

Bardis Vakili (SBN 247783) (bvakili@aclusandiego.org)
 David Loy (SBN 229235) (davidloy@aclusandiego.org)
 ACLU FOUNDATION OF SAN DIEGO &
 IMPERIAL COUNTIES
 P.O. Box 87131
 San Diego, CA 92138-7131
 Telephone: (619) 398-4485

Joanna Fuller (SBN 266406) (jfuller@fr.com)
 Aleksandr Gelberg (SBN 279989) (gelberg@fr.com)
 Megan A. Chacon (SBN 304912) (chacon@fr.com)
 Geuneul Yang (SBN 323287) (jyang@fr.com)
 FISH & RICHARDSON P.C.
 12390 El Camino Real
 San Diego, CA 92130
 Telephone: (858) 678-5070

Leonard B. Simon (SBN 58310) (lens@rgrdlaw.com)
 LAW OFFICES OF LEONARD B. SIMON P.C.
 655 West Broadway, Suite 1900
 San Diego, CA 92101
 Telephone: (619) 338-4549

Counsel for Plaintiff-Petitioners

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA

JOSE ORLANDO CANCINO
 CASTELLAR, ANA MARIA
 HERNANDEZ AGUAS, MICHAEL
 GONZALEZ,

Plaintiff-Petitioners,

v.

CHAD WOLF, Acting Secretary of
 Homeland Security; et al.,
 Defendant-Respondents.

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

**Memorandum of Points and
 Authorities in Support of Plaintiff-
 Petitioners' Motion to Reconsider
 Orders Dismissing Fourth
 Amendment Claims**

Date: January 19, 2021
Time: TBD
Courtroom: 4B (Schwartz)
Judge: Hon. Cynthia Bashant

**NO ORAL ARGUMENT UNLESS
 REQUESTED BY JUDGE**

I. INTRODUCTION

Based on recent binding precedent, Plaintiff-Petitioners (“Plaintiffs”) respectfully seek reconsideration of this Court’s ruling that it lacks jurisdiction over their Fourth Amendment claim. ECF No. 1 ¶ 83. The Court retains authority to reconsider that interlocutory decision. *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 888 (9th Cir. 2001). This motion is properly filed based on a recent “intervening change in the controlling law.” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009).

This Court initially held 8 U.S.C. § 1252(b)(9) barred jurisdiction over all of Plaintiffs’ claims. ECF No. 49 at 20–42. The Court also held 8 U.S.C. § 1252(g) bars jurisdiction over Plaintiff Gonzalez’s Fourth Amendment claim because he was an alleged arriving alien subject to mandatory detention as a result of expedited removal proceedings. *Id.* at 14–15. Subsequently, based on *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), the Court reconsidered that decision in part and held § 1252(b)(9) does not bar jurisdiction to decide Plaintiffs’ Fifth Amendment claim that due process prohibits prolonged detention without prompt judicial presentment. ECF No. 56 at 13–15. However, the Court upheld its prior ruling that § 1252(b)(9) bars jurisdiction over Plaintiffs’ Fourth Amendment claim challenging continued detention beyond 48 hours without a prompt judicial determination of probable cause, concluding that such a claim challenges the decision to detain them in the first place. *Id.* at 11–13. Because § 1252(g) was not implicated by *Jennings*, the Court’s § 1252(g) ruling as to Plaintiff Gonzalez’s Fourth Amendment claim also remained in effect.

Two recent appellate decisions warrant reconsideration of those jurisdictional rulings. First, in *Gonzalez v. United States Immigration & Customs Enf’t*, 975 F.3d 788 (9th Cir. 2020), the Ninth Circuit held that § 1252(b)(9) does not deprive a district court of jurisdiction to decide whether “the Fourth Amendment requires a prompt probable cause determination by a neutral and detached magistrate to justify continued

detention.” *Id.* at 798. For jurisdictional purposes, *Gonzalez* is indistinguishable from this case and requires the Court to hold that § 1252(b)(9) does not bar jurisdiction to decide Plaintiffs’ Fourth Amendment claim.

Second, the Supreme Court’s decision in *Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891 (2020) (“*Regents*”) illuminated the narrow scope of § 1252(g) and showed it does not apply to a claim such as Mr. Gonzalez’s that does not challenge any “decision to ‘commence proceedings,’ much less to ‘adjudicate’ a case or ‘execute’ a removal order.” *Id.* at 1907. Mr. Gonzalez does not challenge here the validity of his detention at its inception. Instead, he challenges only his continued detention without the procedural safeguard of neutral probable cause review *after* he was initially detained. Therefore, § 1252(g) does not bar his Fourth Amendment claim.

II. ARGUMENT

A. Under *Gonzalez*, Plaintiffs’ Fourth Amendment Claim is Not Barred by 8 U.S.C. § 1252(b)(9).

Plaintiffs’ Fourth Amendment claim challenges only Defendants’ policy of “retain[ing] a person in custody” beyond 48 hours “without prompt judicial review” of probable cause, not the initial decision to detain them in the first place. ECF No. 1, Complaint ¶¶ 4, 5. Plaintiffs assert that it violates the Fourth Amendment “to keep persons in custody beyond 48 hours ... without prompt judicial review” of probable cause. *Id.* ¶ 46. In *Gonzalez*, the Ninth Circuit has now made clear that claim is not barred by § 1252(b)(9).

According to § 1252(b)(9), “Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section,” and except as otherwise provided, “no court shall have jurisdiction ... to review such an order or such questions of law or fact.” 8 U.S.C. § 1252(b)(9). The Supreme Court has “eschewed uncritical literalism” when interpreting

1 “capacious phrases” such as “arising from.”¹ *Jennings*, 138 S. Ct. at 840 (Alito, J.).
 2 Although this Court previously held that § 1252(b)(9) barred jurisdiction over Plaintiffs’
 3 Fourth Amendment claim, the Ninth Circuit has now decided a case on point that
 4 requires reconsideration and modification of that holding.

5 In *Gonzalez*, the plaintiffs claimed “the Government violates the Fourth
 6 Amendment” by failing “to provide a prompt probable cause determination by a
 7 neutral and detached magistrate” after detention based on an immigration detainer. 975
 8 F.3d at 800. The Ninth Circuit held that 8 U.S.C. § 1252(b)(9) did not bar jurisdiction
 9 to decide that claim as applied to “noncitizen class members.” *Id.* at 810.

10 The Ninth Circuit explained “§ 1252(b)(9) is a ‘targeted’ and ‘narrow’ provision
 11 that ‘is certainly not a bar where, as here, the parties are not challenging any removal
 12 proceedings.’” *Id.* (quoting *Regents*, 140 S. Ct. at 1907). “As in *Regents*, § 1252(b)(9) is not
 13 a bar to jurisdiction over the claims of any class members—noncitizen or U.S.
 14 citizens—because none ‘ask[s] for review of an order of removal, the decision to seek
 15 removal, or the process by which removability will be determined.’” *Id.* (quoting *Regents*,
 16 140 S. Ct. at 1907).

17 As the Ninth Circuit held, “Section 1252(b)(9) is also not a bar to jurisdiction
 18 over noncitizen class members’ claims because claims challenging the legality of
 19 detention pursuant to an immigration detainer are independent of the removal
 20 process.” *Id.* In so holding, the court relied on and approved decisions holding that
 21 detention challenges are independent of and collateral to removal and thus not barred
 22 by § 1252(b)(9). *Id.* at 810-11 (citing “*Aguilar v. ICE*, 510 F.3d 1, 11 (1st Cir. 2007)
 23 (reading ‘arising from’ ‘to exclude claims that are independent of, or wholly collateral
 24 to, the removal process’ and identifying ‘challenges to the legality of detention’ as
 25 squarely outside § 1252(b)(9)’s scope); *Hernández v. Gonzales*, 424 F.3d 42, 42–43 (1st
 26
 27

28 ¹ This Court has treated Justice Alito’s opinion as stating the jurisdictional holding of
Jennings. ECF No. 56 at 8–10.

1 Cir. 2005) (holding that detention claims are independent of removal proceedings and,
2 thus, not barred by section 1252(b)(9))”.

3 The holding in *Gonzalez* confirms that § 1252(b)(9) does not bar jurisdiction over
4 Plaintiffs’ Fourth Amendment claim. As in *Gonzalez*, Plaintiffs claim that the Fourth
5 Amendment prohibits Defendants from continuing their detention without a prompt
6 determination of probable cause by a neutral and detached magistrate.² As in *Gonzalez*,
7 Plaintiffs are not asking this Court to review any order of removal, any decision to seek
8 removal, or any process by which removability is determined. As in *Gonzalez*, Plaintiffs
9 raise a Fourth Amendment challenge to continued detention that is independent of and
10 collateral to the removal process, which may proceed without continued detention.
11 Accordingly, under *Gonzalez*, § 1252(b)(9) does not bar jurisdiction to decide that
12 Fourth Amendment claim.

13 Plaintiffs previously relied on *Aguilar* to argue that § 1252(b)(9) does not bar
14 detention claims that “cannot be meaningfully heard in the administrative process.”
15 ECF No. 49 at 29:7–8. Based on earlier precedent, the Court noted, “The problem with
16 Plaintiffs’ reliance on *Aguilar* is the Ninth Circuit’s explicit rejection of that argument.”
17 ECF No. 49 at 30:15–16 (citing *J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016)).
18 Now, however, in *Gonzalez*, the Ninth Circuit has confirmed that unlike claims for a
19 right to appointed counsel in removal proceedings, which were at issue in *J.E.F.M.*,
20 Fourth Amendment detention claims are not barred by § 1252(b)(9). *Gonzalez* is on
21 point and is now the controlling precedent for purposes of jurisdiction over Plaintiffs’
22 Fourth Amendment claim.

23 Under *Aguilar*, which is incorporated into *Gonzalez*, § 1252(b)(9) does not bar
24 this Court from deciding Fourth Amendment “challenges to the legality of detention in
25 the immigration context,” which are “independent of, or wholly collateral to, the
26

27 ² Such determination may be made by an immigration judge. ECF No. 1 ¶ 83 (seeking
28 “prompt judicial determination” of probable cause “by an immigration judge or
otherwise”); *Gonzalez*, 975 F.3d at 825 (“acknowledg[ing] the permissibility” of
probable cause review by “immigration judge”).

removal process,” where “by reason of the nature of the right asserted,” they “cannot be raised efficaciously within the administrative proceedings delineated in the INA.” *Aguilar*, 510 F.3d at 11. As stated in *Hernández*, also approved by *González*, § 1252(b)(9) does not apply to Plaintiffs’ Fourth Amendment claim, “which challenges only the [Plaintiffs’] detention rather than [their] removal,” because the statute does not preclude “review over challenges to detention that are independent of challenges to removal orders.” *Hernández*, 424 F.3d at 42.

As confirmed in *González*, *Aguilar*, and *Hernández*, a claim of unlawful detention is independent of any challenge to a removal order that is later entered, because the fact of detention is “effectively unreviewable” in the administrative process, given that “[b]y the time a final order of removal [is] eventually entered, the allegedly excessive detention would have already taken place. And of course, it is possible that no such order would ever be entered in a particular case, depriving that detainee of any meaningful chance for judicial review.” *Jennings*, 138 S. Ct. at 840.

Neither an immigration judge nor the Board of Immigration Appeals can retrospectively “undetain” individuals previously held beyond 48 hours without prompt judicial review of probable cause. Nor can the Court of Appeals address such detention under its jurisdiction to review “final orders of removal.” *Alcala v. Holder*, 563 F.3d 1009, 1013 (9th Cir. 2009) (citing 8 U.S.C. § 1252(a)). The scope of review of such an order includes only “matters on which the validity of the final order is contingent.” *INS v. Chadha*, 462 U.S. 919, 938 (1983). The validity of a removal order is not contingent on the legality of detention without probable cause review, just as “a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause.”³ *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975); cf. *United States v. Crews*, 445 U.S. 463, 474 (1980) (“An illegal arrest, without more, has never

³ By contrast, the Ninth Circuit held “a right-to-counsel claim” can be “teed up for appellate review” within the immigration courts, and effective relief for such a claim can be granted by overturning a removal order. *J.E.F.M.*, 837 F.3d at 1038.

1 been viewed as a bar to subsequent prosecution, nor as a defense to a valid
2 conviction.”).

3 That position is consistent with *Jennings*, because the Fourth Amendment claim
4 does not challenge “the decision ... to seek removal” or “the decision to detain
5 [Plaintiffs] in the first place.” ECF No. 56 at 11:17–24 (quoting *Jennings*, 138 S. Ct. at
6 841). Instead, Plaintiffs’ Fourth Amendment claim challenges the later decision “to *keep*
7 persons in custody beyond 48 hours ... without prompt judicial review of probable
8 cause.” *Id.* at 11:19–20 (quoting ECF No. 1, Complaint ¶ 46) (emphasis added). Such a
9 claim is “effectively unreviewable” in the administrative process and therefore not
10 barred by § 1252(b)(9). *Jennings*, 138 S. Ct. at 840.

11 It is immaterial that *Gonzalez* was based on detention by local law enforcement
12 agencies “pursuant to an immigration detainer” issued by Department of Homeland
13 Security (“DHS”). 975 F.3d at 810 (9th Cir. 2020). An immigration detainer is a request
14 that a federal, state, or local law enforcement agency “temporarily detain an alien in that
15 agency’s custody ... in order to permit assumption of custody” by DHS. *Id.* at 798.
16 DHS issues a detainer when it claims “probable cause to believe that the subject is an
17 alien who is removable from the United States,” after which the subject may be
18 “detained pursuant to the detainer” by local law enforcement. *Id.* at 799, 820.

19 Here, Plaintiffs are detained by DHS, not other agencies, but that is a distinction
20 without a difference. As in *Gonzalez*, the continued detention of Plaintiffs is based on
21 the assertion there is probable cause that they are removable. 8 U.S.C. § 1357(a)(2)
22 (permitting arrest without warrant where government “has reason to believe that the
23 alien so arrested is in the United States” unlawfully and providing for examination by
24 immigration officer); 8 C.F.R. § 287.3(a)–(b) (examining officer “will refer the case to
25 an immigration judge” if there is “prima facie evidence” of removability”); *Tejeda-Mata*
26 *v. INS*, 626 F.2d 721, 725 (9th Cir. 1980) (“The phrase ‘has reason to believe’ has been
27 equated with the constitutional requirement of probable cause.”); *Yiu Fong Cheung v.*
28 *INS*, 418 F.2d 460, 463 (D.C. Cir. 1969) (equating “prima facie” to “probable cause”

1 and holding examining officer must “ascertain whether there is probable cause for
2 detention pending the issuance of charges”) (citing 8 C.F.R. § 287.3).

3 Furthermore, even if any potential class members were arrested on an
4 administrative warrant, 8 U.S.C. § 1226(a), this Court would retain jurisdiction. In
5 *Gonzalez*, the Ninth Circuit noted that ICE’s policy had changed such that “a signed
6 administrative arrest warrant” based on alleged probable cause “must now accompany
7 a detainer,” but that an immigration judge still does not independently determine
8 probable cause for detention. 975 F.3d at 799. The Ninth Circuit remanded for the
9 district court to decide whether such a policy complies with the Fourth Amendment.
10 *Id.* at 826 & n.27. The Ninth Circuit could not have remanded for decision on the
11 merits of that claim if § 1252(b)(9) barred jurisdiction. Therefore, § 1252(b)(9) does not
12 bar jurisdiction regardless of whether Plaintiffs were arrested with or without an
13 administrative warrant.

14 Similarly, § 1252(b)(9) does not bar jurisdiction even if potential class members
15 here are “subject to ongoing removal proceedings.” *Id.* at 810. As in *Gonzalez*, Plaintiffs
16 “are not challenging any removal proceedings.” *Id.* Instead, Plaintiffs’ Fourth
17 Amendment claim challenges only their ongoing *detention* beyond 48 hours without
18 prompt judicial review of probable cause, not the commencement or conduct of
19 removal proceedings, which may begin and continue regardless of whether persons are
20 detained. *See Gerstein*, 420 U.S. at 125 & n.26 (requiring prompt “determination of
21 probable cause as a condition for any significant pretrial restraint of liberty” and noting
22 “[b]ecause the probable cause determination is not a constitutional prerequisite to the
23 charging decision, it is required only for those suspects who suffer restraints on liberty
24 other than the condition that they appear for trial.”). Thus, if Plaintiffs prevailed on
25 their Fourth Amendment claim, this Court’s judgment would not overturn any removal
26 orders or prevent Defendants from commencing, prosecuting, or deciding removal
27 proceedings; it would only require the procedural safeguard of neutral probable cause
28

1 review when Defendants make the additional and independent decision to impose
2 detention during those removal proceedings.

3 Likewise, any finding by an immigration judge that probable cause does not exist
4 in a particular case would not preclude removal proceedings against that person,
5 because unlawful detention does not bar trial of removability on its merits or invalidate
6 the result of removal proceedings, just as an order releasing a criminal defendant from
7 pretrial detention does not preclude trial. *Id.* at 119. Accordingly, regardless of whether
8 any putative class members are in removal proceedings, § 1252(b)(9) does not bar
9 jurisdiction because, in raising a Fourth Amendment claim for a process by which an
10 immigration judge reviews probable cause as a condition for “detaining individuals for
11 extended periods” beyond 48 hours, ECF No. 1, Complaint ¶ 1, Plaintiffs do not ask
12 “for review of an order of removal, the decision to seek removal, or the process by
13 which removability will be determined.” *Gonzalez*, 975 F.3d at 810.

14 For the foregoing reasons, *Gonzalez* requires the Court to reconsider its
15 jurisdictional holding that §1252(b)(9) bars Plaintiffs’ Fourth Amendment claims.

16 **B. As Illuminated by *Regents*, 8 U.S.C. § 1252(g) Does Not Bar Plaintiff**
17 **Gonzalez’s Fourth Amendment Claims.**

18 Like the other Plaintiffs, Plaintiff Gonzalez claims that extended detention
19 beyond 48 hours without a prompt judicial determination of probable cause violates
20 the Fourth Amendment. His claim is not separately barred under 8 U.S.C. § 1252(g)
21 simply because he was designated an “arriving alien.” As *Regents* makes clear, § 1252(g)
22 only deprives courts of jurisdiction over a narrow set of claims involving challenges to
23 three discretionary decisions by DHS, none of which involve the extended detention at
24 issue in this case.

25 Under § 1252(g), except as otherwise provided, “no court shall have jurisdiction
26 to hear any cause or claim by or on behalf of any alien arising from the decision or
27 action by the Attorney General to commence proceedings, adjudicate cases, or execute
28 removal orders against any alien under this chapter.” 8 U.S.C. § 1252(g). This Court

1 initially held § 1252(g) bars the Fourth Amendment claim of Plaintiff Gonzalez, who
 2 was initially subject to so-called “mandatory” detention as a result of expedited removal
 3 proceedings commenced on the alleged ground that he was an “arriving alien.”⁴ ECF
 4 No. 49 at 14–15. However, the Supreme Court recently held that § 1252(g) must be
 5 read more narrowly.

6 In *Regents*, the Supreme Court held that § 1252(g) did not bar jurisdiction to
 7 decide whether the government unlawfully rescinded the Deferred Action for
 8 Childhood Arrivals program. The Court concluded § 1252(g) is “similarly narrow” in
 9 scope to § 1252(b)(9) and does not bar a claim that challenges an action which “is not a
 10 decision to ‘commence proceedings,’ much less to ‘adjudicate’ a case or ‘execute’ a
 11 removal order.” *Regents*, 140 S. Ct. at 1907.

12 Plaintiff Gonzalez’s Fourth Amendment claim does not challenge any “decision
 13 to ‘commence proceedings,’ much less to ‘adjudicate’ a case or ‘execute’ a removal
 14 order.” *Id.* His claim does not address the initial decision to detain him as an alleged
 15 arriving alien. Instead, it challenges only his *subsequent* detention for “extended periods”
 16 without a “prompt judicial determination ... of probable cause” *after* he was arrested.
 17 ECF No. 1, Complaint ¶¶ 1, 83. Therefore, his Fourth Amendment claim does not fall
 18 within the narrow class of cases exempt from this Court’s jurisdiction under § 1252(g).

19 In light of *Regents*, Plaintiff Gonzalez’s Fourth Amendment claim is not barred
 20 by § 1252(g) even if he was “initially subject to mandatory detention because he was
 21 initially placed in expedited removal proceedings.” ECF No. 49 at 15:11–12. Plaintiff
 22 Gonzalez does not challenge the initial decision to detain him, and thus his Fourth
 23 Amendment claim does not implicate the “decision to commence expedited removal
 24 proceedings” at the outset. *Id.* at 15:22; *see also* ECF No. 49 at 17:14–15 (noting
 25 “Plaintiffs disavowal ... of any challenge to the commencement of removal
 26

27 ⁴ “Mandatory” detention is a misnomer, because DHS always retains the discretion to
 28 release people designated as arriving, at minimum pursuant to its parole authority.
 8 C.F.R. § 212.5; Mem. Points and Authorities in Support of Pltf.-Petitioners’ Renewed
 Mtn for Class Certification, ECF 125-1 at 4:10-16.

1 proceedings against them”). Instead, his Fourth Amendment claim challenges
2 continued detention without a *subsequent* probable cause determination from a neutral
3 adjudicator. Nor does his detention claim implicate Defendants’ ability to adjudicate
4 removal proceedings or execute a removal order. *See Gerstein*, 420 U.S. at 119.
5 Therefore, under *Regents*, § 1252(g) does not bar Plaintiff Gonzalez’s Fourth
6 Amendment claim.

7 In light of *Regents*, it is now clear that *Sissoko v. Rocha*, 509 F.3d 947 (9th Cir.
8 2007) (“*Sissoko III*”), on which this Court primarily relied in dismissing Plaintiff
9 Gonzalez’s Fourth Amendment claim, does not apply to this case. In *Sissoko*, the
10 plaintiffs alleged a “Fourth Amendment-based damages claim for false arrest.” *Id.* at
11 948. Unlike Plaintiff Gonzalez’s claim, that claim asserted Mr. Sissoko’s detention was
12 substantively unlawful at its inception. *Sissoko v. Rocha*, 440 F.3d 1145, 1152 (9th Cir.
13 2006) (“*Sissoko II*”), *opinion withdrawn by Sissoko III*, 509 F.3d at 948 (incorporating
14 factual background of *Sissoko II*) (noting plaintiffs “alleg[ed] that Rocha wrongfully
15 took Sissoko into custody on August 26, 1997, in violation of his Fourth Amendment
16 rights”). In taking him into detention, Rocha commenced expedited removal
17 proceedings against Mr. Sissoko, who had stated “he had a fear of persecution if
18 returned to Senegal,” which triggered referral “for an interview by an asylum officer”
19 and consequent so-called “mandatory detention.” 509 F.3d at 949. The plaintiffs argued
20 Mr. Sissoko’s detention was substantively unjustified at its outset because he was not in
21 fact an “arriving alien” “subject to expedited removal” and mandatory detention.
22 *Sissoko II*, 440 F.3d at 1165, 1167. However, the Ninth Circuit held § 1252(g) barred
23 that Fourth Amendment claim because at its inception Mr. Sissoko’s “detention arose
24 from Rocha’s decision to commence expedited removal proceedings.” *Sissoko III*, 509
25 F.3d at 949. Here, by contrast, as illuminated by *Regents*, Plaintiff Gonzalez’s Fourth
26 Amendment claim does not challenge the substantive validity of his detention at its
27 inception, and thus it does not implicate any decision to commence expedited removal
28 proceedings against him.

Furthermore, Plaintiff Gonzalez does not ask this Court to decide if there was in fact probable cause for his extended detention. Instead, he seeks the establishment of a procedural safeguard against continued detention in the future, on behalf of the putative class. If that safeguard were in place, any finding by an immigration judge that probable cause did not exist in anyone's particular case would not be a finding by a federal "court" barred under §1252(g), nor would it invalidate any "decision or action" to "commence proceedings" against any person. As explained above, just as an order releasing a criminal defendant from pretrial detention based on lack of probable cause does not preclude trial, a finding by an immigration judge that extended detention was not supported by probable cause would not preclude the initiation or prosecution of removal proceedings, which Defendants may pursue against people designated as "arriving" without keeping them in custody. *See* n.4, *supra*.

Accordingly, § 1252(g) does not bar jurisdiction over Plaintiff Gonzalez's Fourth Amendment claim.

C. The Decision on This Motion Should Not Delay the Case.

In this motion, Plaintiffs ask the Court only to hold it has jurisdiction over their Fourth Amendment claim. The jurisdictional issue "precedes, and does not require, analysis of the merits" of that claim. *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011). A holding that the Court has jurisdiction over the Fourth Amendment claim would not affect Plaintiffs' independent Fifth Amendment due process claims, which seek a prompt first appearance before an immigration judge, regardless of whether or how probable cause is determined. ECF No. 56 at 13:19–24; *Armstrong v. Squadrito*, 152 F.3d 564, 569–70, 573 (7th Cir. 1998); *Coleman v. Frantz*, 754 F.2d 719, 721, 724 (7th Cir. 1985). The Fourth Amendment claim seeks prompt determination of probable cause by an immigration judge, but such review may be done without a detained person's appearance. ECF No. 56 at 11:8–13; *Gerstein v. Pugh*, 420 U.S. 103, 120 (1975); *Jones v. City of Santa Monica*, 382 F.3d 1052, 1055–56 (9th Cir. 2004).

Finally, a holding that the Court has jurisdiction over the Fourth Amendment claim should not delay the pending motion for class certification or the schedule for resolving the case. ECF No. 110 at 3. Class certification requires only a single common issue, which can be based on the Fifth Amendment claims already upheld by the Court regardless of how the Court decides this motion. ECF No. 63; *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013) (*citing Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)). To the extent distinct class certification questions might later arise that relate to the Fourth Amendment claim, those issues can be addressed at that time.⁵ The Fourth Amendment claim likely requires no new or additional discovery, especially where it is likely uncontested that Defendants provide no judicial review of probable cause to detain. *Roy v. County of Los Angeles*, No. CV-12-09012-BRO (FFMx), 2017 WL 2559616, at *6 (C.D. Cal. June 12, 2017), *rev'd on other grounds*, *Gonzalez v. United States Immigration & Customs Enft.*, 975 F.3d 788 (9th Cir. 2020) (“Defendants concede ... that ICE officers’ probable cause determinations are never judicially reviewed.”). Therefore, to grant this motion would not delay resolution of the case on its merits.

Dated: November 9, 2020

Respectfully submitted,

By: s/ Bardis Vakili

David Loy

Bardis Vakili

ACLU FOUNDATION OF SAN DIEGO &
IMPERIAL COUNTIES

P.O. Box 87131

San Diego, CA 92138-7131

Telephone: (619) 398-4485

Joanna Fuller

Aleksandr Gelberg

Megan A. Chacon

⁵ To the extent the Court wishes to hear oral argument on this motion, Plaintiffs would not object to consolidation of the hearing for class certification with a hearing on this motion once it is fully briefed.

1 Geuneul Yang
2 FISH & RICHARDSON P.C.
3 12390 El Camino Real, Suite 100
4 San Diego, CA 92130
5 Telephone: (858) 678-5070

6 Leonard B. Simon
7 LAW OFFICES OF LEONARD B. SIMON P.C.
8 655 West Broadway, Suite 1900
9 San Diego, CA 92101
10 Telephone: (619) 338-4549
11 ***Attorneys for Plaintiff-Petitioners***
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27
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1 Bardis Vakili (SBN 247783) (bvakili@aclusandiego.org)
2 David Loy (SBN 229235) (davidloy@aclusandiego.org)
3 ACLU FOUNDATION OF SAN DIEGO &
4 IMPERIAL COUNTIES
5 P.O. Box 87131
6 San Diego, CA 92138-7131
7 Telephone: (619) 398-4485

8 Joanna Fuller (SBN 266406) (jfuller@fr.com)
9 Aleksandr Gelberg (SBN 279989) (gelberg@fr.com)
10 Megan A. Chacon (SBN 304912) (chacon@fr.com)
11 Geuneul Yang (SBN 323287) (jyang@fr.com)
12 FISH & RICHARDSON P.C.
13 12390 El Camino Real
14 San Diego, CA 92130
15 Telephone: (858) 678-5070

16 Leonard B. Simon (SBN 58310) (lens@rgrdlaw.com)
17 LAW OFFICES OF LEONARD B. SIMON P.C.
18 655 West Broadway, Suite 1900
19 San Diego, CA 92101
20 Telephone: (619) 338-4549

21 Counsel for Plaintiff-Petitioners

22 **UNITED STATES DISTRICT COURT**
23 **SOUTHERN DISTRICT OF CALIFORNIA**

24 JOSE ORLANDO CANCINO
25 CASTELLAR, et al.,

26 Plaintiff-Petitioners,

27 v.

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

Defendant-Respondents.

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

**DECLARATION OF BARDIS
VAKILI IN SUPPORT OF
MOTION TO RECONSIDER
ORDERS DISMISSING FOURTH
AMENDMENT CLAIMS**

1 I, Bardis Vakili, hereby declare as follows, as required by CivLR 7.1(i) and the
2 Court's Standing Order for Civil Cases ("Standing Order"):

3 1. I am an attorney licensed to practice in California and before this Court,
4 Senior Staff Attorney for the ACLU Foundation of San Diego & Imperial Counties,
5 and counsel of record for Plaintiff-Petitioners ("Plaintiffs") in the above-captioned
6 case. I have personal knowledge of the facts set forth below, and if called to testify, I
7 could and would testify competently thereto.

8 2. Plaintiff filed the complaint and petition for writ of habeas corpus in this
9 action on March 9, 2017. ECF No. 1. Plaintiffs raised two Constitutional claims – one
10 under the Fourth Amendment and one under the Fifth Amendment – and a claim
11 under the Administrative Procedure Act.

12 3. On February 8, 2018, the Court entered an order granting Defendant-
13 Respondents' motion to dismiss the complaint for lack of jurisdiction under 8 U.S.C. §
14 1252(b)(9). ECF No. 49 at 20-42. The Court also dismissed Plaintiff Michael
15 Gonzalez's Fourth Amendment claim for lack of jurisdiction under 8 U.S.C. § 1252(g).
16 *Id.* at 14-15.

17 4. On February 27, 2018, the Court issued an order granting in part
18 Plaintiffs' motion to reconsider its order dismissing the complaint for lack of
19 jurisdiction, based on the Supreme Court's decision regarding section 1252(b)(9) in
20 *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018). ECF No. 56 at 13-15. The Court reinstated
21 Plaintiffs' Fifth Amendment and APA claims, but affirmed that it lacked jurisdiction
22 over Plaintiffs' Fourth Amendment claim. *Id.* at 15.

23 5. On September 11, 2020, the Ninth Circuit issued its decision in *Gonzalez*
24 *v. United States Immigration & Customs Enft.*, 975 F.3d 788 (9th Cir. 2020), which
25 addressed federal court jurisdiction under § 1252(b)(9) over Fourth Amendment claims
26 for prompt judicial review of probable cause when immigration authorities seek to take
27 people into custody.

28 6. On June 18, 2020, the Supreme Court issued its decision in *Dep't of*

1 *Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020), which addressed
2 federal court jurisdiction under § 1252(g) over challenges to agency policies and
3 practices.

4 7. For the reasons stated in the concurrently-filed Memorandum of Points
5 and Authorities, Plaintiffs respectfully submit that the decisions in *Gonzalez* and *Regents*
6 represent changes in controlling law that warrant reconsideration of the Court's orders
7 regarding Plaintiffs' Fourth Amendment claims.

8 8. On November 2, 2020, counsel for the parties convened a conference
9 about the contemplated motion to reconsider based on *Gonzalez* and *Regents*, but we
10 were unable to resolve the substantive issues.

11 9. The parties also discussed procedural matters for this motion in our
12 November 2, 2020 conference and in subsequent communication.

13 a. Counsel for Defendants provided details regarding their severely
14 impacted litigation schedules in December 2020 and informed me that a hearing
15 noticed for December 2020 or early January 2021 would be difficult for them,
16 both in terms of appearing (in the event the Court wishes to hear oral argument)
17 and the attendant briefing schedule. They requested that the hearing be noticed
18 for mid-January 2021.

19 b. I am eager to bring this issue to the Court's attention and see it
20 resolved as expeditiously as possible. However, to avoid unnecessary motion
21 practice over the briefing and hearing schedule and in the interest of professional
22 courtesy and judicial economy, Plaintiffs agreed to notice the hearing for January
23 19, 2021, the earliest date on which the parties could agree.

24 c. For a motion with a noticed hearing on January 19, 2021 to comply
25 with the 30-to-60-day period required by paragraph 4.B. of the Court's Standing
26 Order, it would have to be filed no earlier than November 20, 2020. However,
27 the motion and supporting brief is complete, and further conference with
28 Defendants is unlikely to resolve the substantive issue on its merits. Because I

1 believe it important to bring *Gonzalez* and *Regents* to the Court's attention as
2 promptly as possible, Plaintiffs are filing this motion sooner than November 20,
3 and respectfully request this limited exception to paragraph 4.b. of the Standing
4 Order. My hope is that the Court understands this reasoning, as Plaintiffs do not
5 lightly stray from the instructions laid out in the Standing Order.

6 I declare under penalty of perjury of the laws of the United States that the
7 foregoing statements are true and correct.

8 Dated: November 9, 2020

ACLU FOUNDATION OF SAN DIEGO
& IMPERIAL COUNTIES

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10 By: s/Bardis Vakili
Attorney for Plaintiff-Petitioners
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