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20 UNITED STATES DISTRICT COURT
21 SOUTHERN DISTRICT OF CALIFORNIA

22 JOSE ORLANDO CANCINO
23 CASTELLAR, ANA MARIA
24 HERNANDEZ AGUAS, MICHAEL
25 GONZALEZ,

26 Plaintiff-Petitioners,

27 v.

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

Defendant-Respondents.

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

TIME: December 7, 2020

DATE: 1:00 PM

CTRM: 4B

Judge: Hon. Cynthia Bashant

**DEFENDANT-RESPONDENTS'
RESPONSE IN OPPOSITION TO
PLAINTIFF-PETITIONERS'
RENEWED MOTION FOR CLASS
CERTIFICATION**

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I. INTRODUCTION

In this putative class action, Plaintiff-Petitioners (“Plaintiffs”) attempt to graft a criminal standard into civil immigration detention. Plaintiffs contend that the Constitution requires the government to present aliens who it has detained for proceedings before an immigration judge (“IJ”) for an initial hearing within 48 hours of arrest. Plaintiffs urge this Court to invent an unworkable scheme that is untethered to the Constitution, federal law, and the policy considerations underpinning its existence in the criminal realm, and to apply it to a broad class of individuals detained under a variety of immigration statutes. *See* Plaintiffs’ Brief (“Pl. Br.”), ECF Nos. 125, 125-1.¹

The Court should deny class certification. At the outset, the Court lacks jurisdiction to afford Plaintiffs classwide injunctive relief because 8 U.S.C. §§ 1252(f)(1) and 1252(e) explicitly prohibit this Court from enjoining the operations of the various statutes governing the removal process for, and detention of, proposed class members. And even if the Court had jurisdiction over this case, the newly-minted putative class definition is impermissibly broader than the class as defined in the Complaint. Finally, Plaintiffs’ proposed class fails to satisfy Federal Rule of Civil Procedure 23(a) and (b)(2).

II. BACKGROUND

A. Procedural and Factual Background

The factual² and procedural background can be found in Defendants’ Renewed

¹ Citations to the sealed Memorandum of Points and Authorities in support of Plaintiffs’ renewed motion for class certification, *see* ECF No. 124, are denoted using “Pl. Br.” and refer to the page numbers listed at the bottom of that document. Citations to documents that have been publicly filed are denoted using the document’s number as listed on the docket (“ECF No.”) and reference the ECF-stamped page number.

² The named Plaintiffs’ factual and procedural backgrounds can be found at ECF No. 60-1 at 16–19. Since that briefing, an IJ terminated Mr. Cancino Castellar’s removal proceedings based on his approved DACA application. EOIR Depo Tr. at 43:17–44:21. And, in July 2019, Mr. Gonzalez was released from custody after obtaining withholding of removal. ECF No. 125-3 at 3:2–6.

1 Motion to Dismiss the Complaint (ECF No. 60-1) at 10–19.³

2 On October 16, 2020, Plaintiffs renewed their motion for class certification.
3 See Pl. Br. In their motion, see Pl. Br. at 15, Plaintiffs define their putative class as:

4 All individuals, other than unaccompanied minors or individuals with
5 administratively final removal orders, who (1) are or will have been in
6 the civil custody of the San Diego Field Office of ICE, the San Diego
7 Field Office of CBP Office of Field Operations, the San Diego Sector of
8 U.S. Border Patrol, and/or the El Centro Sector of U.S. Border Patrol,
collectively, for longer than 48 hours and (2) have not had a hearing
before an immigration judge.

9 **B. Statutory and Regulatory Background**

10 Defendants provided a detailed description of the statutory and regulatory
11 background in ECF No. 60-1 at 11–16.

12 **C. Overview of Immigration Detention and Scheduling of Hearing in the** 13 **Southern District of California**

14 When U.S. Customs and Border Protection (“CBP”) apprehends an alien
15 between ports of entry or encounters an alien at a port of entry in the Southern District
16 of California, CBP inspects the alien, which includes a determination of alienage and
17 an initial determination of admissibility. This inspection normally occurs at a Border
18 Patrol station or a port of entry.⁴ Aliens who CBP determines are inadmissible are
19 normally placed in appropriate proceedings, such as section 240 removal proceedings
20 or expedited removal under 8 U.S.C. § 1225(b).⁵ Those who cannot be immediately
21 repatriated are transferred from CBP to U.S. Immigration and Customs Enforcement
22 (“ICE”), Enforcement and Removal Operations (“ERO”), as expeditiously as
23

24
25 ³ On June 11, 2019, the Court granted in part and denied in part Defendants’ motion—
ultimately dismissing Gonzalez’s procedural due process claim and all of
26 Plaintiffs’ APA claims under 5 U.S.C. § 706(1). See ECF No. 63 at 45.

27 ⁴ There are three Border Patrol Sectors operating within the jurisdiction of the
Southern District of California: San Diego Sector (comprised of eight Border Patrol
28 stations), El Centro Sector (comprised of three Border Patrol stations), and Yuma
Sector (comprised of three Border Patrol stations). See
<https://www.cbp.gov/contact/ports/ca> (last visited Oct. 20, 2020).

⁵ In certain cases an individual may be paroled consistent with 8 U.S.C. § 1182(d)(5)
to the custody of state, local or federal entities for criminal prosecution.

1 possible. See ECF No. 125-9 at 33.

2 Most aliens detained in the Southern District of California are detained at the
3 Otay Mesa Regional Detention Facility (“Otay Mesa”) or the Imperial Regional
4 Detention Facility (“IRDF”).⁶ ECF No. 125-16 at 12. At the discretion of ERO, some
5 aliens may be transferred to detention facilities outside the Southern District of
6 California, such as San Luis Regional Detention Center, in the District of Arizona.

7 The Otay Mesa Immigration Court conducts removal proceedings and credible
8 fear review hearings for aliens detained at Otay Mesa. The Imperial Immigration
9 Court conducts hearings for aliens detained at the IRDF. Like all immigration courts,
10 Otay Mesa and Imperial prioritize cases involving detained aliens to avoid lengthy
11 detention pending immigration proceedings.⁷ Once DHS files an NTA with the Otay
12 Mesa and Imperial Immigration Courts, court staff endeavor to schedule an IMCH as
13 quickly as possible, taking into account docket space, IJ availability and caseload,
14 existing resources, interpreter availability, and other competing deadlines, as well as
15 the statutory requirement that the IMCH “shall not be scheduled earlier than 10 days
16 after the service of the notice to appear” subject to the alien’s waiver, see 8 U.S.C.
17 § 1229(b)(1). See *e.g.*, Ex. A (EOIR Dep. Tr. at 74:13; 77:11-80:3; 117:2-8; 119:11-
18 120:14; 122:4-10; 170:2-3).⁸ Additionally, both courts endeavor to schedule credible
19 fear review hearings as promptly as possible consistent with 8 U.S.C.
20 § 1225(b)(1)(B)(iii)(III). See *id.* at 30:1–4.

21 Both courts also conduct bond hearings for detainees in the Otay Mesa and
22 Imperial detention facilities. When ICE detains an alien under 8 U.S.C. § 1226(a),
23 pending removal, ICE provides the alien with a Form I-286, Notice of Custody

24
25 ⁶ None of the named Plaintiffs is (or ever was) detained at the Imperial Regional
Detention Facility. See ECF No. 60-1 at 16–19. See *also* Pl. Br. 13–14.

26 ⁷ See Dep’t of Justice, EOIR: FY 2020 Performance Budget, Congressional Budget
Submission at 20 (EOIR Budget Request).

27 ⁸ Defendants dispute Plaintiffs’ characterization of the EOIR Deponent’s testimony
as stating that but for 8 U.S.C. § 1229(b)(1) EOIR could hold IMCHs in less than 24
28 hours. See Pl. Br. at 10. To the contrary, the EOIR Deponent, Assistant Chief
Immigration Judge Rico Bartolomei testified that a number of factors contribute to
how quickly the immigration court is able to schedule IMCHs. See *e.g.*, EOIR Depo
Tr. at 77:11-80:3; 117:2-8; 119:11-120:14; 122:4-10; 170:2-3.

Determination. The Form I-286 contains a check-box for the alien to request a bond hearing before an IJ. DHS ordinarily files the Form I-286 at the Immigration Court simultaneously with the NTA. The Otay Mesa and Imperial Immigration Courts automatically schedule a bond hearing for any such alien who has checked the box on the Form I-286 requesting such a hearing and the bond hearing is scheduled as promptly as possible (often prior to the initial MCH). EOIR Depo Tr. at 134:14–136:6. Bond hearings are not scheduled for arriving aliens detained under 8 U.S.C. § 1225(b), however, because an IJ has no jurisdiction to hold a bond hearing for such aliens. *See* 8 C.F.R. § 1003.19(h)(2)(i)(B); *but see Padilla v. ICE*, 953 F.3d 1134 (9th Cir. 2020), *petition for cert. filed*, No. 20-234 (Aug. 24, 2020).

III. ARGUMENT

A. The Court Lacks Jurisdiction to Certify the Class.

The Court lacks jurisdiction to certify a class seeking injunctive relief for Plaintiffs’ claims under 8 U.S.C. §1252(f)(1) and lacks authority under 8 U.S.C. § 1252(e)(1), (3) to entertain Plaintiffs’ challenge to the existing process for putative class members subject to expedited removal. At the outset, § 1252(f)(1) broadly restricts courts’ jurisdiction to award injunctions: “Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of [8 U.S.C. §§ 1221–1232].” 8 U.S.C. § 1252(f)(1). Section 1252(f)(1) then carves out a narrow exception to that restriction: a court may award an injunction “with respect to the application of such provisions to an individual alien against whom proceedings under [8 U.S.C. §§ 1221–1232] have been initiated.” *Id.*; *see Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 48–182 (1999).

Here, Plaintiffs seek to enjoin the operations of the relevant removal and detention statutes by creating a deadline at which point aliens who are detained pending immigration proceedings must be presented before an IJ. Yet neither the Due

1 Process Clause, nor any statute or regulation requires any such timeline. *See, e.g.,*
 2 *Hamama v. Adducci*, 912 F.3d 869, 879 (6th Cir. 2018) (holding bond hearing
 3 requirements “created out of thin air...that do[] not exist in the statute” “qualify as a
 4 restraint” on the operation of the statute); *Nielsen v. Preap*, 139 S. Ct. 954, 975 (2019)
 5 (Thomas, J., concurring, in part) (1252(f)(1) bars injunction requiring action that is
 6 “not authorized by the statutes”); *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) ; *but*
 7 *see Padilla*, 953 F.3d at 1150.⁹

8 To the contrary, the expedited removal statute and its implementing regulations
 9 set forth detailed procedures that apply to certain aliens. *See infra* Section III.C.1.a.iii.
 10 Those procedures do not provide an alien with a right to an IMCHzz before an IJ
 11 within 48 hours of arrest, but only provide for a *limited* hearing to determine whether
 12 an alien has a credible fear and only *after* an asylum officer makes an initial
 13 determination. *Id.* Any injunction or court order requiring Defendants to provide class
 14 members who are subject to the expedited removal process with a hearing before an
 15 IJ within 48 hours of the alien’s arrest would necessarily enjoin or restrain the
 16 operation of Congress’s carefully designed expedited removal scheme, *see* 8 U.S.C.
 17 § 1225(b)(1)(A)–(E). Indeed, Congress did set a time-frame for immigration courts to
 18 conduct credible fear review hearings: it set an outer limit of 7 days (not 48 hours)
 19 beginning after the asylum officer’s initial credible fear determination (not beginning
 20 from the date of the alien’s arrest). *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(III). And
 21 Congress limited the scope of that hearing to review of an asylum officer’s
 22 determination that the alien does not have a credible fear of persecution; it did not
 23 provide for an IMCH. *Id.*

24 For the same reasons, under 8 U.S.C. §§ 1252(e)(1) and (3), Plaintiffs cannot
 25 seek relief on behalf of proposed class members who are subject to expedited removal.

26
 27 ⁹ In *Padilla*, the Ninth Circuit erroneously read section 1252(f)(1)’s limitation of
 28 injunctions to the application of a statutory provision to an “individual alien” as
 precluding only challenges brought by “organizational plaintiffs,” not challenges
 brought on behalf of a class of aliens. *Padilla*, 953 F.3d 1134 at 1151. The government
 maintains that the *Padilla* majority wrongly decided the issue and, on August 24,
 2020, filed a petition for certiorari to the Supreme Court (No. 20-234).

1 All systemic challenges to the implementation of 8 U.S.C. § 1225(b) (expedited
 2 removal procedures) must be brought exclusively in the District Court for the District
 3 of Columbia within 60 days of when the statute, regulation or procedure is first
 4 implemented. 8 U.S.C. § 1252(e)(3); *see also* 8 U.S.C. § 1252(a)(2)(A)(iv) (providing
 5 that “no court shall have jurisdiction to review [...] “procedures and policies adopted
 6 by the [DHS] to implement the provisions of section 1225(b)(1)” unless the claim is
 7 brought in accordance with § 1252(e)). Moreover, even if this Court had jurisdiction
 8 to consider this claim, § 1252(e)(1) precludes the Court from doing so on a classwide
 9 basis. 8 U.S.C. § 1252(e)(1)(B) (“no court may [...] certify a class under Rule 23” in
 10 any action brought under § 1252(e)). Because Plaintiffs challenge Defendants’
 11 implementation of the expedited removal process—which does not provide for an
 12 IMCH or similar hearing before an IJ within 48 hours of arrest—their claims cannot
 13 be brought in this Court and they cannot avail themselves of class certification.

14 Finally, the requested relief would enjoin or restrain the operation of 8 U.S.C.
 15 § 1229(b)(1) for aliens placed in removal proceedings directly after apprehension or
 16 after a positive credible fear determination. That section provides that an initial master
 17 calendar “hearing date shall not be scheduled earlier than 10 days after the service of
 18 the notice to appear” unless that provision is waived by the alien. 8 U.S.C.
 19 § 1229(b)(1). Congress chose to set a floor (*e.g.*, the hearing shall not be scheduled
 20 earlier than 10 days) but it did not impose a ceiling. Accordingly, a 48-hour rule would
 21 enjoin the statute’s operation and impose a requirement contrary to the statute. *See*
 22 *Vazquez Perez v. Decker*, No. 18-CV-10683, 2019 WL 4784950, at *6 (S.D.N.Y.
 23 Sept. 30, 2019) (holding that § 1252(f)(1) strips the district court of authority to issue
 24 an injunction requiring the Government to provide detainees within an initial master
 25 calendar hearing within a certain amount of time). Plainly, Plaintiffs’ requested
 26 injunctive relief would amount to an overhaul of the operation and timeframe for
 27 expedited removal proceedings and IMCHs for removal cases on a classwide—not
 28 individual—basis. Accordingly, this Court lacks jurisdiction to certify a class seeking

1 an injunctive remedy for Plaintiffs' claims.¹⁰

2 **B. Plaintiffs' Proposed Class is Impermissibly Broader than the Class**
 3 **Defined in the Complaint.**

4 District courts in California—including this one—have held that attempts to
 5 expand the class as defined in the complaint through a class-certification motion are
 6 inappropriate and will not be considered. *See, e.g., Clay v. Cytosport, Inc.*, No. 15-
 7 CV-00165-L (DHB), 2016 WL 6082314, at *3 (S.D. Cal. Oct. 18, 2016) (“Generally,
 8 a plaintiff may not expand the class definition without amending the complaint.”);
 9 *Berlowitz v. Nob Hill Masonic Mgmt.*, No. C-96-01241 MHP, 1996 WL 724776, at
 10 *2 (N.D. Cal. Dec. 6, 1996) (“The court is bound by the class definition provided in
 11 the complaint...and will not consider certification of the class beyond the definition
 12 provided in the complaint unless plaintiffs choose to amend it.”); *Costello v. Chertoff*,
 13 258 F.R.D. 600, 604–05 (C.D. Cal. 2009) (“The Court is bound to class definitions
 14 found in the complaint and, absent an amended complaint, will not consider
 15 certification beyond it.”).

16 Courts allow a class-certification motion to diverge from the definition in the
 17 plaintiffs' putative class action complaint only when the new definition is narrower
 18 than the original. *See Abdeljalil v. Gen. Elec. Capital Corp.*, 306 F.R.D. 303, 306
 19 (S.D. Cal. 2015) (permitting the plaintiff to propose a new class definition in his
 20 motion for class certification when the new definition was “simply a narrower version
 21 of the class definition presented in the [amended complaint]”). And the few courts
 22 who have considered modifications to the class definition in a class-certification
 23 motion have done so only when the change is minor and “when doing so won't
 24 prejudice the defendant in any way.” *See Patten v. Vertical Fitness Grp., LLC*, No.
 25 12CV1614-LAB (MDD), 2013 WL 12069031, at *3 (S.D. Cal. Nov. 8, 2013)

26
 27 ¹⁰ To the extent Plaintiffs rest on their request for declaratory relief, *see* ECF No. 1 at
 28 25, ¶¶ c–e, their request for the Court to create and implement a 48-hour rule requiring
 Defendants to present detainees at a IMCH clearly is the functional equivalent of
 injunctive relief. *See Hamama*, 912 F.3d at 880 n.8 (“The practical effect of a grant
 of declaratory relief as to Petitioners' detention would be a class-wide injunction
 against the detention provisions, which is barred by § 1252(f)(1).”).

(considering the modified class definition because it did not prejudice the defendant).

Defendants take no issue with Plaintiffs excluding certain individuals that had been in the original definition because it narrows the proposed class's scope. See *Abdeljalil*, 306 F.R.D. at 306. But Defendants oppose Plaintiffs' attempt to expand the scope of the proposed class to include individuals outside the Southern District of California in their class-certification motion—without amending the complaint and after the close of class discovery—because it constitutes a material change that will significantly prejudice Defendants and usurp authority from other district courts.¹¹

Plaintiffs have expanded their putative class to include individuals detained in two facilities that they concede are “outside this district” (Pl. Br. at 16). The San Luis Regional Detention Center (“SLRDC”) is in San Luis, Arizona (ECF No. 125-8, ICE Dep. 30:21–31:2), and, thus, falls within the jurisdiction of the U.S. District Court for the District of Arizona. Newton and Azrak Border Patrol Station (“Newton and Azrak”) is in Murrieta, California, located in Riverside County, California, which is within the jurisdiction of the U.S. District Court for the Central District of California.¹²

This expansion would prejudice Defendants because implementing any relief that this Court may order would be confusing and burdensome. If this Court grants any of Plaintiffs' requested relief, Defendants will face the practical challenge of determining which rules apply to which detainees in these two facilities. Then they will have to administer two sets of rules, treating differently detainees within the same

¹¹ Defendants interpret Plaintiffs' putative class definition to exclude family units, since Plaintiffs use the term “individual” (and a family unit plainly is not an “individual”) and because none of the family residential centers are located within the Southern District of California. But to the extent that Plaintiffs intend for their new class definition to include family units, such a change would be improper and this Court should reject it as untimely and unduly burdensome at this late juncture.

¹² See Pl. Br. at 16; <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/san-diego-sector-california/murrieta-station#:~:text=The%20Theodore%20L.-,Newton%2C%20Jr.,historic%20Temecula%20Border%20Patrol%20Checkpoint> (last visited Nov. 6, 2020); <https://countyofriverside.us/Residents/CitiesNeighboringCommunities.aspx#gsc.tab=0> (last visited Nov. 6, 2020); <https://www.cacd.uscourts.gov/jurisdiction> (last visited Nov. 6, 2020).

1 facilities—for instance detainees who are in ICE’s Phoenix Field Office’s custody,
2 although detained alongside class members in SLRDC, will not be entitled to any
3 relief this Court grants. And applying different treatment to detainees in the same
4 facilities likely will give rise to new litigation.

5 In addition to the procedural flaws in Plaintiffs’ eleventh-hour class expansion,
6 its timing—three weeks after the close of class discovery—weighs against granting
7 it. *See* ECF No. 112 at 3 (“[C]lass discovery must be completed by September 25,
8 2020.”) (emphasis omitted). At this stage of the case, additional discovery would be
9 unduly burdensome on Defendants, who have spent myriad resources and nearly a
10 year responding to Plaintiffs’ discovery demands—including nine depositions, nearly
11 22,000 pages of responses to requests for production, creation of a multi-agency data
12 set, and responses to 31 interrogatories. Thus, to the extent this Court certifies the
13 expanded putative class, Defendants strongly object to the imposition of any
14 additional discovery. *See In re TFT–LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D.
15 583, 590–91 (N.D. Cal. 2010) (allowing minor class-definition modification because
16 it required no additional discovery and caused no prejudice).

17 Perhaps even more significant than the prejudices the expanded class would
18 impose on Defendants are those it would impose on other district courts. It would strip
19 other courts—the U.S. District Courts for the Central District of California and the
20 District of Arizona—of jurisdiction over claims currently pending or that may arise
21 in their own courts. *See Geraghty v. U.S. Parole Comm’n*, 719 F.2d 1199, 1205 (3d
22 Cir. 1983) (affirming the district court’s decision to limit a class of federal prisoners
23 to the Middle District of Pennsylvania because “it is within the district court’s
24 discretion to conclude that classwide consideration of the legality of the parole
25 guidelines and the constitutionality of the [statute at issue] might interfere with the
26 litigation of similar issues in other judicial districts). Because Plaintiffs seek
27 certification under Rule 23(b)(2), class members cannot opt out (*see, e.g., Frank v.*
28 *United Airlines, Inc.*, 216 F.3d 845, 850 (9th Cir. 2000)), and if, for instance, a class
member detained in SLRDC filed a delayed-presentment challenge in the District of

1 Arizona, his claim would be dismissed. *See e.g., Crawford v. Bell*, 599 F.2d 890, 892–
 2 93 (9th Cir. 1979) (a district court may dismiss “those portions of [the] complaint
 3 which duplicate the [class action’s] allegations and prayer for relief”).

4 Thus, expanding the class to include individuals detained outside this Court’s
 5 jurisdiction deprives other federal district courts of the ability to decide issues of local
 6 importance—including claims of prolonged detention (*see* ECF No. 56 at 15
 7 (Plaintiffs challenge “[a]llegedly excessive detention caused by delays in
 8 presentment”); ECF No. 1 at 25, ¶ 8 (seeking habeas relief)). But Congress
 9 specifically determined that the local district court alone should have venue to
 10 determine whether federal detainees should be released from federal custody. *See* 28
 11 U.S.C. § 2241(a); *Rumsfeld v. Padilla*, 542 U.S. 426, 443 (2004) (“The plain language
 12 of the habeas statute thus confirms the general rule that for core habeas petitions
 13 challenging present physical confinement, jurisdiction lies in only one district: the
 14 district of confinement.”). “Congress added the limiting clause—‘within their
 15 respective jurisdictions’—to the habeas statute in 1867 to avert the ‘inconvenient
 16 [and] potentially embarrassing’ possibility that ‘every judge anywhere [could] issue
 17 the Great Writ on behalf of applicants far distantly removed from the courts whereon
 18 they sat.’” *Id.* at 442 (quoting *Carbo v. U.S.*, 364 U.S. 611, 617 (1961)). Expanding
 19 the putative class to include individuals outside the District of Southern California
 20 would deprive local courts of their congressionally-dictated authority over detainee
 21 release and prevent them from conducting the necessarily individualized due-process
 22 analysis, taking into account regional differences in factual circumstances. Further, if
 23 a parallel class action arises in another district, confusion could ensue about which
 24 case governs detainees at SLRDC and Newton and Azrak.

25 Thus, if this Court decides that class certification is appropriate under Rule 23’s
 26 requirements, it should hold Plaintiffs to the geographic scope as defined in their
 27 Complaint: “individuals in the Southern District of California” (ECF No. 1 ¶ 68).
 28

1 C. The Putative Class Does Not Satisfy Rule 23's Requirements.

2 Even if Plaintiffs can survive the issues above, this Court should still deny their
 3 motion for class certification because the proposed class does not meet the
 4 requirements of Rule 23. "The class action is 'an exception to the usual rule that
 5 litigation is conducted by and on behalf of the individual named parties only.'" *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (quoting *Califano v.*
 6 *Yamasaki*, 442 U.S. 682, 700–01 (1979)). To fall within this exception, Plaintiffs
 7 "must affirmatively demonstrate [their] compliance" with Federal Rule of Civil
 8 Procedure 23. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The burden
 9 is on the party seeking certification of a proposed class to demonstrate satisfaction of
 10 the elements required under Rule 23(a), including that: (1) there are sufficiently
 11 numerous parties ("numerosity");¹³ (2) there are questions of law or fact common to
 12 the class ("commonality"); (3) the claims or defenses of the named plaintiffs are
 13 typical of claims or defenses of the class ("typicality"); and (4) the named plaintiffs
 14 will fairly and adequately protect the interests of the class ("adequacy of
 15 representation"). See Fed. R. Civ. P. 23(a). The Supreme Court has held that "actual,
 16 not presumed, conformance with Rule 23(a) [is] indispensable." *Gen. Tel. Co. of*
 17 *Southwest v. Falcon*, 457 U.S. 147, 160 (1982).

18
 19 When reviewing a motion for class certification, a court may "'probe behind
 20 the pleadings before coming to rest on the certification question,' and [] certification
 21 is proper only if 'the trial court is satisfied, after rigorous analysis, that the
 22 prerequisites of Rule 23(a) have been satisfied.'" *Wal-Mart*, 564 U.S. at 350–51
 23 (quoting *Falcon*, 457 U.S. at 160–61). Moreover, while not a listed requirement of
 24 Rule 23, courts have also recognized that the proposed class must be "adequately
 25 defined and clearly ascertainable before a class action may proceed." *Algarin v.*
 26 *Maybelline, LLC*, 300 F.R.D. 444, 454 (S.D. Cal. 2014); see also *Berger v. Home*
 27

28 ¹³ Defendants do not at this time challenge whether the proposed class meets the
 numerosity requirement of Rule 23(a)(1), but reserve the right to do so in the future
 should grounds arise for such a challenge.

1 *Depot USA, Inc.*, 741 F.3d 1061, 1071 n.3 (9th Cir. 2014).

2 **1. The proposed class fails to satisfy the commonality and typicality**
 3 **requirements of Rule 23(a)(2).**

4 Plaintiffs have not met their burden to establish the commonality and typicality
 5 requirements because they propose an overbroad class of individuals with varying
 6 legal rights, interests, and factual circumstances, and who are subject to different
 7 statutory regimes governing their apprehension, detention, and removal. Rule 23's
 8 commonality and typicality requirements often merge, as "[b]oth serve as guideposts
 9 for determining whether under the particular circumstances maintenance of a class
 10 action is economical and whether the named plaintiff's claim and the class claims are
 11 so interrelated that the interests of the class members will be fairly and adequately
 12 protected in their absence." *Wal-Mart*, 564 U.S. 349 n.5 (cited by *Torres v. Mercer*
 13 *Canyons Inc.*, 835 F.3d 1125, 1141 n.11 (9th Cir. 2016)). Indeed, the typicality
 14 requirement seeks to determine "whether the named plaintiff's claim and the class
 15 claims are so interrelated that the interests of the class members will be fairly and
 16 adequately protected in their absence." *Falcon*, 457 U.S. at 157 n.13.

17 Plaintiffs must show that a court would be able to fairly and efficiently resolve
 18 the issue raised by the class "in one stroke." *Wal-Mart*, 564 U.S. at 350. The Supreme
 19 Court has repeatedly held that "[i]t is not the raising of common 'questions'—even in
 20 droves—but, rather the capacity of a classwide proceeding to generate common
 21 answers apt to drive the resolution of the litigation." *Id.* The commonality requirement
 22 is uniquely rigorous when applied to a class—like the proposed class here—seeking
 23 certification under Rule 23(b)(2), and Plaintiffs must show that the legal and factual
 24 differences in the class are unlikely to bear on the individual's entitlement to relief.
 25 *See id.* at 360. If the differences have the likelihood of changing the outcome of the
 26 legal issue, then class certification is not appropriate. *Cf. id.* at 350–51, 360;
 27 *Yamasaki*, 442 U.S. at 701.

28 Plaintiffs' proposed class includes, with limited exceptions, *all* individuals who
 are detained for more than 48 hours before having a hearing before an IJ. *See* Pl. Br.

at 15. This definition broadly encompasses individuals with diverse legal and factual circumstances surrounding their apprehension, detention, and the procedures that apply to determining their removability. Accordingly, the class fails the test for commonality and typicality because none of the legal inquiries necessary to adjudicate Plaintiffs' APA and Due Process claims can be conducted without consideration of unique legal rights, characteristics, and factual circumstances that are not shared by the class as a whole. Because the proposed class presents a hodgepodge of legal and factual issues that cannot be resolved *en masse*, Plaintiffs cannot establish commonality or typicality consistent with Rule 23(a)(2).

a. Proposed class members are subject to divergent statutory authority and have differing constitutional rights and interests.

Plaintiffs' proposed class includes individuals who are detained for more than 48 hours, *regardless* of why they are detained and which statutory or regulatory procedures apply to them. Although Plaintiffs argue that several questions are common to the entire class, in fact, these questions demonstrate that this proposed class lacks commonality. *See* Pl. Br. at 9. As an initial matter, each of the four purported common issues Plaintiffs raise relies on the misplaced assumption that if a detained alien is not brought before an IJ within 48 hours, a delay in judicial presentment has occurred. *See* ECF No. 28-1, Memo in Support of Def.'s Mot. to Dismiss, at 17–36. Plaintiffs posit that this “delay in presentment” violates the Constitution and the APA. Pl. Br. at 9. But the question of when and how an alien first sees an IJ varies based on multiple statutes within the INA. Thus, in order to determine whether a particular alien has been “delayed” in his presentment to an IJ, the Court first would have to make several individualized determinations. It would have to determine not only the statutory basis that governs the alien's detention and removal process, but also whether that specific statute and associated statutory or regulatory procedures violate the Constitution or the APA. This individualized analysis is anathema to classwide resolution. Neither this question, nor its answer, is common or typical to all members of Plaintiffs' proposed class. *See Mazza v. Am.*

1 *Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012) (commonality turns on whether
 2 there is a “*significant* question of law or fact.”); *see also Armstrong v. Davis*, 275 F.3d
 3 849, 868 (9th Cir. 2001) (typicality requires “that the claims of the class
 4 representatives be typical of those of the class, and [is] to be ‘satisfied when *each*
 5 class member’s claim arises from the same course of events, and each class member
 6 makes similar legal arguments to prove the defendant’s liability.”) (quoting *Marisol*
 7 *v. Giuliani*, 126 F.3d 372, 376 (2nd Cir. 1997)) (emphasis added).

8 Under the INA, an alien lacking final order of removal may be detained under
 9 one of several specific statutory provisions, including 8 U.S.C. §§ 1225(b)(1)(B)(ii),
 10 (b)(1)(B)(iii)(IV), and (b)(2)(A); 8 U.S.C. §§ 1226(a) and 1226(c). Some of these
 11 statutes grant DHS the discretionary authority to detain or release the alien, while
 12 others mandate detention with limited exceptions pending further administrative
 13 proceedings. Moreover, these statutes provide differing procedural pathways by
 14 which an alien may appear before an IJ. Thus, the question of why an individual is
 15 detained and what statutory or regulatory procedures apply to him is a multi-factor
 16 inquiry based on the location of his apprehension and status, potential relief, and any
 17 criminal or immigration history. The following categories of detained aliens provide
 18 a glimpse into the complexities of the various detention statutes, as well as the various
 19 classes of aliens that would be included in Plaintiffs’ proposed class.

20 **i. Aliens detained under § 1225.**

21 Plaintiffs’ proposed class includes various categories of aliens seeking
 22 admission to the United States who are detained pursuant to 8 U.S.C. § 1225. This
 23 exceptionally broad group includes aliens in expedited removal proceedings.¹⁴ The
 24 question of if and when an alien subject to expedited removal receives a hearing
 25

26 ¹⁴ Expedited removal proceedings under 8 U.S.C. § 1225 are limited to aliens arriving
 27 in the United States, “whether or not at a designated port of arrival;” and “aliens (1)
 28 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.” 8 U.S.C. §§ 1225(a)(1), (b)(1)(A)(iii)(II); 8
 C.F.R. § 235.3(b)(1); 69 Fed. Reg. at 48880 (internal quotations omitted).

1 before an IJ turns on whether that alien expresses a fear of persecution or an intent to
 2 apply for asylum, and then is able to demonstrate a credible fear at a hearing with an
 3 asylum officer. *See* 8 U.S.C. §§ 1225(b)(1)(A)(i)-(iii); 8 U.S.C. § 1225(b)(1)(B)(ii),
 4 8 C.F.R. § 235.6(a)(1)(ii). If the asylum officer finds that the alien has a credible fear,
 5 DHS will commence full removal proceedings; but if the asylum officer finds that the
 6 alien lacks a credible fear, he shall be removed subject to a limited opportunity to
 7 request IJ review of the negative credible fear determination. 8 U.S.C.
 8 §§ 1225(b)(1)(B)(ii), 1225(b)(1)(B)(iii)(III).¹⁵ The statute also provides a time-frame
 9 for IJ review, *see* 8 U.S.C. § 1225(b)(1)(B) (“[T]o the maximum extent possible
 10 within 24 hours, but in no case later than 7 days after the date of the [asylum officer’s]
 11 determination.”). With few exceptions, such aliens are not entitled to bond hearings
 12 and may only be released subject to DHS’s parole power. *See infra* fns. 18–19.¹⁶

13 Plaintiffs argue that delayed presentment before an IJ necessarily violates the
 14 Constitution and the APA for each member of their proposed class. ECF No. 1 at
 15 ¶¶ 75–84; Pl. Br. at 1, 18. But for those aliens found inadmissible at a port of entry,
 16 as well as those apprehended between the ports of entry and subject to expedited
 17 removal, Congress has plenary power to define the process provided to such aliens.
 18 *See e.g., Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972). As the Supreme Court has
 19 long held, in those circumstances, “[w]hatever the procedure authorized by Congress
 20 is, it is due process as far as an alien denied entry is concerned” and “it is not within
 21 the province of any court, unless expressly authorized by law, to review the
 22 determination of the political branch of the Government to exclude a given alien.”
 23 *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543-44 (1950); *see also*

24
 25 ¹⁵ An alien’s rights during a negative credible fear review hearing are not co-extensive
 26 with the statutory rights provided to aliens in removal proceedings. *Compare* 8 U.S.C.
 27 § 1225(b)(1)(B)(iii)(III), *with* 8 U.S.C. § 1229a(b)(4). Therefore requiring an alien
 28 who is subject to expedited removal proceedings to appear before an IJ prior to DHS
 determining whether the alien expressed a credible fear would at best cause confusion,
 especially for an alien later found to not have a credible fear, and worse interfere with
 timely completion of the credible fear process.

¹⁶ Defendants previously provided a more detailed statutory background of 8 U.S.C.
 § 1225 in their renewed motion to dismiss (*see* ECF No. 60-1 at 13).

1 *Carlson v. Landon*, 342 U.S. 524, 537 (1952) (“The power to expel aliens is
 2 essentially a power of the political branches of government, which may be exercised
 3 entirely through executive officers, with such opportunity for judicial review of their
 4 action as Congress may see fit to authorize or permit.”).

5 Accordingly, as the Supreme Court and the Ninth Circuit have repeatedly held,
 6 aliens placed in expedited removal proceedings are *not* entitled to the full panoply of
 7 procedural rights enjoyed by other aliens.¹⁷ See *Landon v. Plasencia*, 459 U.S. 21, 32
 8 (1982) (“This Court has long held that an alien seeking initial admission to the United
 9 States requests a privilege and has no constitutional rights regarding his application,
 10 for the power to admit or exclude aliens is a sovereign prerogative.” (citing *Knauff*,
 11 338 U.S. at 542; *Nishimura Ekiu v. United States*, 142 U.S. 651, 659–60 (1892)).
 12 Aliens subject to expedited removal are not entitled to an IMCH or a similar hearing
 13 within 48 hours of arrest. Indeed, as discussed, such aliens only are entitled to a
 14 limited hearing where an IJ reviews the credible-fear claim and only after an asylum
 15 officer made an initial determination. And only once this process is exhausted (and if
 16 the alien is found to have a credible fear) would the alien be placed in removal
 17 proceedings. See 8 U.S.C. § 1225(b)(1)(B)(iii)(III).¹⁸

18 Thus, these aliens are in a legally distinct posture from other members of the
 19 Plaintiffs’ proposed class, and common questions of law do not exist between this
 20 category of aliens and others.¹⁹

21
 22
 23 ¹⁷ Aliens apprehended between the ports of entry and subject to expedited removal
 24 also fall within the so-called “entry fiction.” See *Castro v. United States Dep’t of*
 25 *Homeland Sec.*, 835 F.3d 422, 445–46 (3d Cir. 2016). That is, although aliens seeking
 26 admission into the United States who lack such connections “may physically be
 27 allowed within its borders pending a determination of admissibility, such aliens are
 28 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).

¹⁸ And this Court previously held that “Plaintiff Gonzalez’s Fourth Amendment claim
 is barred by Section 1252(g) because his ‘detention arose from [the] decision to
 commence expedited removal proceedings.’” ECF No. 49 at 15 (quoting *Sissoko v.*
Rocha, 509 F.3d 947, 949 (9th Cir. 2007)), *aff’d* ECF No. 56 at 3, 11–13.

¹⁹ As discussed, *supra* Section III.A, 8 U.S.C. §§ 1252(e)(1), (3) expressly prohibits
 inclusion of these individuals in Plaintiffs’ proposed class.

1 **ii. Non-criminal aliens detained under § 1226(a).**

2 Plaintiffs’ proposed class also includes aliens held in the government’s
3 discretion under 8 U.S.C. § 1226(a), which provides authority to detain “pending a
4 decision on whether the alien is to be removed[.]” 8 U.S.C. § 1226(a). Section 1226(a)
5 detainees are automatically assessed for bond eligibility, and may be released on bond
6 if “the alien...demonstrate[s] to the satisfaction of the officer that such release would
7 not pose a danger to property or persons, and that the alien is likely to appear for any
8 future proceeding.” 8 C.F.R. § 236.1(c)(8). An alien who is denied release (or
9 disagrees with the amount of bond DHS sets) may request an IJ conduct a custody
10 redetermination hearing at any time—including before the NTA has been filed with
11 the immigration court. 8 U.S.C. § 1226(a); 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1),
12 1003.19; *see Matter of Sanchez*, 20 I. & N. Dec. 223 (BIA 1990).

13 This subset of detained aliens raises separate legal issues from those raised by
14 § 1225 detainees. First, § 1226(a) detainees have a more straightforward path to
15 appearing before an IJ because they are placed directly into § 1229a removal
16 proceedings without going through the credible fear process. *See* 8 U.S.C.
17 § 1225(b)(1)(A)(ii). Second, they may be eligible for forms of relief from removal not
18 available to arriving aliens placed in expedited removal proceedings. *See, e.g.*, 8
19 U.S.C. § 1229b. Third, their detention is discretionary, rather than mandatory, and
20 they are automatically assessed for bond eligibility. 8 C.F.R. § 236.1(c)(8).

21 Moreover, even *within* the category of § 1226(a) detainees, significant legal
22 distinctions that drastically alter each individual alien’s legal posture and
23 constitutional rights exist. For instance, § 1226(a) includes aliens who are unlawfully
24 present in the U.S. However, it also includes lawful permanent resident aliens who
25 may have more substantial constitutional rights. *See Plasencia*, 459 U.S. at 32
26 (“[O]nce an alien gains admission to our country and begins to develop the ties that
27 go with permanent residence his constitutional status changes accordingly.”).
28 Therefore, common questions of law do not even exist *within* the subset of aliens
detained under §1226(a)—much less between this subset and those detained under

§ 1225. These fundamental legal distinctions between different categories of class members prevent Plaintiffs from establishing commonality or typicality.

iii. Criminal aliens detained under § 1226(c).

Although none of the named plaintiffs is held as a criminal alien, Plaintiffs’ proposed class appears to include aliens who are mandatorily detained under 8 U.S.C. § 1226(c).²⁰ Under this statute, certain criminal aliens are subject to mandatory detention—without the possibility of release—unlike noncriminal aliens detained under section 1226(a). If a § 1226(c) detainee claims that he is not covered by this provision, he may request a “*Joseph* hearing.” *Demore v. Kim*, 538 U.S. 510, 514 n.3 (2003); *see also Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999); 8 C.F.R. § 1003.19(h)(1)(ii) (providing that an alien may seek a “determination by an immigration judge that the alien is not properly included” within § 1226(c)). This hearing provides an alien “the opportunity to offer evidence and legal authority on the question whether the [government] has properly included him within a category that is subject to mandatory detention.” *Matter of Joseph*, 22 I. & N. Dec. at 805.

Section 1226(c) detainees present starkly distinct detention issues from detained aliens seeking admission under § 1225(b) or non-criminal aliens detained under § 1226(a). Any initial hearing necessarily would focus not only on whether the individual is an alien, but also on whether his predicate crime falls within the categories outlined in § 1226(c). The analyses necessary to determine whether § 1226(c) detainees’ constitutional and statutory rights have been violated are distinct from that conducted for the other classes of detained aliens. Including § 1226(c) detainees in the proposed class defeats a showing of common questions of law or fact.

b. The proposed class encompasses individuals with widely varying factual circumstances.

In addition to the putative class members’ legal differences, the class also lacks

²⁰ Whether Plaintiffs intend to include § 1226(c) detainees in their proposed class remains unclear. *See* Pl. Br. at 15 (noting that “criminal aliens” are excluded because the class only includes those in “civil custody”). But § 1226(c) is a civil detention statute, and aliens detained pursuant to it as a result of criminal convictions are nonetheless held in civil custody.

1 commonality because of the widely varying factual circumstances surrounding their
 2 apprehension and detention. For example, the proposed class includes those who: (1)
 3 present themselves at a port of entry and seek admission to the U.S. and are taken into
 4 custody by the Office of Field Operations; (2) Border Patrol apprehends along the
 5 border between the ports of entry; and (3) ICE takes into custody within the U.S. Pl.
 6 Br. at 4–5. All of these distinctions impact which DHS subcomponents may be
 7 involved in detaining and processing the alien before he can appear in immigration
 8 court. Moreover, as discussed, these distinctions affect whether an individual is even
 9 *eligible* to immediately appear before an IJ, since some aliens may need to complete
 10 other administrative processes before being referred to immigration court. *See* 8
 11 U.S.C. § 1225(b)(1)(A)(ii). All of these differences may impact how quickly an
 12 individual is presented to an IJ.

13 In addition, the proposed class members lack commonality because of the
 14 unique factual circumstances surrounding each individual’s apprehension and
 15 detention. A number of factors may impact the time that someone is detained before
 16 appearing before an IJ, including whether [REDACTED]
 17 [REDACTED]
 18 [REDACTED]; Border Patrol Dep. at [REDACTED]. Even if individuals do not fall
 19 into one of these categories, their time in custody may be prolonged if they are
 20 detained at the same time as other individuals who do fall into one of these categories.
 21 *See* OFO Dep. 186:1–19 (explaining that one person’s medical emergency can
 22 prolong the time in custody for other individuals detained at the same time, since the
 23 medical emergency reduces staffing available to perform other tasks). Further, other
 24 operational factors, [REDACTED]
 25 [REDACTED]
 26 [REDACTED], may impact when an alien first sees
 27 an IJ. OFO Dep. at 154:3–6; [REDACTED];
 28 ICE Dep. at 125:8–22 [REDACTED] EOIR Dep. at 30:18–22, 31:1–22; 32:1–9.

Finally, proposed class members lack commonality because of differences

1 related to their litigation choices in immigration court. Some may decide not to waive
 2 the ten-day statutory waiting period for an IMCH to have time to obtain an attorney
 3 or prepare for their hearing. *See* 8 U.S.C. § 1229(b). Others may seek a bond hearing
 4 prior to their IMCH with the hope of obtaining release. *See* EOIR Dep. at 43:14–44:17
 5 (noting Mr. Castellar’s attorney’s litigation strategies likely helped him receive a low
 6 bond).

7 **c. The putative class members’ varying legal and factual**
 8 **circumstances preclude any uniformed relief.**

9 Plaintiffs’ proposed class lacks commonality and typicality because they
 10 cannot show that every member of the class is entitled to the same relief—or any relief
 11 at all. Satisfaction of Rule 23(a)(2) for a Rule (b)(2) class requires two steps: (1) the
 12 identification of a common legal problem and (2) a demonstration that the common
 13 legal issue may be resolved as to all class members simply by virtue of their
 14 membership in the class. *Wal-Mart*, 564 U.S. at 350, 360 (the common legal problem
 15 “must be of such a nature that it is capable of classwide resolution—which means that
 16 determination of its truth or falsity will resolve an issue that is central to the validity
 17 of each one of the claims *in one stroke*.” (emphasis added)). The proposed class fails
 18 this test since none of the necessary inquiries can be conducted without considering
 19 unique legal and factual circumstances that the whole class does not share.

20 Plaintiffs’ constitutional claim must be individually analyzed under the Due
 21 Process Clause’s flexible framework and must account for a multitude of facts—not
 22 just the amount of time that has passed. Similarly, Plaintiffs’ APA claim challenging
 23 the “unreasonable delay” in their judicial presentment requires (at a minimum) an
 24 analysis of why the government did not meet Plaintiffs’ arbitrary deadline, which is
 25 not common to the whole class. Tellingly, Plaintiffs’ motion does not even address
 26 the legal standards applicable to their APA and constitutional claims or otherwise
 27 discuss why certification of these claims using the proposed class is appropriate. Thus,
 28 Plaintiffs have not demonstrated that either class can be certified under Rule 23(a)(2).

Plaintiffs claim that procedural due process entitles all putative class members

1 to initial hearings before IJs within 48 hours of arrest. ECF No. 1 at ¶¶ 38–40 (citing
 2 *Mathews v. Eldridge*, 424 U.S. 319 (1976)). However, “[t]he very nature of due
 3 process negates any concept of inflexible procedures universally applicable to every
 4 imaginable situation.” *Lujan v. G&G Fire Sprinklers, Inc.*, 532 U.S. 189, 196 (2001).
 5 Indeed, *Mathews* reaffirms that “due process is flexible and calls for such procedural
 6 protections as the particular situation demands.” 424 U.S. at 334.²¹ Each *Mathews*
 7 factor requires fact-intensive analysis that is not suited to classwide resolution here.

8 As discussed, Plaintiffs’ overbroad proposed class contains individuals subject
 9 to different detention schemes and removal procedures pursuant to different statutory
 10 authorities and who have varying levels of constitutional interests. The various
 11 constitutional interests of all putative class members makes ordering one-size-fits-all
 12 relief under the *Mathews* framework nearly impossible.

13 Moreover, the various individual circumstances of aliens detained for more
 14 than 48 hours do not allow easy resolution of the second *Mathews* factor. Each
 15 detained alien’s individual factual and legal circumstances will vary widely and the
 16 benefit of providing a hearing within 48 hours to all such aliens therefore cannot be
 17 determined without examining each alien’s situation, including the reason for
 18 detention, removal charges, and eligibility for relief or release on bond.

19 Finally, each putative class member’s different factual and legal circumstances
 20 necessarily will affect the strength of the government’s interest. Plaintiffs seek an
 21 order requiring release of any class member who is not brought before an IJ within 48
 22 hours. ECF No. 1 at 25, ¶ g. Such a requirement would interfere with the
 23 government’s ability to control the borders effectively and could potentially result in
 24 the release of dangerous aliens or aliens who are a flight risk. Moreover, assessing on
 25 a classwide basis the fiscal and administrative burden of bringing individuals before
 26

27 ²¹ Courts must consider: “(1) the nature of the private interest that will be affected, (2)
 28 the comparative risk of an erroneous deprivation of that interest with and without
 additional or substitute procedural safeguards, and (3) the Government’s interest,
 including the function involved and the fiscal and administrative burden that the
 additional or substitute procedures would entail.” *Id.* at 335.

1 an IJ within 48 hours is impossible, since any such burden will vary widely depending
 2 on the unique circumstances of each individual's apprehension and detention. Thus,
 3 certification of such an overbroad class is not appropriate where, as here, the Court
 4 cannot order one-size-fits-all relief under *Mathews*.²²

5 **2. Plaintiffs have not satisfied their burden of demonstrating the**
 6 **suitability of the proposed class representatives.**

7 Resolution of two questions determines legal adequacy, whether the named
 8 plaintiffs and their counsel (1) have any conflicts of interest with other class members;
 9 and (2) will prosecute the action vigorously on behalf of the class. *Hanlon Chrysler*
 10 *Corp.*, 150 F.3d 1011, 1020–21 (9th Cir. 1998); *see also Denney v. Deutsche Bank*
 11 *AG*, 443 F.3d 253, 268 (2d Cir. 2006) (“[T]he proposed class representative must have
 12 an interest in vigorously pursuing the claims of the class, and must have no interests
 13 antagonistic to the interests of other class members.”). The nature of Rule 23(b)(2)
 14 class certification amplifies the need to confirm representatives' commitment because
 15 class members cannot opt out. *Molski v. Gleich*, 318 F.3d 937, 947 (9th Cir. 2003).

16 Plaintiffs have failed to meet their burden under Rule 23(a)(4) because
 17 Plaintiffs no longer have interests aligned with putative class members. The class is
 18 limited to aliens who have not yet had a hearing before an IJ. Pl. Br. at 15. But as
 19 Plaintiffs acknowledge, all of the proposed representatives received such hearings
 20 over three years ago (*id.* at 13–14); further, all have been released from detention and
 21 none is even in removal proceedings. When a “plaintiff's claim becomes moot before
 22 the district court certifies the class, the class action normally also becomes moot.”
 23 *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1048 (9th Cir. 2014).

24
 25
 26 ²² Similarly, Plaintiffs' APA claims are not proper for class resolution because
 27 applicable precedent does not support imposition of a one-size-fits-all deadline.
 28 Plaintiffs assert that all class members are subject to the same arbitrary and capricious
 “policy” because the applicable laws and regulations do “not require any class
 members to be presented to a judge within any set amount of time.” Pl. Br. at 22; ECF
 No. 1 ¶ 88. But Plaintiffs fail to explain *how* their APA claims could be adjudicated
 on a classwide basis. A putative delay could be entirely reasonable under one set of
 legal and factual circumstances but arbitrary and capricious under another.

1 But even if Plaintiffs' claims were not moot,²³ they have not shown that they
 2 are interested in, willing to, or capable of prosecuting this action on behalf of all
 3 putative class members. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 986 (9th
 4 Cir. 2011) (concluding that former employees are not adequate representatives of a
 5 class of current employees seeking injunctive relief arising out of gender
 6 discrimination claim). The named Plaintiffs have not demonstrated that their interests
 7 are aligned with the remainder of the putative class because they would derive no
 8 benefit from any relief this Court awarded. Accordingly, Plaintiffs have fallen short
 9 of showing that they are adequate class representatives—especially considering that
 10 they are not even members of the class they seek to certify. *See Unthaksinkun v.*
 11 *Porter*, No. C11-0588JLR, 2011 WL 4502050, at *14 (W.D. Wash. Sept. 28, 2011)
 12 (named plaintiff not an adequate representative when she was no longer a class
 13 member); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997)
 14 (assessing whether class representatives are “part of the class”).

15 Furthermore, the motion for class certification makes no representations about
 16 the class representatives' adequacy beyond counsel's unsupported assertions that the
 17 named Plaintiffs “seek no relief for themselves through this case beyond the relief
 18 sought for the entire class and have no interests adverse to the class.” Pl. Br. at 22.
 19 Similarly, the record supporting both the original and renewed class-certification
 20 motions is devoid of any evidence demonstrating the proposed representatives'
 21 commitment to the litigation—including any mention of their desire or ability to
 22 litigate a complicated class action. Instead, Plaintiffs re-attach their nearly three-year-
 23 old declarations. *See* ECF Nos. 2-2 at 8–9, 25–26, 29–30; 125-4 at 2–3; 125-6 at 3–4;
 24 125-7 at 2–3. At a minimum, Plaintiffs have the burden of demonstrating that the
 25 proposed class representatives are aware of this class action litigation and their role
 26 in it. *See Spinelli v. Capital One Bank*, 265 F.R.D. 598, 614 (M.D. Fla. 2009) (“[The
 27

28 ²³ Although Plaintiffs insinuate that their claims could qualify for an exception to the
 mootness doctrine, they have not supported that claim with any actual argument or
 evidence (Pl. Br. at 18).

class representative] provided no affidavit reflecting her understanding and acceptance of the duties of a class representative.... Her lack of interest in the lawsuit makes her unsuitable to represent the putative class.”); *Buford v. H & R Block, Inc.*, 168 F.R.D. 340, 353–54 (S.D. Ga. 1996), *aff’d*, 117 F.3d 1433 (11th Cir. 1997) (a class representative must understand the case in order to “avoid investing unbridled discretion in the class attorney and effectively anointing the class attorney as the class representative.”). The motion, however, lacks any acknowledgement that class representatives must actively participate in the litigation. This dearth of evidence is particularly problematic here given that the named Plaintiffs received the relief that they are seeking from this litigation years ago and are no longer in ongoing removal proceedings. Plaintiffs did not satisfy their burden of showing that the proposed representatives will “vigorously” pursue those interests on behalf of the unnamed class members. Certification should be denied.

Further, Plaintiffs do not have an adequate representative for their claims regarding most of the at-issue DHS facilities. DHS has not detained, inspected, or otherwise encountered any of the named Plaintiffs at most of the facilities they take issue with in this case. Namely, no named plaintiff has any connection to two of the three Border Patrol Sectors two (El Centro or Yuma)²⁴ or four of the five ports of entry (Otay Mesa, Tecate, Calexico, or Andrade) operating within the jurisdiction of the Southern District of California. *See* ECF No. 60-1 at 16–19; Pl. Br. at 13–14. And none of the named Plaintiffs has ever been detained at IRDC. *See supra*, n.6.²⁵

3. The proposed class does not satisfy Rule 23(b)(2)’s requirements.

In addition to meeting the requirements set forth in Rule 23(a), the proposed class must also qualify under Rule 23(b)(1), (2), or (3). *Zinser v. Accufix Research*

²⁴ Similarly, none of the named plaintiffs alleges any contact with the Newton and Azrak Border Patrol Station in Murrieta, California.

²⁵ Likewise, none of the named plaintiffs is detained under 8 U.S.C. § 1226(c). Given the uniqueness of and challenges inherent in section 1226(c) detainees’ prompt-presentment claims—they are statutorily ineligible for bond—none of the three named representatives are adequate for this claim.

1 *Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Plaintiffs claim that their proposed
2 class “squarely fits within Rule 23(b)(2).” Pl. Br. at 21. To earn certification under
3 Rule 23(b)(2), Plaintiffs must demonstrate that Defendants have “acted or refused to
4 act on grounds that apply generally to the class, so that final injunctive relief or
5 corresponding declaratory relief is appropriate respecting the class as a whole.” Fed.
6 R. Civ. P. 23(b)(2).

7 Here, Plaintiffs claim that Defendants “subject all class members to the same
8 policies or practices by detaining them without a prompt hearing before a judge.” Pl.
9 Br. at 22. As a preliminary matter, for civil immigration detainees, no right to “prompt
10 presentment” exists at all—much less a mandate that they appear before an IJ within
11 48 hours of apprehension, no matter their circumstances. Further, neither DHS nor
12 EOIR has a “policy” regarding how quickly a detained alien appears before an IJ;
13 instead, multiple individualized factors, such as the applicable detention and removal
14 statute and factual circumstances surrounding the particular detention comprise this
15 determination. Despite this reality, Plaintiffs argue that the Defendants’ operations
16 violates the Fifth Amendment because their pattern and practice are contrary to
17 Plaintiffs’ own 48-hour presentment rule. *See* ECF No. 1 at 24–25. But Plaintiffs’
18 requested blanket relief is not warranted. Rather each detained alien must demonstrate
19 that he is entitled to relief by making an individualized showing that Defendants’
20 actions violated his constitutional rights. *See Wal-Mart*, 564 U.S. at 360 (“The key to
21 the (b)(2) class is ‘the indivisible nature of the injunctive or declaratory remedy
22 warranted—the notion that the conduct is such that it can be enjoined or declared
23 unlawful only as to all of the class members or as to none of them.’”)(internal
24 quotation omitted).

25 For all these reasons, Plaintiffs also have failed to satisfy Rule 23(b)(2). The
26 Court should deny Plaintiffs’ motion.

27 IV. CONCLUSION

28 For the foregoing reasons, Defendants respectfully request that this Court
deny Plaintiffs’ renewed motion for class certification.

1
2 DATED: November 6, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on November 6, 2020 to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Civ. L.R. 5.4(d). Any other counsel of record will be served by U.S. mail or hand delivery.

DATED: November 6, 2020

s/ Huy M. Le

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Exhibit A

Deposition Transcript Excerpts of Assistant
Chief Immigration Judge Rico Bartolomei, Rule
30(b)(6) Witness for Executive Office for
Immigration Review (September 16, 2020)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

-----X
JOSE ORLANDO CANCINO)
CASTELLAR, et al.,)
Plaintiff-Petitioners,)
v.) Case No.
CHAD WOLF, acting Secretary,) 17-cv-00491-BAS-AHG
U.S. Department of Homeland)
Security, et al.,)
Defendant-Respondents.)
-----x

CONFIDENTIAL UNDER PROTECTIVE ORDER

VIDEOTAPED 30(b)(6) DEPOSITION OF
JUDGE RICO BARTOLOMEI
ON BEHALF OF
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

September 16, 2020

9:30 A.M., Pacific

Reported by: Lori J. Goodin, RPR, CLR, CRR,
RSA, California CSR #13959

DIGITAL EVIDENCE GROUP
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1 INDEX TO EXAMINATION

2

3 WITNESS: Judge Rico Bartolomei

4

5 EXAMINATION BY PAGE

6 Ms. Fuller 7

7 Mr. Le 194

8 * * *

9

10 INDEX TO EXHIBITS

11 Judge Rico Bartolomei

12 Jose Cancino Castellar, et al.,

13 vs. Chad Wolf, et al.

14 Wednesday, September 16, 2020

Lori J. Goodin, RPR, CLR, CRR,

15 RSA, California CSR #13959

16 BARTOLOMEI

17 EXHIBIT DESCRIPTION PAGE

18 Exhibit 72 Fourth Amended Notice of 22

Deposition Under Federal Rules of

19 Civil Procedure, 30(b)(6), for

EOIR, File 01

20 Exhibit 73 EOIR Supplemental Responses to 93

Plaintiff's First Group of

21 Interrogatories 1-5, 5/1/2020

22 File 02

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1	EXHIBITS CONTINUED		
2	EXHIBIT	DESCRIPTION	PAGE
3	Exhibit 74	EOIR Uniform Docketing System Manual, Revised September 2018	111
4		File 03	
5	Exhibit 75	Advisals, File 04	124
6	Exhibit 76	Bond Redetermination Checklist File 05, DEF-0021227	152
7	Exhibit 77	Immigration Court Practice Manual File 06	153
8	Exhibit 78	Memo from Director of EOIR, Case Priorities and Immigration Court Performance Measures, 1/17/2018	157
9		File 07, DEF-0003666	
10	Exhibit 79	Memo from Chief Immigration Officer, Operating Policies and Procedures, Change of Venue 1/17/2018, File 08	166
11			
12	Exhibit 80	EOIR Memo, Standards for NTAs 12/21/2018, File 09	170
13		DEF-00003810	
14	Exhibit 81	Memo from Director of EOIR No Dark Courtrooms, 5/1/2019	180
15		File 10, DEF-0003673	
16	Exhibit 82	EOIR Memo, Case Management and Docketing Practices, 1/31/2020	183
17		File 11, DEF-00003676	

18
19
20

21 (All exhibits were provided
22 electronically to the reporter.)

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1 A. The respondent's freedom is
2 restricted.

3 Q. And do you know what kinds of costs
4 to the United States there are?

5 MR. LE: Objection, form.

6 THE WITNESS: What kinds of costs?
7 I believe the answer to be monetary costs or
8 among the costs.

9 BY MS. FULLER:

10 Q. And that is the cost due to the
11 detainment?

12 A. The cost to -- did somebody say
13 something? I'm sorry.

14 MR. LE: Oh, Judge, I was just
15 objecting.

16 THE WITNESS: Oh, may I answer the
17 question?

18 MR. LE: Yes, Judge.

19 THE WITNESS: Okay. So, the costs
20 would be the costs to the Department of
21 Homeland Security.

22 BY MS. FULLER:

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1 Q. Does EOIR have any additional costs
2 due to detained matters having a longer pendency
3 before an IJ?

4 MR. LE: Objection, form.

5 THE WITNESS: I'm not sure I
6 understand the question. Would you repeat it
7 please?

8 BY MS. FULLER:

9 Q. I think I will move on. I don't
10 really understand it, either.

11 When you reviewed the records of
12 proceedings of the named plaintiffs, did anything
13 stand out to you about these cases?

14 A. One thing that stood out to me was
15 the excellent job that pro bono Gott, counsel,
16 did for Mr. Cancino.

17 If I recall correctly Attorney [REDACTED],
18 [REDACTED], was his representative, and it jumped
19 out at me, as an immigration judge having
20 adjudicated many cases myself, that Attorney [REDACTED]
21 appeared to me, as I was looking over his
22 shoulder, so to speak, to recognize the

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1 importance of getting the young man's DACA
2 application in order. And it seemed to me,
3 without again knowing all of the facts and
4 circumstances behind it, that Mr. [REDACTED] did a very
5 laudable job for Mr. Cancino in getting the DACA
6 application filed, if I recall March 20th, 2017,
7 such that when it went to the bond hearing, I
8 presume Attorney [REDACTED] knew the importance of
9 having that done ahead of time and was again, I
10 don't want to be a Monday morning quarterback but
11 looking over his shoulder, it seemed that had he
12 not done all of that work ahead of time, there is
13 a very good chance that that plaintiff would have
14 had a higher bond.

15 So, that jumped out at me in his
16 case.

17 Q. Anything else?

18 A. Again, with his case, the success
19 that counsel was able to achieve for the
20 respondent, DACA was ultimately approved and the
21 motion to terminate was granted.

22 Certainly, it is beyond the scope of

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1 items all the time.

2 What they do though from that moment,
3 I cannot say.

4 BY MS. FULLER:

5 Q. Okay. And do you have a certain
6 length of time in mind when you discuss this, the
7 time for the Notice of Hearing plus the time to
8 prepare, what sort of length of time does the
9 court have in mind for that?

10 MR. LE: Objection to form.

11 THE WITNESS: So, what I believe the
12 law requires is if the hearing notice is
13 being prepared by the clerk, she must not
14 schedule it within the next ten days.

15 So, she is looking at Day 11,
16 Day 12, Day 13.

17 BY MS. FULLER:

18 Q. Okay. And if they waived their
19 rights, you might add them to a slot as late as
20 49 hours in advance. Is that, is that right?

21 A. It could even be sooner.

22 I think you will notice with

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1 Mr. Cancino, he had the questionnaire worksheet
2 attached to his Notice to Appear where the other
3 respondents didn't. Again it is sort of a
4 longstanding tradition going back to the '90s
5 when there used to be a large number of
6 non-contested dockets, the court was able to
7 address with INS, now DHS, the need to separate a
8 contested docket from the non-contested docket
9 and that questionnaire is utilized by the
10 department.

11 If that form is there and it is
12 attached, and it informs the court that this
13 person may be giving up his or her right to be in
14 the United States and just want to go home to
15 their native country, we might schedule it within
16 48 hours if there's available slot. Because it
17 is not in the interests of the United States
18 government to keep any person detained here in
19 this country, you know, any longer than he or she
20 might want to be detained, if they wish to go
21 back to their native land.

22 Q. So, are initial master calendar

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1 hearing sessions, like how many would happen in a
2 typical week at Otay Mesa?

3 A. Five. Each judge, she would have an
4 initial master calendar hearing.

5 Q. Are those spread throughout the
6 week?

7 A. Yes. They are.

8 Q. And how about Imperial court?

9 A. Those immigration judges have two
10 initial master calendar sessions.

11 Q. So, is that spread throughout the
12 week?

13 A. Correct.

14 Q. Is that, has that schedule been
15 changed, that aspect of their docket, has that
16 been changed over time or is that pretty
17 permanent?

18 A. So, at Imperial, recall, we didn't
19 have any judges on site until March of 2017, then
20 they had a period of training. By June they had
21 their own dockets.

22 So, that has been in place since

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1 June of 2017 at Imperial and then it has been
2 consistent at Otay Mesa the way Otay has done it
3 since, yes, since about June of 2017 as well.

4 Q. So, you mentioned that the ISS
5 system is not used for detained cases. Is that
6 right?

7 A. At Otay Mesa and Imperial.

8 Q. Would using that system streamline
9 the process in any way?

10 MR. LE: Objection, form.

11 THE WITNESS: If it works, it could.

12 BY MS. FULLER:

13 Q. You mentioned that the staff at the
14 immigration court receives these MTAs, stamps
15 them valid if they are, and then enters data into
16 the system. Do you have an estimate of about how
17 long that process takes?

18 A. The process to, from review to
19 input?

20 Q. Yes.

21 A. It depends on the skill of the legal
22 assistant involved, but my best estimate with the

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1 turned off to see if there could be a better way.

2 At other times court administrators
3 thought well they want to use the so-called card
4 dealing system anyway to make sure that for a
5 given number of notices to appear that are
6 actually filed, there is a balance among the
7 judges and among the dockets to try to create an
8 even workload among the judges.

9 Q. So, in the immigration court, all
10 things being equal, the immigration courts would
11 prefer to see an even distribution of cases
12 across the initial master calendar hearings?

13 MR. LE: Objection, form.

14 THE WITNESS: Yes, all things being
15 equal at a given snapshot of time, like one
16 week, we would like to see the judges having
17 a balanced docket with one another.

18 BY MS. FULLER:

19 Q. Would that be the case even if
20 initial master calendar hearings then went past
21 that were underfilled or half-filled or anything?

22 A. I'm not sure of your question, would

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1 you please repeat it?

2 Q. If you had a master calendar hearing
3 on Monday with 19 open slots and then on Tuesday
4 with, Tuesday was wide open, and you had ten
5 people, like your example, your preference,
6 EOIR's preference would be to put five on one day
7 and five on the other day, rather than put them
8 all on the first available slot in that case?

9 A. Correct. Other things being equal,
10 we would put five on one day and then five on the
11 second day.

12 Q. Okay.

13 A. All other things being equal,
14 though.

15 Q. So, is there then an exception where
16 EOIR doesn't assign the NTA to the first
17 available slot in situations like this?

18 A. There could be exceptions, yes.

19 Q. How common is that?

20 A. It is not necessarily uncommon,
21 depending upon the type of cases being filed
22 with us.

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1 Q. Looking at the paragraph below the
2 one we have been looking at, it begins with this
3 statement saying, "Generally the support staff
4 schedules 25 cases for each half day master
5 calendar session."

6 Do you see that?

7 A. I do.

8 Q. Why does that 25 number differ from
9 the numbers we have talked about so far for
10 Imperial and Otay Mesa?

11 A. Because the complexity of the type
12 of case that might arise at Otay Mesa or Imperial
13 has been generally understood to potentially be
14 more complex than other parts of the country.

15 And we need to make sure that we
16 also have docket time for things like civil
17 detention hearings, which are not mentioned in
18 the docketing manual, for example, but are unique
19 to the United States Court of Appeals for the 9th
20 Circuit.

21 The Otay and Imperial immigration
22 judges must address Franco class members again.

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1 That is something that is not
2 addressed on a nationwide basis.

3 So, the difference between the 25
4 and the 20, is the recognition that the nature of
5 the docket at Imperial and Otay Mesa is
6 different, and then it also gives the judges a
7 degree of flexibility to use part of the morning
8 as a reset docket.

9 So, an immigration judge might say
10 okay from eight until 10:30, I'm going to do the
11 20 initial master calendars.

12 But, then at 10:30 I'm going to ask
13 that I have five resets, places to put adjourned
14 cases to, off that initial master calendar.

15 Q. Is it the case that sometimes an
16 initial master calendar hearing a Franco analysis
17 can be detected, a Franco case can be detected by
18 the judge at that time?

19 MR. LE: Objection to form.

20 THE WITNESS: Counsel, I'm not sure
21 what you mean by a Franco case detected.

22 The immigration judge is looking for

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1 indicia.

2 If there are indicia, they could be
3 present at an initial master calendar, and
4 the immigration judge would be prepared to
5 look for any indicia.

6 BY MS. FULLER:

7 Q. Moving down from here on this page,
8 it has Section E it is called on The Master
9 Calendar. In the second paragraph of that
10 section, the whole thing is okay, I think.

11 It says, the second paragraph begins
12 by stating, "The judge usually is able to
13 complete a simple issue case, simple issue cases
14 at the master calendar hearing."

15 Do you see that?

16 A. I do.

17 Q. What is a simple issue case?

18 A. There are many types where there is
19 really no case in controversy from either side.

20 Q. And so for cases like this when it
21 says that they are able to complete the case,
22 does that mean bring it to full disposition?

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1 A. It does.

2 Q. Are translators provided for
3 respondents at the master calendar hearing?

4 A. The immigration judge will, and the
5 court staff will, endeavor to get an interpreter
6 in the language that the respondent speaks and
7 understands the best for the initial master
8 calendar with the caveat that the department is
9 entrusted first with the responsibility of trying
10 to identify what that might be.

11 Q. Are translators typically present in
12 the immigration court?

13 A. It depends on the language and the
14 case.

15 Q. Is there, understanding that there
16 is large Spanish speaking population here, is,
17 would Spanish language translators typically be
18 present in initial master calendar hearing?

19 A. Yes.

20 Q. Why are translators provided at that
21 proceeding?

22 A. The respondent has a right to the

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1 A. Applicants for withholding only can
2 ask the Department of Homeland Security to
3 entertain any kind of request for their liberty
4 interest. That is within the purview of DHS.

5 An immigration judge does not have
6 authority to redetermine the custody status of
7 somebody in reasonable fear proceedings unless it
8 is authorized by Federal District Court and it
9 becomes a civil detention proceeding.

10 Q. So, for the narrowed group of
11 detainees who are having initial bond
12 redetermination hearings, what triggered the
13 scheduling of that bond redetermination hearing?

14 A. There are different ways in which it
15 might occur.

16 It might be a telephone call by a
17 respondent who is detained before the court ever
18 receives the charging document.

19 The clerk will ask some basic
20 questions. And if it appears, or if it is
21 possible that a Notice to Appear has been issued
22 against that individual, but not yet filed, that

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1 person will be set for a custody hearing.

2 If the Notice to Appear is filed,
3 either on paper or electronically, and Box 2
4 and/or 3 is checked, the staff will automatically
5 look for the form I-286 that where the initial
6 custody determination has been made by the
7 Department of Homeland Security.

8 And then C, if the individual has
9 checked the box asking for redetermination, if
10 the box is checked, then the staff is
11 automatically going to set that for a custody
12 redetermination hearing.

13 Thirdly a detained individual might
14 write a letter to the court, give it to the
15 detention officer who then gives it to the court,
16 and in the letter the individual might ask for
17 some sort of bond or custody hearing and then
18 would be brought before the judge.

19 Q. How are bond hearings docketed? How
20 are they put on the schedule?

21 A. The staff at Imperial, if there is
22 the 286 attached and asks for the bond hearing

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1 will set the bond with the initial master
2 calendar.

3 Otay Mesa, the judges have a
4 separate bond docket distinct from the initial
5 master calendar and so the clerk will set it for
6 the bond hearing.

7 Q. So, at Imperial when it has a cap
8 of 15 for initial master calendar hearings and
9 five for bond, is sometimes people add to both of
10 those totals because they are there both for the
11 initial master calendar hearing and for the bond
12 hearing?

13 A. Yes, exactly.

14 Q. And then at Otay Mesa is the
15 schedule that there are just certain sessions set
16 aside for bond redetermination hearings?

17 A. Correct.

18 Q. Is there a separate detained bond
19 redetermination.

20 I guess it would only be for
21 detained, never mind.

22 A. Well, San Diego from time to time,

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1 what would have been the rule otherwise?

2 A. For the courts that I supervise, I
3 would say as expeditiously as possible.

4 Q. Okay.

5 MS. FULLER: I want to bring up the
6 next exhibit. Mr. Sparks it is the one with
7 09 at the beginning of the file name. This
8 would be Exhibit Number 80.

9 (Bartolomei Exhibit 80
10 marked for identification.)

11 THE WITNESS: I do recognize this
12 one and it is an EOIR document.

13 BY MS. FULLER:

14 Q. Thank you. And I wanted to look at
15 the footnote at the bottom of Page 1.

16 It says, "Prior to Pereira, EOIR has
17 never used ISS for detained case. Following
18 Pereira, EOIR attempted to use ISS for detained
19 cases but found the operational logistics
20 impossible to overcome due to continual
21 fluctuations in the detained population.

22 "Consequently EOIR provides hearing