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16 SOUTHERN DISTRICT OF CALIFORNIA

17 JOSE ORLANDO CANCINO
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18 HERNANDEZ AGUAS, MICHAEL
19 GONZALEZ,

20 Plaintiffs-Petitioners,

21 vs.
22

23 KIRSTJEN M. NIELSEN,¹ Secretary of
Homeland Security, *et al.*,

24 Defendants-Respondents.
25
26

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

TIME: TBD

DATE: December 10, 2018

CTRM: 4B (Schwartz)

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

DEFENDANTS-RESPONDENTS'
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF THEIR
RENEWED MOTION TO DISMISS ALL
REMAINING CLAIMS.

27
28 ¹Kirstjen M. Nielsen became Secretary of the Department of Homeland Security on
December 6, 2017, and should be substituted for John F. Kelly under Fed. R. Civ. P. 25(d).

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I. INTRODUCTION

Defendants renew their request that the Court dismiss Plaintiffs’ complaint under Federal Rule of Civil Procedure 12(b)(6) (“Rule 12(b)(6)”) because the complaint fails to state a claim upon which this Court can grant relief. While couched in the language of due process, Plaintiffs’ remaining claims effectively invite the Court to insert itself into the functioning of the Department of Homeland Security (“DHS”), and the immigration court system. Mere invocation of the Due Process Clause does not authorize judicial intervention of the sort that Plaintiffs propose, where there already exists a statutory and regulatory framework for ensuring that individuals are not held in immigration detention longer than permitted by law.

In essence, Plaintiffs contend that the Due Process Clause requires a specific – and presumably uniform – deadline at which point aliens who are detained pending removal proceedings must be presented before an immigration judge for an initial master calendar hearing.¹ They also argue that failure to present an alien before an immigration judge before this imagined deadline violates the Administrative Procedure Act (as “arbitrary and capricious”), 5 U.S.C. § 702, 706(1), (2)(A)-(D). Complaint (“Compl.”), ECF No. 1. Plaintiffs’ contentions are refuted by decades of precedent recognizing the constitutional authority of immigration authorities to detain aliens pending removal. To the extent that Plaintiffs attempt to import due process principles from the criminal law context, they ignore the longstanding distinction between civil immigration proceedings and criminal proceedings. *See Carlson v. Landon*, 342 U.S. 524, 533 (1952) (“Deportation is not a criminal proceeding and has never been held to be punishment. No jury sits. No judicial

¹ Plaintiffs’ complaint simply argues that presentment to an immigration judge for an initial master calendar hearing must be “prompt,” and does not specify any particular timeframe in which presentment must occur in order to satisfy their due process concerns. *See* Compl. at ¶¶ 78-79. While the proposed class is defined as any alien detained longer than 48 hours, *see* Compl. at ¶ 69, Plaintiffs argued in their opposition to Defendants’ original motion to dismiss that detention for “[o]ver a [m]onth [w]ithout a [h]earing” violates procedural and substantive due process, *see* ECF No. 35, at 16.

review is guaranteed by the Constitution.”). Neither the Due Process Clause, nor any statute or regulation requires that aliens who are detained for removal proceedings must be presented to an immigration judge within any specific timeframe. Indeed, the INA explicitly states that an initial hearing should not normally take place earlier than 10 days after service of a notice to appear, regardless of whether an alien is in detention, in order for the alien to have time to obtain counsel. Because Plaintiffs’ claims based on a lack of “prompt presentment” to an immigration judge necessarily fail, and the Court should dismiss these claims under Rule 12(b)(6).

II. BACKGROUND

A. PROCEDURAL BACKGROUND

On March 9, 2017, Plaintiffs filed a complaint alleging three claims for relief: (1) that Defendants’ failure to promptly present detained aliens for an initial master calendar hearing before an immigration judge amounts to a denial of due process, Compl. at ¶¶ 75-80; (2) that the lack of “judicial review” of probable cause for detention within 48 hours violates the Fourth Amendment to the Constitution, Compl. at ¶¶ 81-84; and (3) that Defendants’ policies violate the APA, Compl. at ¶¶ 85-90. Plaintiffs also filed a motion for class certification. Motion for Class Cert., ECF No. 2. Plaintiffs seek to represent “[a]ll individuals in the Southern District of California, 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 or judicial review of whether their detention is justified by probable cause.” Compl. at ¶ 68. At the time they filed their complaint, the named Plaintiffs were 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) (requiring detention of certain 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.

On May 31, 2017, Defendants filed a motion to dismiss the complaint for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), or alternatively,

for failure to state a claim upon which relief can be granted under Rule 12(b)(6). ECF No. 28. The Court heard argument on that motion on December 14, 2017, and on February 8, 2018, granted the motion based on a determination that the Court lacked subject-matter jurisdiction over all of Plaintiffs' claims. ECF No. 49. On February 27, 2018, the Supreme Court issued a decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), which addressed several of the same jurisdictional provisions that this Court cited as the basis for its order dismissing the case. Plaintiffs subsequently moved the Court for reconsideration of its February 8, 2018 Order in light of *Jennings*. ECF No. 50. On September 5, 2018, the Court granted reconsideration as to Plaintiffs' "Fifth Amendment Prompt Presentment Claim," as well as their similar APA claim, and thus reinstated those claims. ECF No. 56, at 13-15. The Court denied reconsideration of Plaintiffs' Fourth Amendment-based claim, which raised the issue of whether the government may "detain individuals without prompt judicial determination of whether probable cause justifies their detention." ECF No. 56, at 11 (citing Compl. at ¶ 82). The Court's September 5, 2018 Order also provided that if Plaintiffs did not file an amended complaint by October 1, 2018, Defendants should file a renewed motion to dismiss Plaintiffs' remaining claims by October 15, 2018. *Id.* As reflected in the parties' joint status report of October 3, 2018, Plaintiffs have advised that they intend to proceed based on their Fifth Amendment and APA claims as pled in their original complaint. ECF No. 59.

B. 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. *See Demore v. Kim*, 538 U.S. 510, 523-26 (2003); *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 are not yet been subject to a removal order² stems primarily from two

² Section 1231 of Title 8 governs the detention of aliens who are subject to a removal order.

sections of Title 8: section 1225, which governs the detention of inadmissible arriving aliens and certain other aliens who have not been admitted or paroled; and section 1226, which allows for (and in some instances, mandates) 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.

1. DHS's Authority to Arrest⁴

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

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

The regulations implementing this statute explain that "an alien arrested without a warrant of arrest . . . will be examined by an officer other than the arresting officer." 8 C.F.R. § 287.3(a). "If the examining officer is satisfied that there is prima facie evidence that the arrested alien . . . is present in the United States in violation of the immigration laws, the officer will either refer the case to an immigration judge for further inquiry . . . , order the alien removed . . . , or take whatever other action may be appropriate or required

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

⁴ Although DHS's authority to arrest is more relevant to Plaintiffs' now-dismissed Fourth Amendment claim, Defendants describe this background again here in order to provide a complete picture of the process afforded aliens between the time when they are taken into custody and when they first appear before an immigration judge.

under the laws or regulations applicable to the particular case. *Id.* § 287.3(a)-(b). DHS ordinarily will make an initial determination within 48 hours of the apprehension whether the alien will remain in custody, be paroled, be released on bond or released on recognizance.⁵ 8 C.F.R. § 287.3(d).

2. Detention of aliens under section 1225

Section 1225 applies to aliens seeking admission to the United States, including arriving aliens and aliens subject to expedited removal. 8 U.S.C. § 1225(b); 8 C.F.R. § 235.3(b). If an immigration officer determines that an alien seeking admission lacks valid documents or is inadmissible due to fraud or misrepresentation, the officer “shall order the alien removed from the United States without further hearing.” 8 U.S.C. § 1225(b)(1)(A)(i); *see also* 8 U.S.C. §§ 1182(a)(6)(C) and (7); *Designating Aliens for Expedited Removal*, 69 Fed. Reg. 48877-01, 48880 (Aug. 11, 2004) (applying expedited removal authority to those aliens (1) “who are physically present in the U.S. without having been admitted or paroled,” (2) who are found “within 100 air miles of the U.S. international land border,” and (3) who cannot establish that they have been physically present in the United States for the immediately preceding fourteen days”). If the alien indicates an intention to apply for asylum or expresses a fear of persecution or torture, an asylum officer must determine whether the alien has a credible fear. 8 U.S.C. § 1225(b)(1)(A)(ii) and (B); 8 C.F.R. §§ 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).⁶

⁵ A custody determination is made within 48 hours of the arrest “except in the event of an 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).

⁶ Immigration judges do not have authority to release aliens arriving at a port of entry on bond, *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 these aliens may be considered for parole as a matter of discretion under

3. Detention of aliens under section 1226

The general detention authority for aliens in removal proceedings (other than arriving aliens) 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),⁷ which prohibits their release during their removal proceedings. Congress enacted this mandate “justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers.” *Demore*, 538 U.S. at 513 (2003). An individual detained under § 1226(c) may ask an immigration judge to reconsider whether the mandatory detention provision applies to him. *See* 8 C.F.R. § 1003.19(h)(2)(ii). At this hearing, called a “*Joseph* hearing,” a detainee “may avoid mandatory detention by demonstrating that he is not an alien, was not convicted of the predicate crime, or that the [DHS] is otherwise substantially unlikely to establish that he is in fact subject to mandatory detention.” *Demore*, 538 U.S. at 514 n.3; *see also Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999). Immigration judges, however, do not have

8 U.S.C. § 1182(d)(5), *see* 8 C.F.R. §§ 212.5, 235.3(c).

⁷ 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 authority to release aliens detained under § 1226(c) on bond. See 8 C.F.R.
 2 § 1003.19(h)(2)(i)(D) (“[A]n immigration judge may not redetermine conditions of custody
 3 imposed by [DHS] with respect to . . . [a]liens in removal proceedings subject to section
 4 236(c)(1) of the Act . . .”).

5 **4. Removal Proceedings before an Immigration Judge**

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

13 The first removal hearing in immigration court is referred to as the “initial master
 14 calendar hearing.” By statute, “in order to allow the alien time to obtain representation . . .
 15 the first hearing date in proceedings under section 240 . . . shall not be scheduled earlier
 16 than 10 days after the service of the notice to appear, unless the alien requests an earlier
 17 hearing date.” 8 U.S.C. § 1229(b)(1). Likewise, if an alien is *pro se* and requests more time
 18 to obtain the assistance of an attorney at the initial master calendar hearing, the immigration
 19 judge must grant a continuance. *Matter of C-B-*, 25 I. & N. Dec. 888, 889 (BIA 2012); *cf.*
 20 *Criollo v. Lynch*, 647 F. App’x 731, 732 (9th Cir. 2016) (agreeing with the BIA’s holding
 21 in *Matter of C-B-* that an immigration judge must advise a respondent of forms of relief to
 22 which he is eligible, such as voluntary departure). “The immigration judge shall require the
 23 [alien] to plead to the notice to appear by stating whether he or she admits or denies the
 24 factual allegations and his or her removability under the charges contained therein.” 8
 25 C.F.R. § 1240.10(c). When an “immigration judge does not accept an admission of
 26 removability, he or she shall direct a hearing on the issues.” *Id.* A separate hearing called a
 27 merits hearing is conducted to determine any issues of removability and to hear any
 28

1 application for relief or protection from removal filed by the alien. 8 C.F.R. §§ 1240.10(d),
2 1240.11.

3 **C. THE NAMED PLAINTIFFS⁸**

4 **1. Jose Orlando Cancino Castellar**

5 Jose Orlando Cancino Castellar (“Cancino Castellar”) is a native and citizen of
6 Mexico. Compl. at ¶ 9. On February 17, 2017, he was taken into ICE custody. *Id.* at ¶ 47.
7 He was detained in the Otay Mesa Regional Detention Facility on February 18, 2017.⁹ *Id.*
8 On February 21, 2017, DHS executed a warrant for arrest and issued a notice of custody
9 determination (Form I-286), on which Cancino Castellar marked the box to request an
10 Immigration Judge (“IJ”) custody review. *Id.*; *see also* ECF 28-2, at 11, Form I-286. Also
11 on February 21, 2017, ICE issued an NTA charging Cancino Castellar with removability as
12 an alien present in the United States without being admitted or paroled, under 8 U.S.C.
13 § 1182(a)(6)(A)(i). ECF 28-2, at 4-5, NTA. Cancino Castellar also signed a “Detainee
14 Calendar Screening Questionnaire” indicating, among other things, that he speaks English,
15 that he received a copy of the NTA, that he was not afraid to return to his home country,
16 that he was not a permanent or temporary resident of the United States, and that he did not
17 have a pending petition for legal status. ECF 28-2, at 7, Questionnaire. ICE filed the NTA
18 with the immigration court on February 24, 2017. ECF 28-2, at 4-5, NTA.

19 On March 8, 2017, before this lawsuit was filed, the Otay Mesa Immigration Court
20 scheduled his initial master calendar hearing, which was held on March 23, 2017. ECF 28-2,
21

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

27 ⁹ Cancino Castellar was held at Otay Mesa as a “Room and Board” from Friday,
28 February 17 through Tuesday, February 21 because it was a holiday weekend. He was
processed with a NTA on the first business day following apprehension, February 21, 2017.
ECF 28-2, at 4-5, NTA.

1 at 9, Notice of Hearing. He had a bond hearing on March 27, 2017, and was released on
2 bond on March 28, 2017.¹⁰ ECF 28-2, at 14-17, Proof of Release.

3 **2. Ana Maria Hernandez Aguas**

4 Ana Maria Hernandez Aguas (“Hernandez Aguas”) is a native and citizen of Mexico.
5 Compl. at ¶ 10. On February 7, 2017, CBP took Hernandez Aguas into custody. *Id.* at ¶ 48;
6 ECF 28-2, at 19, Warrant of Arrest. CBP executed a warrant for her arrest and issued an
7 I-286, on which Hernandez Aguas marked the box to request an immigration judge custody
8 review. ECF 28-2, at 19, 21. She also signed a “Detainee Calendar Screening
9 Questionnaire” on that date indicating, among other things, that she wanted time to obtain
10 an attorney. ECF 28-2, at 23, Detainee Questionnaire. On February 7, 2017, she was issued
11 an NTA, which charged her with removability as an alien present in the United States
12 without being admitted or paroled, under 8 U.S.C. § 1182(a)(6)(A)(i). ECF 28-2, at 25-26,
13 NTA. The NTA was filed with the immigration court on February 21, 2017. *Id.*

14 Hernandez Aguas was detained in Chula Vista, California, until February 12, 2017.
15 Compl. at ¶ 48. On February 12, 2017, Hernandez Aguas was transferred to San Luis,
16 Arizona. *Id.* There, a DHS officer completed a second “Detainee Calendar Screening
17 Questionnaire” that indicated, among other things, that Hernandez received a copy of the
18 NTA, again wanted time to obtain an attorney, was not a permanent resident of the United
19 States, and did not have a pending petition for legal status. ECF 28-2, at 30, Detainee
20 Questionnaire. Hernandez Aguas was transferred to Otay Mesa Regional Detention Facility
21 on February 15, 2017. Compl. at ¶ 48. On February 16, 2017, the immigration court issued
22 a notice scheduling a custody redetermination hearing to be held on March 13, 2017. *Id.*

23 At the custody determination hearing on March 13, 2017, the immigration judge
24 granted Hernandez Aguas’s request for bond in the amount of \$2,500. ECF 28-2, at 32,
25 Bond Order. She was released from custody on March 14, 2017. ECF 28-2, at 34, Notice of
26

27 ¹⁰ Following his release from custody, Cancino Castellar’s removal proceedings
28 were transferred to the San Diego Immigration Court, a non-detained docket. His next
hearing is scheduled for December 19, 2018.

1 Release. On October 18, 2017, Hernandez Agua's removal proceedings were
2 administratively closed, and she remains free from custody.

3 **3. Michael Gonzalez**

4 Michael Gonzalez claims to be a United States citizen, which DHS disputes.¹¹ Compl.
5 at ¶ 49. He was most recently encountered as an arriving alien on November 17, 2016, at
6 the San Ysidro port of entry. *Id.* Gonzalez expressed a fear of persecution in Mexico. *Id.*
7 CBP served him with an I-860 Notice and Order of Expedited Removal on November 18,
8 2016. ECF 28-2, at 36-38, I-860. On November 23, 2016, Gonzalez was detained at the
9 Otay Mesa Regional Detention Facility. Compl. at ¶ 49.

10 On December 16, 2016, a USCIS officer found that Gonzalez had a credible fear.
11 Compl. at ¶ 49. On January 9, 2017, ICE revoked Gonzalez's order of expedited removal
12 and served him with a NTA, charging him as removable as an immigrant not in possession
13 of a valid visa or entry document, under 8 U.S.C. § 1182(a)(7)(A)(i). ECF 28-2, at 40-42,
14 NTA. The NTA was filed with the immigration court on January 19, 2017. *Id.*

15 Gonzalez's initial master calendar hearing on March 14, 2017, was continued so
16 Gonzalez could obtain counsel. ECF 28-2, at 63-57, Transcript of 3/14/2017 Hearing
17 (102:7-106:16). At a second master calendar hearing on March 27, 2017, Gonzalez
18 represented himself. ECF 28-2, at 71-72, Transcript of 3/27/17 Hearing (107:15- 108:13).
19 Gonzalez claimed to be a United States citizen, and DHS requested additional time to obtain
20 an original birth certificate from Jalisco, Mexico. *Id.* at 73 (110:22). At the March 27, 2017
21 hearing, the immigration judge noted Gonzalez's multiple prior removal proceedings as
22 well as at least two prior convictions and jail time for illegal reentry. *Id.* at 76 (124:10-20).

24 ¹¹ On June 13, 1989, Gonzalez was convicted of a violation of 8 U.S.C. § 1326 in the
25 Eastern District of California in case number CR-S-89-080-EJG under the name Michael
26 Gonzalez Banuelos. ECF 28-2, at 44-50, 1989 Conviction. On September 21, 1992, he was
27 again convicted of the same, illegal re-entry, in the Eastern District of New York in case
28 number 92CR 00101-001-S under the name Fernando Hernandez Valdivia, a/k/a/ Michael
Gonzalez Banuelos. ECF 28-2, at 52-59, 1992 Conviction.

At DHS's request, the immigration judge continued the case to April 6, 2017. *Id.* at 74-75 (115:15, 119:1-12). At the April 6, 2017 hearing, the immigration judge rejected Gonzalez's claim to U.S. citizenship, based on his prior convictions in federal court for illegal reentry and a certified document from the El Paso, Texas, Clerk's office stating that it had no record of him being born in El Paso, Texas. ECF 28-2, at 82, Transcript of 4/6/17 Hearing (149:21-24) (referring to 142:15-143:4). The immigration judge sustained the removal charges against Gonzalez. *Id.* On September 12, 2017, an immigration judge found him incompetent. Gonzalez subsequently obtained counsel, and was afforded a bond hearing on October 24, 2017, under the Ninth Circuit's then-existing precedent in *Rodriguez v. Robbins*, 715 F.3d 1127, 1144 (9th Cir. 2013). His request for release on bond was denied.¹²

III. STANDARD OF REVIEW

In deciding a Rule 12(b)(6) motion, the court must assume allegations in the challenged complaint are true, and construe the complaint in the light most favorable to the non-moving party. *See Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell At. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). A court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form 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. *Mendondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

¹² Gonzalez's removal proceedings remain ongoing and he remains detained.

IV. ARGUMENT

A. Defendants' current practice of presenting aliens for an initial hearing before an immigration judge are fully consistent with the Fifth Amendment.¹³

1. Procedural Due Process

Insofar as the complaint does not identify any statutory right to an initial master calendar hearing within any particular timeframe, Plaintiffs effectively ask this Court to find that the existing statutory scheme is unconstitutional insofar as it permits detention prior to an initial hearing for longer than one month.¹⁴ “Judging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty that [a court] is called upon to perform” *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (internal quotation marks and citation omitted). “[D]eference to congressional judgment must be afforded even though the claim is that a statute Congress has enacted effects a denial of the procedural due process guaranteed by the Fifth Amendment.” *Id.* at 319-20. This deference is particularly powerful in the area of immigration and

¹³ It is not entirely clear from the complaint whether Plaintiffs’ “Probable Cause Claim,” as the Court describes it, *see* ECF No. 56, at 11, stems entirely from the Fourth Amendment, or whether Plaintiffs also relied in part on the Fifth Amendment in support of that claim. Regardless though, Defendants read the Court’s September 5, 2018 Order as reinstating Plaintiffs’ Fifth Amendment claim only as it relates to “prompt presentment” before an immigration judge. *See* ECF No. 56, at 13 (“At the heart of Plaintiffs’ Fifth Amendment claim is the notion that unreasonable delays in the presentment of detained aliens seeing an immigration judge (‘IJ’) unconstitutionally extends their detention.”). In other words, Defendants read the Court’s Order as concluding that, even in the wake of *Jennings*, it continues to lack jurisdiction over Plaintiffs’ “Probable Cause Claim,” regardless of whether that claim is framed under the Fourth or Fifth Amendments.

¹⁴ To the extent Plaintiffs may wish to urge this Court to apply the canon of constitutional avoidance in order to read into the statute an implicit deadline for initial presentment before an immigration judge, they have not raised this claim in their complaint. In any event, such an argument is foreclosed by the Supreme Court’s recent decision in *Jennings*, which rejected the Ninth Circuit’s use of constitutional avoidance to find that various immigration detention statutes contained an implicit six-month limitation for detention without bond. 138 S. Ct. at 836 (“a court relying on that canon still must *interpret* the statute, not rewrite it”) (original emphasis).

1 naturalization because “the power to expel or exclude aliens [is] a fundamental sovereign
2 attributed exercised by the Government’s political departments largely immune from
3 judicial control.” *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953).

4 It is well established that aliens are entitled to due process of law in removal
5 proceedings. *See, e.g., Reno v. Flores*, 507 U.S. 292, 307 (1993). The Supreme Court has
6 recognized, however, that “[t]he fact that all persons, aliens and citizens alike are protected
7 by the Due Process Clause does not lead to the further conclusion that all aliens are entitled
8 to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must
9 be placed in a single homogeneous legal classification.” *Mathews v. Diaz*, 426 U.S. 67, 78
10 (1976). Indeed, “[i]n the exercise of its broad power over naturalization and immigration,
11 Congress regularly makes rules that would be unacceptable if applied to citizens.” *Id.* at
12 79-80. “Due Process is flexible and calls for such procedural protections as the particular
13 situation demands.” *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v.*
14 *Brewer*, 408 U.S. 471, 481 (1972)).

15 The constitutional sufficiency of procedures Congress provided . . . is determined by
16 application of the balancing test articulated in *Mathews v. Eldridge*. 424 U.S. at 319. In
17 *Mathews*, the Supreme Court identified three factors to be considered in determining
18 whether additional due process is required in a particular situation: “(1) the nature of the
19 private interest that will be affected; (2) the comparative risk of an erroneous deprivation of
20 that interest with and without additional or substitute procedural safeguards; and (3) the
21 Government’s interest, including the function involved and the fiscal and administrative
22 burdens that the additional or substitute requirement would entail.” *Id.*, at 335.

23 Plaintiffs have not identified any way in which a deadline for presentment to an
24 immigration judge would meaningfully reduce the risk of erroneous detention. Indeed, the
25 complaint does not allege that any of the named plaintiffs were erroneously detained.
26 Compl. at ¶ 47-49. While Plaintiffs Cancino Castellar and Hernandez Aguas were released
27 after bond hearings, this was based on a discretionary determination by an immigration
28 judge that they were not flight risks or a danger to the community, not because their

1 detention was not authorized. It is thus entirely unclear from the complaint how mandating
 2 that individuals such as Cancino Castellar and Hernandez Aguas appear before an
 3 immigration judge within one month (or any other particular timeframe) would reduce the
 4 risk of erroneous detention.¹⁵

5 Nor does the complaint meaningfully consider “the fairness and reliability of the
 6 existing . . . procedures, and the probative value, if any, of additional procedural
 7 safeguards.” *Mathews*, 424 U.S. at 343. The Court must look “to the process given
 8 [Plaintiffs] in this case, as well as the process generally given” to aliens detained prior to an
 9 initial immigration court hearing, and evaluate the likelihood of the Government making an
 10 erroneous deprivation. *Buckingham v. U.S. Dep’t of Agric.*, 603 F.3d 1073, 1082 (9th Cir.
 11 2010). Here, there are a number of procedural safeguards already in place to ensure
 12 fundamental fairness to aliens detained for immigration purposes. As discussed above, once
 13 an alien has been arrested without a warrant of arrest, an examining officer will determine
 14 if there is prima facie evidence that the arrested alien is in the United States in violation of
 15 the immigration laws. 8 C.F.R § 287.3(a)-(b). Except for aliens subject to expedited removal
 16 provisions of 8 U.S.C. § 1225(b)(1), the examining officer will advise the alien “of the
 17 reasons for his or her arrest and the right to be represented at no expense to the
 18 Government,” provide the alien “a list of the available free legal services provided by
 19 organizations and attorneys . . . located in the district where the hearing will be held,” and
 20 “advise the alien that any statement made may be used against him or her in a subsequent
 21 hearing.” *Id.* § 287.3(c). Moreover, the regulations provide that “a determination will be
 22 made within 48 hours of the arrest, except in the event of an emergency or other
 23

24 ¹⁵ Moreover, as explained above, both Cancino Castellar and Hernandez Aguas did
 25 appear before an immigration judge within 40 days of being taken into custody. Plaintiffs’
 26 clarification in their opposition that Defendants’ prior motion to dismiss that pre-initial
 27 hearing detention violates due process only when it extends “[o]ver a [m]onth,” see ECF
 28 No. 36, at 16, thus amounts to an argument that accelerating the timeframe for the initial
 hearing by approximately one week in the case of these individuals would somehow
 reduce the risk of error.

1 extraordinary circumstance . . . whether the alien will be continued in custody or released
2 on bond.” *Id.* § 287.3(d). An alien detained under 8 U.S.C. § 1226(a) who is denied bond
3 by the examining officer may request a custody redetermination hearing conducted by an
4 immigration judge at any time before the issuance of a final order of removal. 8 U.S.C.
5 § 1226(a); 8 C.F.R. §§ 236.1(d)(1), 1003.19, 1236.1(d)(1). In sum, Plaintiffs have failed to
6 provide any evidence that aliens are being wrongfully detained because of a lack of
7 additional process.

8 As for the third consideration under *Mathews*, the government’s interest in the
9 existing process is extensive, as is the potential for significant fiscal and administrative
10 burdens from any additional process. 424 U.S. at 335. Mandating a requirement of
11 presentment before an immigration judge within one month, or within any specific,
12 judicially imposed timeframe, would create a ripple effect. DHS and the immigration courts
13 have finite resources, and thus any mandate to accelerate one particular phase of the process
14 will necessarily result in delays at other phases. For example, meeting a judicially-imposed
15 deadline for all initial master calendar hearings may ultimately impede immigration judges’
16 ability to provide prompt hearings (including subsequent master calendar and merits
17 hearings) for other detained aliens. Such a requirement could therefore lead to other
18 detained aliens being detained for longer periods of time pending resolution of their cases.

19 Plaintiffs therefore fail to show that, under *Mathews*, any period of detention longer
20 than one month without a hearing before an immigration judge violates procedural due
21 process. Indeed, this was the conclusion of another district court when it recently dismissed
22 a nearly identical complaint. *See Aguilar v. U.S. Immigration and Customs Enforcement*
23 *Chicago Field Office, et al.*, No. 17-cv-2296, 2018 WL 4679569, at *12-15 (N.D. Ill. Sept.
24 28, 2018). While the Fifth Amendment claim in *Aguilar* was perhaps closer to the
25 now-dismissed Fourth Amendment claim presented in this case (which asserted a right to a
26 probable cause review by an immigration judge), the plaintiffs’ claim in *Aguilar* was
27 fundamentally a due process challenge to the same statutory and regulatory scheme at issue
28 here. *Id.* The district court in *Aguilar* cited precisely the same regulatory framework

described above and concluded that “Plaintiffs have not alleged facts that show there is a high risk that Plaintiffs will be erroneously deprived of liberty without the additional safeguards they seek.” *Id.* at *14. Moreover, with respect to the third *Mathews* factor – whether DHS and the immigration courts would be burdened by additional procedural protections – the district court cited “Congress’s broad power over naturalization and immigration,” as well as the fact that the statutorily required procedures “already provide for the safeguarding of Plaintiffs’ rights,” and therefore concluded that “the third factor weighs heavily against the imposition of additional procedures, especially considering the possible costs.” *Id.*; *see id.* at *15 (“the Supreme Court and other courts repeatedly have held that the political branches have wide latitude to determine what procedures immigration detainees must be afforded.”); *see also Flores*, 507 U.S. at 309 (rejecting plaintiffs’ procedural due process challenge that “the regulations do not set a time period within which the immigration-judge hearing . . . must be held,” and holding that “we will not assume, on this facial challenge, that an excessive delay will invariably ensue.”). Like the plaintiffs in *Aguilar*, who challenged the same statutory and regulatory framework at issue here, Plaintiffs’ procedural due process claim fails to state a claim upon which the Court can grant relief.

2. Aliens seeking admission, such as the named Plaintiff Gonzalez, do not have due process rights beyond those which Congress provides him.

To the extent that Plaintiffs’ proposed class includes aliens seeking admission, such as Plaintiff Gonzalez, the Constitution does not afford any rights beyond those provided by Congress. *See, e.g., Castro v. U.S. Dept. of Homeland Sec.*, 835 F.3d 422, 445-46 (3d Cir. 2016) (because petitioners were aliens seeking initial admission to the United States who were apprehended within hours of entering the United States, they “cannot invoke the Constitution . . . in an effort to force judicial review beyond what Congress has already granted them”). Congress has plenary power to exclude aliens or prescribe the conditions for their entry into the country. *Kleindienst v. Mandel*, 408 U.S. 753 (1972). Section 1225(b) is the most recent iteration of a statutory framework that, for a century, has provided for the

1 exclusion of inadmissible aliens arriving at the nation’s borders. Again, the Supreme Court
 2 has “long recognized [that] the power to expel or exclude aliens [i]s a fundamental
 3 sovereign attribute exercised by the Government’s political departments largely immune
 4 from judicial control.” *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *United States ex*
 5 *rel. Mezei*, 345 U.S. at 210); *see also Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012).
 6 The Supreme Court has also long recognized that “detention during deportation proceedings
 7 [i]s a constitutionally valid aspect of the deportation process.” *Demore*, 538 U.S. at 523.

8 Likewise, “[t]he Supreme Court has consistently recognized that our immigration
 9 laws have long made a distinction between those aliens who have come to our shores
 10 seeking admission and those who are within the United States after an entry, irrespective of
 11 its legality.” *Alvarez-Garcia v. Ashcroft*, 378 F.3d 1094, 1097 (9th Cir. 2004);
 12 *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1450 (9th Cir. 1995) (en banc). This
 13 fundamental “distinction between an alien who has effected an entry into the United States
 14 and one who has never entered” runs throughout immigration law. *See Zadvydas v. Davis*,
 15 533 U.S. 678, 693 (2001); *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2419 (2018) (“foreign
 16 nationals seeking admission have no constitutional right to entry”); *United States v.*
 17 *Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (“[A]liens receive constitutional protections
 18 when they come within the territory of the United States and developed substantial
 19 connections with this country.”) (citations omitted).

20 This distinction is significant because aliens “standing on the threshold of entry” are
 21 “not entitled to the constitutional protections provided to those within the territorial
 22 jurisdiction of the United States” and who have developed substantial connections to the
 23 country.¹⁶ *Alvarez-Garcia*, 378 F.3d at 1097 (citing *Ma v. Ashcroft*, 257 F.3d 1095, 1107

24 ¹⁶ Aliens apprehended between the ports of entry and subject to expedited removal
 25 also fall within the so-called “entry fiction.” *See Castro*, 835 F.3d at 445-46. That is,
 26 although aliens seeking admission into the United States who lack such connections “may
 27 physically be allowed within its borders pending a determination of admissibility, such
 28 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

(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*, 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 alien found inadmissible at the border 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

(D.D.C. 1998), *aff’d*, 199 F.3d 1352 (D.C. Cir. 2000); *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, Inc.*, 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”).

1 confinement, as part of the means necessary to give effect to the provisions for the exclusion
2 or expulsion of aliens would be valid”).

3 Here, Gonzalez’s detention is statutorily required under 8 U.S.C. § 1225(b)(2), and
4 an immigration judge has no authority to release him from detention. *See* 8 C.F.R.
5 § 1003.19(h)(2)(i)(B) (“[A]n immigration judge may not redetermine conditions of custody
6 imposed by [DHS] with respect to . . . [a]rriving aliens in removal proceedings.”). Until
7 recently, Ninth Circuit precedent interpreted the INA to require that an alien detained under
8 section 1225(b) for more than 180 days must be afforded a bond hearing. *Rodriguez v. Robbins*,
9 715 F.3d at 1144. However, the Supreme Court reversed that decision in *Jennings* earlier
10 this year, based on a determination that the Ninth Circuit misapplied the canon of
11 constitutional avoidance. 138 S. Ct. at 836. Nevertheless, to the extent *Rodriguez* suggested
12 that detention without bond under section 1225(b) for up to six months is consistent with
13 the due process, even *Rodriguez* offers no support for the notion that due process requires
14 presenting aliens detained under section 1225(b) before an immigration judge within one
15 month of being detained.

16 Even if this Court were to conclude, against the weight of longstanding precedent,
17 that aliens seeking admission are constitutionally entitled to presentment before an
18 immigration judge within a specific timeframe, it cannot grant the relief Plaintiffs seek. To
19 do so would require the Court to either strike down the law in its entirety as unconstitutional,
20 or create in place of section 1225(b) a judicially-crafted system of detention and
21 presentment not contemplated by Congress. *Jennings*, 138 S. Ct. at 843 (“Spotting a
22 constitutional issue does not give a court the authority to rewrite a statute as it pleases.”).
23 Therefore, this Court should dismiss all claims to the extent they challenge detention under
24 8 U.S.C. § 1225(b).

25 **3. Substantive Due Process**

26 Removal proceedings are without doubt civil proceedings and “the full trappings of
27 legal protections that are accorded to criminal defendants are not necessarily
28 constitutionally required” *Dor v. I.N.S.*, 891 F.2d 997, 1003 (2d Cir. 1989); *see Carlson*

1 v. *Landon*, 342 U.S. at 533. Nonetheless, Plaintiffs assert that “[t]he first hearing before an
 2 immigration judge, like a first appearance in criminal court, is critical to ensuring due
 3 process[, because] it ensures that detainees can learn the charges against them; receive
 4 important advisals about their rights; contest threshold allegations about their status,
 5 custody or bond; request the evidence the government intends to use against them; and
 6 improve chances of securing pro bono counsel.” Compl. at ¶ 3. But an alien’s right to certain
 7 advisals and information provided at an initial master calendar hearing are statutory and
 8 regulatory rights, not constitutional rights. Therefore, Plaintiffs’ reliance on *Coleman v.*
 9 *Frantz*, 754 F.2d 719, 724 (7th Cir. 1985) and *Hayes v. Faulkner Cty.*, 388 F.3d 669, 673
 10 (8th Cir. 2004) are misplaced, because those cases found a Fifth Amendment right to a
 11 prompt initial hearing necessary to protect certain *constitutional* rights that apply
 12 exclusively in the criminal context. *See Coleman*, 754 F.2d at 724 (citing the Sixth
 13 Amendment, the Fifth Amendment right against self-incrimination, and the Eighth
 14 Amendment right to seek bail); *Hayes*, 388 at 673 (same); *cf. Morales-Izquierdo v.*
 15 *Gonzales*, 486 F.3d 484, 497 (9th Cir. 2007) (“there is no Sixth Amendment right to counsel
 16 in any civil removal proceeding . . . [a]ny such right is statutory . . .”).

17 Additionally, no federal court has ever extended the due process right to prompt
 18 presentment in criminal proceedings to the civil immigration context. Yet that is exactly
 19 what Plaintiffs seek in this case. *See generally* Compl. “The mere novelty of [Plaintiffs’]
 20 claim is reason enough to doubt that substantive due process sustains it.” *Flores*, 507 U.S.
 21 at 303; *cf. Manuel v. City of Joliet, Ill.*, 137 S.Ct. 911, 917-18 (2017) (holding, in the
 22 criminal context, that the Fourth Amendment, rather than the Due Process Clause, governs
 23 constitutional claims involving detention prior to an initial appearance). The Supreme Court
 24 has rejected the argument that immigration detention necessarily violates an alien’s
 25 substantive due process rights because there is no set time period within which the
 26 Government must present the alien for a hearing before an immigration judge. *Flores*, 507
 27 U.S. at 309 (further noting the similarity between plaintiffs’ substantive and procedural due
 28 process arguments are the same and rejecting them based on a determination that the process

provided in the INA was constitutionally sufficient). 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 had applied *Gerstein v. Pugh*, 420 U.S. 103, 125-26 (1975), to civil immigration detention. *Id.* at 308-09; *see also Demore*, 538 U.S. at 529 (“detention during removal proceedings is a constitutionally permissible part of that process”). Creating a new constitutional right that would guarantee all aliens a hearing before an immigration judge within a specific, judicially-determined timeframe would also 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. Plaintiffs fail to state a claim under the Administrative Procedure Act.

Plaintiffs’ claim under the APA rely on the same set of allegations that inform their constitutional claim. Compl. at ¶¶ 85-90. And like their constitutional claim, Plaintiffs’ claim under the APA fail to state a claim upon which the court can grant relief.

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 jurisdiction to compel an agency to act within a certain time period under the APA when the agency is compelled by law to act within a certain time period,” *Li v. Chertoff*, 482 F. Supp. 2d 1172, 1178 (S.D. Cal. 2007) (citing *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 65 (2004)). Neither the INA nor its implementing regulations provide a right to an initial master calendar hearing within specific timeframe. To the contrary, by statute, “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 in writing an earlier hearing date.” 8 U.S.C. § 1229(b)(1).

To the extent Plaintiffs challenge the lack of presentment to an immigration judge within a certain timeframe under 5 U.S.C. § 706(2), *see* Compl. at ¶ 88, such a claim also

1 fails. First, because their claim is essentially rooted in an allegation of unlawful delay,
 2 Plaintiffs have not, and cannot, identify the necessary “final agency action” to support a
 3 claim under section 706(2). *See* 5 U.S.C. § 704. Moreover, even if the complaint had
 4 identified a final agency action, section 706(2)(A) requires a reviewing court to uphold
 5 agency action unless it is “arbitrary, capricious, an abuse of discretion, or otherwise not in
 6 accordance with the law.” However, “the only agency action that can be compelled under
 7 the APA is action legally *required*,” *Norton*, 542 U.S. at 63 (emphasis in original), and the
 8 INA does not require the relief that Plaintiffs seek. Nor does the APA provide additional
 9 rights to aliens in removal proceedings beyond those provided in the INA and its
 10 implementing regulations.¹⁷ Similarly, Plaintiffs’ claims under 5 U.S.C. 706(2)(B)
 11 necessarily fail because, as discussed above, there is no *constitutional* right to an initial
 12 master calendar hearing before an immigration judge within any specific timeframe. Any
 13 claim by Plaintiffs that Defendants policies or practices are “contrary to a constitutional
 14 right” is thus unavailing.

15 As noted above, dismissal is appropriate “where the complaint lacks a cognizable
 16 legal theory or sufficient facts to support a cognizable legal theory.” *Mendiondo*, 521 F.3d
 17 at 1104. Because Plaintiffs’ APA claim does not state a claim that is “plausible on its face,”
 18 this Court should dismiss it under Rule 12(b)(b). *Iqbal*, 556 U.S. at 678.

19 V. CONCLUSION

20 Neither procedural nor substantive due process requires that aliens who have been
 21 detained for removal proceedings must appear before an immigration judge within a specific
 22 timeframe. The INA and its implementing regulations already provide a framework which
 23 adequately protects against erroneous deprivations of liberty, and while Plaintiffs may
 24 prefer additional procedures, the Court should reject Plaintiffs’ attempt to remake this
 25

26 ¹⁷ For these same reasons, Plaintiffs have not stated a claim under 5 U.S.C.
 27 § 706(2)(C) and (D), which permit a court to set aside agency action that is “in excess of
 28 statutory jurisdiction, authority, or limitations, or short of statutory right,” or “without
 observance of procedure required by law.”

1 framework through litigation. Plaintiffs' APA claim similarly fails because it is rooted in
2 the same allegations and claims that inform their constitutional claim. This Court should
3 therefore dismiss all of Plaintiffs' remaining claims under Fed. R. Civ. P. 12(b)(6), because
4 the complaint fails to state a claim upon which relief can be granted.

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Respectfully Submitted,

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