in your case to determine whether or not you are truly a citizen or national of
16 the United States?

17 MR. GONZALEZ TO UNIDENTIFIED PERSON

18 I don't know what, what are you saying?

19 JUDGE TO MR. GONZALEZ

20 She's not saying anything, she's just an officer standing there.

21 MR. GONZALEZ TO JUDGE

22 Oh, excuse me. I mean regarding to, to what this man saying, that he don't go
23 nowhere, but stand at his desk, I have a relative going to check on the general hospital
24 and they told him that all the documents were on fire. In 1960-something the place
25 burned and they lost the records. And that's the truth of this matter.

1 MR. GONZALEZ TO JUDGE

2 I got a DUI. All he got was a copy of a DUI in 2007 something.

3 JUDGE TO MR. GONZALEZ

4 Anything else, sir, that you want to submit?

5 MR. GONZALEZ TO JUDGE

6 No. Ever since --

7 JUDGE TO MR. GONZALEZ

8 Hand it to the officer.

9 MR. GONZALEZ TO JUDGE

10 -- this, this paper I got problems with the ICE ever since.

11 JUDGE TO MR. GONZALEZ

12 Anything else, sir, that you want to submit?

13 MR. GONZALEZ TO JUDGE

14 No.

15 JUDGE TO MR. GONZALEZ

16 I'm handing this back to you, this document you provided. Anything else you
17 want to submit, sir, or tell me with respect to your alienage?

18 MR. GONZALEZ TO JUDGE

19 Well, I don't have any other documents.

20 JUDGE TO MR. GONZALEZ

21 I am going to sustain the first factual allegation against you that you are not a
22 citizen or national of the United States. And based on the documents provided by the
23 Government, I'm going to sustain the second allegation against you that you are a
24 native and citizen of Mexico.

25 JUDGE TO MR. LUNDBERG

CERTIFICATE PAGE

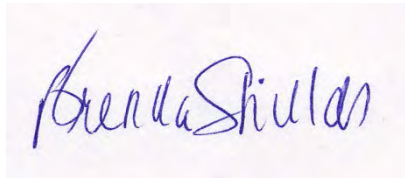
I hereby certify that the attached proceeding before JUDGE MUNISH SHARDA,
in the matter of:

MICHAEL GONZALEZ

A [REDACTED] 712

OTAY MESA, CALIFORNIA

was held as herein appears, and that this is the original transcript thereof for the file of
the Executive Office for Immigration Review.



BRENDA SHIELDS (Transcriber)

FREE STATE REPORTING, Inc.-2

MAY 4, 2017

(Completion Date)

EXHIBIT U

NOTICE OF HEARING IN REMOVAL PROCEEDINGS
IMMIGRATION COURT
7488 CALZADA DE LA FUENTE
SAN DIEGO, CA 92154

RE: GONZALEZ, MICHAEL
FILE: [REDACTED] 712

DATE: Apr 20, 2017

TO:

GONZALEZ, MICHAEL
C/O: JOE GREEN
DHS CUSTODY
SAN DIEGO, CA 92158

Please take notice that the above captioned case has been scheduled for a Master/Individual hearing before the Immigration Court on July 24, 2017 at 8:00 AM at

7488 CALZADA DE LA FUENTE
SAN DIEGO, CA 92154

You may be represented in these proceedings, at no expense to the Government, by an attorney or other individual who is authorized and qualified to represent persons before an Immigration Court. Your hearing date has not been scheduled earlier than 10 days from the date of service of the Notice to Appear in order to permit you the opportunity to obtain an attorney or representative. If you wish to be represented, your attorney or representative must appear with you at the hearing prepared to proceed. You can request an earlier hearing in writing.

Failure to appear at your hearing except for exceptional circumstances may result in one or more of the following actions:

- 1) You may be taken into custody by the Department of Homeland Security and held for further action.
- 2) Your hearing may be held in your absence under section 240(b)(5) of the Immigration and Nationality Act. An order of removal will be entered against you if the Department of Homeland Security established by clear, unequivocal and convincing evidence that a) you or your attorney has been provided this notice and b) you are removable.

IF YOUR ADDRESS IS NOT LISTED ON THE NOTICE TO APPEAR, OR IF IT IS NOT CORRECT, WITHIN FIVE DAYS OF THIS NOTICE YOU MUST PROVIDE TO THE IMMIGRATION COURT SAN DIEGO, CA THE ATTACHED FORM EOIR-33 WITH YOUR ADDRESS AND/OR TELEPHONE NUMBER AT WHICH YOU CAN BE CONTACTED REGARDING THESE PROCEEDINGS. EVERYTIME YOU CHANGE YOUR ADDRESS AND/OR TELEPHONE NUMBER, YOU MUST INFORM THE COURT OF YOUR NEW ADDRESS AND/OR TELEPHONE NUMBER WITHIN 5 DAYS OF THE CHANGE ON THE ATTACHED FORM EOIR-33. ADDITIONAL FORMS EOIR-33 CAN BE OBTAINED FROM THE COURT WHERE YOU ARE SCHEDULED TO APPEAR. IN THE EVENT YOU ARE UNABLE TO OBTAIN A FORM EOIR-33, YOU MAY PROVIDE THE COURT IN WRITING WITH YOUR NEW ADDRESS AND/OR TELEPHONE NUMBER BUT YOU MUST CLEARLY MARK THE ENVELOPE "CHANGE OF ADDRESS." CORRESPONDENCE FROM THE COURT, INCLUDING HEARING NOTICES, WILL BE SENT TO THE MOST RECENT ADDRESS YOU HAVE PROVIDED, AND WILL BE CONSIDERED SUFFICIENT NOTICE TO YOU AND THESE PROCEEDINGS CAN GO FORWARD IN YOUR ABSENCE.

A List of Free Legal Service Providers has been given to you. For information regarding the status of your case, call toll free 1-800-898-7180 OR 240-314-1500.

ALIEN NUMBER: [REDACTED]-712

NAME: GONZALEZ, MICHAEL

LIMITATIONS ON DISCRETIONARY RELIEF FOR FAILURE TO APPEAR

- () 1. You have been scheduled for a removal hearing, at the time and place set forth on the attached sheet. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for a period of ten (10) years after the date of entry of the final order of removal.
- () 2. You have been scheduled for an asylum hearing, at the time and place set forth on the attached notice. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. Below) for a period of ten (10) years from the date of your scheduled hearing.
- () 3. You have been granted voluntary departure from the United States pursuant to section 240B of the Immigration and Nationality Act, and remaining in the United States beyond the authorized date will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. Below) for ten (10) years from the date of the scheduled departure. Your Voluntary departure bond, if any, will also be breached. Additionally, if you fail to voluntarily depart the United States within the time period specified, you shall be subject to a civil penalty of not less than \$1000 and not more than \$5000.
- **the term "exceptional circumstances" refers to circumstances such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances.

A. THE FORMS OF RELIEF FROM REMOVAL FOR WHICH YOU WILL BECOME INELIGIBLE ARE:

- 1) Voluntary departure as provided for in section 240B of the Immigration and Nationality Act;
- 2) Cancellation of removal as provided for in section 240A of the Immigration and Nationality Act; and
- 3) Adjustment of status or change of status as provided for in Section 245, 248 or 249 of the Immigration and Nationality Act.

This written notice was provided to the alien in English. Oral notice of the contents of this notice must be given to the alien in his/her native language, or in a language he/she understands by the Immigration Judge.

Date: Apr 20, 2017

Immigration Judge: _____

or Court Clerk: C. Hernandez

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)

TO: ☒ ALIEN ☐ ALIEN c/o Custodial Officer ☐ ALIEN's ATT/REP ☐ DHSDATE: 4-20-2017 BY: COURT STAFF C. HernandezAttachments: ☐ EOIR-33 ☐ EOIR-28 ☐ Legal Services List ☐ Other

N6