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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOSE ORLANDO CANCINO CASTELLAR, et al.,

Plaintiff-Petitioners,

v.

KIRSTJEN NIELSEN, et al.,

Defendant-Respondents.

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

PLAINTIFF-PETITIONERS' OPPOSITION TO DEFENDANTS-RESPONDENTS' RENEWED MOTION TO DISMISS

Date:	**December 10, 2018**
Time:	**TBD**
Courtroom:	**4B (Schwartz)**
Judge:	**Hon. Cynthia Bashant**

NO ORAL ARGUMENT UNLESS REQUESTED BY JUDGE

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I. INTRODUCTION

To resolve Defendants' motion to dismiss, this Court must decide the straightforward question whether imprisonment for immigration purposes is the lone exception to the bedrock due process principle that detention of a human being requires prompt presentment to a neutral adjudicator. The answer must be no.

Plaintiffs state a claim for violation of substantive due process. The government must present any imprisoned person promptly to a neutral magistrate. The right of prompt presentment has deep roots in the common law as a bulwark against unlawful arrest. Prolonged detention without presentment violates this fundamental right for both civil and criminal detainees. On the facts pleaded, individuals are imprisoned for up to three months without explanation by a neutral adjudicator of the charges, the reason for their incarceration, or any procedure to seek release. Merely labeling immigration detention as "civil" does not exempt it from due process. Detention is detention, and ordered liberty does not permit detention without prompt presentment.

Plaintiffs also state a claim for violation of procedural due process. The right to physical freedom is paramount and demands prompt presentment to a judge after imprisonment given the systemic risk of error inherent in any detention regime. Viewing the facts in Plaintiffs' favor, an early hearing would reduce the risk of erroneous detention by promptly identifying wrongly detained persons and accelerating their release. Defendants ignore the importance of a neutral adjudicator and improperly place the burden on detainees, many of whom are unrepresented and do not speak English, to seek a prompt hearing. Although the government may find prompt hearings bothersome, it may not sacrifice due process for bureaucratic convenience. It may relieve itself of any burden by exercising its admitted discretion to detain fewer people.

This case challenges policies and practices adopted by the defendant agencies. To find Plaintiffs state a claim, the Court need not find any statute unconstitutional. Instead, it need only interpret the law consistently with its duty to avoid constitutional

problems. The relevant statutes do not foreclose prompt presentment and are easily construed to require it as part of otherwise authorized detention.

The designation of some class members as "arriving aliens" does not exempt them from the due process right to prompt presentment. The so-called "entry fiction" is a narrow doctrine that applies only to the merits of admission or exclusion. It does not extinguish the due process right against prolonged imprisonment without prompt presentment. Even assuming otherwise, the relevant statute governs detention both of persons subject to the "entry fiction" and persons who are not. Properly construed, the statute requires prompt presentment for all persons it covers because it cannot be construed differently for different people.

For these reasons, Plaintiffs state claims for equitable relief or a writ of habeas corpus. They also state a claim under the Administrative Procedure Act ("APA") that Defendants' policy is unlawful final agency action without other adequate remedy under the APA. Accordingly, the Court should deny the motion to dismiss.

II. FACTS

The facts pleaded are extensively discussed in prior briefing, ECF No. 35 at 3:24-8:18, and briefly restated here. The Department of Homeland Security ("DHS") has a policy and practice of imprisoning people for up to three months without presenting them to a neutral adjudicator such as an immigration judge ("IJ"). ECF No. 1 ¶¶ 1, 5, 47-60, 62-64. Many detainees are unrepresented and speak no English. *Id.* ¶ 31. DHS does not set custody hearings before an IJ or inform prisoners of their rights in their native language. *Id.* ¶¶ 6, 29, 63. DHS delays filing of the notice to appear ("NTA") with the immigration court for days or weeks. *Id.* ¶¶ 47-48. The immigration court, not DHS, sets initial hearing dates, but it does not schedule first appearances more promptly than other hearings for detainees. *Id.* ¶¶ 6, 28, 64-65.

A DHS agent may arrest a person with or without an administrative warrant. 8 U.S.C. §§ 1226(a), 1357(a)(2); 8 C.F.R. §§ 287.3(d), 1236.1(b). DHS agents take arrestees to another DHS agent who examines them "as to their right to enter or

remain in the United States." 8 U.S.C. § 1357(a)(2). A DHS agent, not a judge, decides "within 48 hours of the arrest" whether to keep persons in custody for removal proceedings. 8 C.F.R. § 287.3(d).

With exceptions not relevant here, removal proceedings are conducted by an IJ. ECF No. 1 ¶ 21. The Immigration and Nationality Act ("INA") and relevant regulations require that detained cases be "expedited" and "completed as promptly as possible." *Id.* ¶ 26. Although the INA states only that a removal "hearing" will be held, Defendants provide non-statutory "Master Calendar Hearings" ("MCHs"), as a "pre-trial docket" to narrow the issues. *Id.* ¶¶ 27, 32. Defendants refuse to present detainees to a neutral adjudicator until the first MCH, which can occur months after arrest. *Id.* ¶¶ 1, 6, 28, 47-49, 63,67. Without an earlier appearance, the first MCH is the first time the IJ, with an interpreter if necessary, advises prisoners of their rights, explains the charges, and verifies service of the NTA, which may contain errors. *Id.* ¶¶ 29-30. Thus, under current practice, the initial MCH is a detainee's first meaningful opportunity to challenge detention or request a hearing to do so. *Id.* ¶¶ 31.

Many detainees are eligible to seek a custody review or "bond" hearing, which must be scheduled promptly on request, and those deemed ineligible for a bond hearing may seek a hearing to challenge DHS's assertion of ineligibility. ECF No. 1 ¶ 31. However, Defendants' failure to present detainees promptly impedes the ability to request custody hearings, packing detention centers with more people than the immigration court can expeditiously handle, feeding the cycle of delayed first appearances. *Id.* ¶¶ 3, 31, 33, 63.

Defendants are prolonging the imprisonment of many individuals who qualify for release, as shown in this case. Plaintiffs Jose Orlando Cancino Castellar, Ana Maria Hernandez Aguas, and Michael Gonzalez were imprisoned for 34 days, 32 days, and 117 days, respectively, before first appearance with a judge. ECF No. 28-2, Ex. C, F, L, N, O. Mr. Cancino and Ms. Hernandez were each released soon after first appearance because IJs disagreed with DHS that their detention was necessary. *Id.* Ex. E, L, M.

The named plaintiffs represent a class of "[a]ll individuals in the Southern District of California, other than those with final removal orders, who are or will be detained by DHS more than 48 hours without a hearing before an immigration judge." ECF No. 1 ¶ 68. The original class definition also referred to "judicial review of … probable cause" to detain, *id.*, but the Court found it lacked jurisdiction over the "probable cause claim." ECF No. 56 at 13:17. However, the Court confirmed it has jurisdiction to decide the lawfulness of "Defendants' alleged unreasonable *delays* in presenting detained aliens to an IJ." *Id.* at 14:11-12.

III. STANDARD OF REVIEW

The Court takes the facts pleaded as true, along with matters subject to judicial notice, drawing all reasonable inferences in the light most favorable to Plaintiffs. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010).

IV. ARGUMENT

A. The Imprisonment of the Plaintiff Class for One to Three Months Without a Hearing Violates Substantive and Procedural Due Process.

As the Supreme Court has confirmed, "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979). For immigrants, like any other detainees, "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty" protected by the Due Process Clause. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). While certain immigrants may be detained pending removal proceedings, "detention for long and unreasonable periods before hearing is illegal." *Carlson v. Landon*, 186 F.2d 183, 186 (9th Cir. 1950).

The Ninth Circuit recently expressed "grave doubts" that "arbitrary prolonged detention without any process is constitutional or that those who founded our democracy precisely to protect against the government's arbitrary deprivation of liberty would have thought so." *Rodriguez v. Marin*, No. 13-56706, 2018 WL 6164602, at *3 (9th Cir. Nov. 19, 2018). The Ninth Circuit's concerns illustrate why the government's

failure to present imprisoned immigrants to a judge for one to three months violates both substantive and procedural due process.

1. Substantive Due Process

Due process includes "a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided." *Reno v. Flores*, 507 U.S. 292, 302 (1993). Substantive due process prohibits extended incarceration without prompt appearance before a judge. *Hayes v. Faulkner County*, 388 F.3d 669, 673 (8th Cir. 2004).

The obligation of "an arresting officer to bring his prisoner before a magistrate as soon as he reasonably could" has deep roots in the common law as a check against unlawful detention. *Corley v. United States*, 556 U.S. 303, 306 (2009). Prompt presentment "serves to enforce or give meaning to important individual rights." *Coleman v. Frantz*, 754 F.2d 719, 724 (7th Cir. 1985). Extended incarceration without prompt hearing "substantially impinges upon and threatens" those rights. *Id.* "The first appearance has such great value in protecting numerous rights that its denial presumptively disrupts those rights. Therefore, as a matter of constitutional prophylaxis, the denial of a first appearance offends the Due Process Clause." *Armstrong v. Squadrito*, 152 F.3d 564, 573 (7th Cir. 1998).

That principle holds true for both civil and criminal detention. In a case Defendants ignore, the Seventh Circuit held prolonged incarceration without prompt first appearance violates substantive due process although the arrest is under "civil, rather than criminal, law." *Armstrong*, 152 F.3d at 581-82. In *Armstrong*, the plaintiff was arrested on a civil warrant for failure to appear at a child support hearing in alleged contempt of court. *Id.* at 573-74. Such a "warrant shares certain attributes with its criminal cousin," including direction to take a person into custody and provision for bail. *Id.* at 574. The "requirements for contempt are extensive and intimately concern such traditional due process concepts as notice and opportunity to be heard," giving plaintiff "the right to defend himself against the contempt charge." *Id.* at 575.

The court was "struck by the extent to which these rights parallel the protections accorded a criminal defendant." *Id.* "Most compellingly," the court noted, the "contempt statutes provide for fines and imprisonment. Thus, even if [plaintiff] cannot avail himself of the protections of the Fifth, Sixth, and Eighth Amendments to defend against a charge of civil contempt, he faces the same sort of ultimate sanction as if he defended himself from a criminal charge—the loss of liberty. This is atypical of a civil proceeding." *Id.*

The same is true for immigration proceedings, which are also hardly typical of most civil cases and resemble criminal proceedings in several important ways. In immigration cases, agents arrest persons, and the government often detains them, with bail often available. Thus, like a criminal proceeding, a removal proceeding can result in detention pending adjudication, a circumstance entirely different from most civil matters. Although persons facing removal are not entitled to appointment of counsel, they have the right to retain counsel, as did the plaintiff in *Armstrong*. 152 F.3d at 568; 8 U.S.C. §§ 1229a(b)(4)(A), 1392. They are entitled to notice of the charges, the right to a hearing, and the right to present a defense, cross-examine witnesses, and compel production of documents and witnesses. 8 U.S.C. § 1229a(b)(4)(B); 8 C.F.R. § 1240.10(a).[1] While removal is "not, in a strict sense, a criminal sanction," it is "a particularly severe 'penalty.'" *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010).

Plaintiffs seek only a prompt first appearance, not "the full trappings" of criminal cases, such as appointed counsel or trial by jury. Renewed Motion to Dismiss, ECF No. 60-1 ("RMTD") at 19:26. The government cannot skirt its due process obligations by merely labeling its incarceration of Plaintiffs as "civil." As the Ninth Circuit has held, "civil detainees retain greater liberty protections than individuals

[1] Individuals in "expedited removal" who do not intend to seek asylum receive notice and opportunity to respond but not full hearing with a judge. ECF No. 1 ¶ 23; 8 C.F.R. §235.3(b)(2), The proposed class does not include individuals with expedited removal orders, ECF No. 1 ¶ 68, and thus the rights of such persons, who presumably do not experience lengthy detention, are not at issue, ECF No. 33 at 9:14-18.

detained under criminal process," and therefore they enjoy constitutional protections "at least as great as those afforded to" criminal detainees. *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004) (involving due process protections for sexually violent offenders in civil custody). If criminal detainees have a right to prompt presentment, then so do civil detainees. In either context, "due process simply does not permit the [government] to detain an arrestee" for an extended time "without procedural protections," and the denial of a prompt appearance following a civil arrest violates "substantive due process rights." *Armstrong*, 152 F.3d at 575-76. Whether civil or criminal, "protracted incarceration" without prompt presentment is "wholly inconsistent" with "the concept of ordered liberty." *Coleman*, 754 F.2d at 723 (citation and quotation marks omitted).

Thus, the delays of one to three months alleged in the complaint state a claim for violation of substantive due process. *Hayes,* 388 F.3d at 673 (38 days); *Armstrong*, 152 F.3d at 567 (57 days); *Coleman*, 754 F.2d at 723-24 (18 days). This Court need not find "deliberate indifference," *Armstrong*, 152 F.3d at 577, which is not required in this Circuit.[2] *Blanas*, 393 F.3d at 933 (rejecting "Eighth Amendment's 'deliberate indifference' standard" for civil detainees). Instead, the Court need only balance Plaintiffs' "liberty interests in freedom from incarceration" against "the legitimate interests of the state." *Or. Advoc. Ctr. v. Mink*, 322 F.3d 1101, 1121 (9th Cir. 2003); *cf. Zadvydas*, 533 U.S. at 690 (civil detention authority requires "special justification" that "outweighs" the right to physical freedom). On the facts pleaded, that balance favors Plaintiffs, because the complaint reveals no legitimate interest in delaying first appearance for one to three months.

Defendants are wrong that "the purpose of immigration detention is … to put an end to a continuing violation of the immigration laws." RMTD at 21:10-11 (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984)). In *Lopez-Mendoza*, the Court

[2] Even if deliberate indifference were required, DHS detains people without regard for ensuring a prompt first appearance, leaving that responsibility to a busy court system. ECF No. 1 ¶¶ 6, 62, 64. Those facts show deliberate indifference. *Hayes*, 388 F.3d at 674; *Armstrong,* 152 F.3d at 577-78.

discussed "[t]he purpose of *deportation*" rather than detention. 468 U.S. at 1039 (emphasis added). The only purpose of immigration detention is to mitigate risk of flight or danger to the community while removal is adjudicated. *Demore v. Kim*, 538 U.S. 510, 528 (2003); *Zadvydas*, 533 U.S. at 679; *Lopez v. Sessions*, No. 18 CIV. 4189 (RWS), 2018 WL 2932726, at *10 (S.D.N.Y. June 12, 2018). Removal proceedings do not invariably require detention, and many persons in such proceedings are not detained. The issue is whether individuals are entitled to a prompt hearing after they are detained, not whether they are removable. Defendants cannot collapse removal into detention.

To delay first appearance for up to three months does not serve the government's legitimate interests. Given that denial of a prompt hearing impedes the opportunity to seek neutral custody review, the delays hinder those interests because imprisoning people who do not belong in detention wastes limited resources. *See Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017) (noting "reduced detention costs can free up resources to more effectively process claims in Immigration Court.").

Defendants find no support in *Flores*, which did not address prompt presentment of imprisoned adults. *Flores* involved the government's duty to care for unaccompanied children pending deportation proceedings. 507 U.S. at 295, 304. Because the children had "no available parent, close relative, or legal guardian," they were cared for in group homes providing "shelter care, foster care, group care, and related services." *Id.* at 298, 303. Though the children were nominally "in INS detention," the Court observed that "juveniles, unlike adults, are always in some form of custody" and noted "'[l]egal custody' rather than 'detention' more accurately describes the reality of the arrangement." *Id.* at 298, 302. On those facts, the Court found no substantive due process right of such children to be removed from "a decent and humane custodial institution," given the legitimate interest in "preserving and promoting the welfare of the child." *Id.* at 303. That holding cannot apply to extended incarceration of adults without a prompt first appearance, which is not justified by any legitimate interest.

The decision in *Aguilar v. U.S. Immigration & Customs Enf't Chicago Field Office*, No. 17-CV-2296, 2018 WL 4679569 (N.D. Ill. Sept. 28, 2018) must be disregarded because it incorrectly collapsed "substantive due process claims" for prompt presentment into "Fourth Amendment analysis." *Id.* at *12-13. The Fourth Amendment and substantive due process are analytically distinct and protect different rights. The Fourth Amendment prohibits arrest without probable cause and requires either a warrant or prompt determination of probable cause after arrest, but it does not require a hearing for such determination. *Baker v. McCollan*, 443 U.S. 137, 143 (1979); *Gerstein v. Pugh*, 420 U.S. 103, 120 (1975); *Jones v. City of Santa Monica*, 382 F.3d 1052, 1055-56 (9th Cir. 2004). Substantive due process protects the right to a prompt hearing after arrest regardless of whether the arrest complies with the Fourth Amendment.

The *Aguilar* court ignored the precedent of its own circuit in merging the two issues. In *Armstrong*, the court held prolonged detention without judicial appearance violated substantive due process even though the "arrest took place pursuant to a bench warrant" that represented "a judicial determination of sufficient cause." 152 F.3d at 569-70. In *Coleman*, the court held due process requires a prompt first appearance for detainees "whether or not there has been a valid determination of probable cause" by warrant or otherwise. 754 F.2d at 721. Therefore, prolonged detention without a prompt hearing violates substantive due process regardless of whether the Fourth Amendment is satisfied.[3]

The substantive due process right to prompt presentment is hardly a "novelty." RMTD at 20:19. It descends from the common law and expressly applies to civil detention. *Corley*, 556 U.S. at 306; *Armstrong*, 152 F.3d at 574. The novelty is in Defendants' arguments, which cite no case authorizing the government to lock people

[3] Defendants find no help in *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017). The Court held the plaintiff's Fourth Amendment claim for arrest without probable cause continued after his first appearance. *Id.* at 917. The plaintiff made no due process claim for delayed presentment, as he appeared before a judge on the same day as his arrest. *Id.* at 915. Therefore, delayed presentment was not at issue.

away for months without seeing a judge. For fundamental principles such as the right to prompt presentment, any assertion about the small number of cases on point "does more to show that the proposition is too clear to be questioned than to show that it is debatable." *Ueland v. United States*, 291 F.3d 993, 997 (7th Cir. 2002).

2. Procedural Due Process

Prolonged incarceration without prompt presentment also violates procedural due process. The Due Process Clause guarantees essential "procedural safeguards" against deprivation of liberty. *McNabb v. United States*, 318 U.S. 332, 347 (1943). It may not require a hearing prior to arrest, *Baker*, 443 U.S. at 143, but it mandates a "prompt post-deprivation hearing" afterward. *Comm'r v. Shapiro*, 424 U.S. 614, 629 (1976).

Procedural due process balances (a) the private interest at stake, (b) the risk of error and value of additional safeguards, and (c) the burden on the government. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Oviatt v. Pearce*, 954 F.2d 1470, 1475-76 (9th Cir. 1992). On the facts pleaded, incarceration for one to three months without a hearing fails that test because (a) the interest in liberty is paramount; (b) the risk of erroneous detention is significant without a prompt hearing, which would significantly reduce that risk; and (c) providing a prompt hearing would not burden any legitimate governmental interest.

a. The Individual Interest in Liberty Is Paramount and Demands Prompt Presentment after any Arrest, Civil or Criminal.

"Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). The "most elemental of liberty interests" is "the interest in being free from physical detention by one's own government." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004).

The government simply ignores the paramount interest in liberty, which inherently demands a prompt hearing after arrest. "It is a basic assumption with which we guide our lives: the state may not incarcerate any individual randomly and without specific protective procedures." *Oviatt*, 954 F.2d at 1476. The due process right "to be

heard at a meaningful time and in a meaningful manner" requires a prompt hearing after arrest. *Mathews*, 424 U.S. at 333.

Even for deprivations short of imprisonment, "[p]romptness is the touchstone" of due process "analysis into the timeliness of post-deprivation review." *Jordan v. Jackson*, 15 F.3d 333, 349 (4th Cir. 1994). In the context of removal from parental custody, a deprivation of liberty that is "commanding and deserving of the greatest solicitude," though "less comprehensive in scope than that resulting from an arrest," a delay of 65 hours "is near, if not at, the outer limit of permissible delay between a child's removal from his home and judicial review." *Id.* at 346, 350-51; *see also Campbell v. Burt*, 141 F.3d 927, 929 (9th Cir. 1998) (due process "guarantees prompt post-deprivation judicial review in child custody cases"). It therefore violates due process to imprison persons for one to three months without any hearing.

Prompt hearings are required even in civil matters involving mere deprivation of property. *See, e.g., North Georgia Finishing, Inc. v. DiChem, Inc.*, 419 U.S. 601, 607 (1975) (garnishment statute violated due process without any "provision for an early hearing"); *Barry v. Barchi*, 443 U.S. 55, 66 (1979) (suspension of horse racing license required a "prompt postsuspension hearing"); *Krimstock v. Kelly*, 306 F.3d 40, 61 (2d Cir. 2002) (Sotomayor, J.) (prompt hearing required after impoundment of motor vehicle). The same is true for school suspension. *Goss v. Lopez*, 419 U.S. 565, 582-83 (1975) (post-suspension hearing "should follow as soon as practicable"). Therefore, due process necessarily demands a prompt hearing following arrest and incarceration.

It is premature to complain that Plaintiffs have not yet specified "any particular timeframe" for promptness. RMTD at 1 n.1. A delay in first appearance of "[o]ver a [m]onth," *id.* at 14 n.16, is sufficient but not necessary to prove a violation. *Coleman*, 754 F.2d at 723-24 (delay of 18 days unconstitutional). What constitutes unreasonable delay will be informed by discovery into Defendants' policies, practices, and operations. Discovery may reveal that some delay beyond 48 hours after arrest—when class membership begins—may be reasonable. But one to three months cannot pass muster.

As with substantive due process, Defendants find no comfort in *Flores*, in which the Court rejected a "facial challenge" to rules that did not require automatic custody hearings, noting that most juveniles "will have been in telephone contact with a responsible adult outside the INS—sometimes a legal services attorney." 507 U.S. at 309. Although the regulations did not specify how quickly a custody hearing must be set once requested, the Court declined to assume "an excessive delay will invariably ensue—particularly since there is no evidence of such delay." *Id.* at 309. On that facial challenge, the Court held procedural "due process is satisfied by giving the detained alien juveniles the right to a hearing before an immigration judge" on request. *Id.*

By contrast, Plaintiffs raise an as-applied challenge to specific policies and practices, on facts showing that imprisoned and unrepresented adults do experience excessive delays prior to their first appearances. ECF No. 1 ¶¶ 5, 28-34, 50-60. While the *Flores* Court held that automatic custody hearings were unnecessary without evidence the children lacked a meaningful opportunity to request such hearings, 507 U.S. at 309, Plaintiffs here do not seek automatic custody hearings and specifically allege the presentment delays undermine their ability to request them. ECF No. 1 ¶¶ 3, 6, 7, 31, 63. In addition, a delayed first appearance involves much more than delayed review of "initial deportability and custody determinations." *Flores*, 507 U.S. at 308. It deprives detainees of notice of essential rights and impedes access to counsel, ECF No. 1 ¶¶ 3, 27-34, unlike in *Flores*, where the juveniles had access to counsel or other support. 507 U.S. at 309. As a result, *Flores* does not preclude Plaintiffs' procedural due process claim.

b. On the Facts Pleaded, the Risk of Error Is Significant and Would Be Meaningfully Reduced by a Prompt First Appearance.

The second *Mathews* factor "has two components: the risk that the procedures used will erroneously deprive plaintiff of his liberty interest, and the value of additional or alternate procedural safeguards." *Oviatt*, 954 F. 2d at 1476. Here, there is a significant risk of erroneous deprivation of physical liberty because detainees with legitimate

claims to release are not given a hearing to assert them for one to three months. The risk of error is magnified by language barriers, lack of sophistication regarding complex immigration laws, and ignorance of procedures for seeking a bond hearing. ECF No. 1 ¶¶ 29-31; *cf. Oviatt*, 954 F.2d at 1476 (where "inmates were mentally impaired" or "did not speak English and were unlikely to know of their legal rights" or "were not in contact with their families or lawyers… [t]he risk of an erroneous deprivation of plaintiff's liberty interest… was enormous").

Conversely, the value of a prompt first appearance is unquestionable. Prompt presentment is not "some administrative nicety" but rather "one of the most important" protections "against unlawful arrest" and "Government overreaching." *Corley*, 556 U.S. at 320. After an immigration arrest, the initial hearing is the first time a judge can review the NTA, notify detainees of their rights, provide an opportunity to challenge detention or seek release, and observe detainees' mental health and capacity to represent themselves. ECF No. 1 ¶¶ 3, 27-34.

On this motion, Plaintiffs are entitled to the reasonable inference that there are numerous ways in which prompt presentment "would meaningfully reduce the risk of erroneous detention" and prevent or mitigate other violations.[4] RMTD at 13:24. An early first hearing could promptly identify and accelerate release for individuals who are (a) U.S. citizens not subject to immigration proceedings; (b) lawful residents mistakenly charged with removability; (c) not subject to mandatory detention; or (d) not subject to detention because they present no danger or risk of flight. Such errors recur in immigration proceedings.[5] The risk of error is also aggravated because erroneous

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[4] For instance, the class members in *Ms. L v. ICE*, 3:18-CV-00428-DMS-MDD—many of whom are also class members here—had their children ripped from their arms and sent to undisclosed locations. *See id.,* Order Granting Preliminary Injunction, ECF No. 83. They could not inform a judge of this unlawful action for one to three months. Had a first hearing been held promptly, an IJ could have told them why such a horror was inflicted on them and advised of procedures to challenge it instead of letting them languish in a foreign jail with no explanation why their children had disappeared.

[5] *See, e.g.*, Paige St. John & Joel Rubin, *ICE held an American man in custody for 1,273 days. He's not the only one who had to prove his citizenship*, L.A. Times (Sep. 17, 2018, 6:20 p.m.),

incarceration "cannot be recompensed by the claimant's prevailing in later proceedings." *Krimstock*, 306 F.3d at 53.

Because the interest in liberty is paramount, any risk of erroneous detention demands prompt presentment after imprisonment. In a due process case, the Court must "consider the interest of the *erroneously* detained individual," even if the plaintiff was not wrongly detained. *Hamdi*, 542 U.S. at 530 (emphasis in original). It is therefore beside the point whether any named plaintiff was in fact "erroneously detained," RMTD at 13:25, although as noted, Mr. Cancino and Ms. Hernandez were released soon after first appearance. The "right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). Therefore, "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases," not any single case. *Mathews*, 424 U.S. at 344.

The *Aguilar* court thus erred in dismissing a procedural due process claim because the plaintiffs did not allege that "a hearing before a neutral and detached judicial officer could or would have resulted in a different outcome." 2018 WL 4679569 at *13. This case is a class action which does not require proof at the pleading stage that any plaintiff or class member would be released after a prompt hearing. A due process plaintiff seeking a hearing need not show he or she would win at the desired hearing; the purpose of the suit is to protect the due process right to the hearing. Individuals detained on criminal charges are entitled to prompt first hearings regardless of the evidence against them. The same is true for immigration detainees, who suffer no less loss of liberty and enjoy similar or greater due process rights with respect to detention pending proceedings. *Blanas*, 393 F.3d at 932.

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www.latimes.com/local/lanow/la-me-citizens-ice-20180427-htmlstory.html; Leslie Berestein Rojas, *A 'complicated, convoluted' case of mistaken identity and deportation*, KPCC (Feb. 8, 2012), https://www.scpr.org/blogs/multiamerican/2012/02/08/7484/a-complicated-convoluted-case-of-mistaken-identity/; ECF No. 28-2, Ex. E, L (Plaintiffs Cancino and Hernandez released by IJ's who found detention unjustified)

The so-called "procedural safeguards" asserted by Defendants are insufficient because they do not involve a neutral adjudicator. RMTD at 14:11. The "examining officer" who keeps individuals in custody is an officer of the arresting agency, not a judge. *Id.* at 14:13. A neutral decision-maker is a core element of due process in "both civil and criminal cases," which the Supreme Court has "jealously guarded" to prevent "unjustified or mistaken deprivations" of liberty. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). The due process right to "fundamental fairness," RMTD at 14:12, does not allow the same agencies that arrest and imprison individuals to serve as neutral adjudicators evaluating that imprisonment. Instead, "due process requires a neutral and detached judge in the first instance." *Concrete Pipe & Prod. of California, Inc. v. Constr. Laborers Pension Tr. for S. California*, 508 U.S. 602, 617 (1993) (citation and quotation marks omitted). In addition, a neutral judge advises of rights "in the alleged noncitizen's own language" with an interpreter if needed, ECF No. 1 ¶ 29, which Defendants do not contend they provide, RMTD at 14-15.

The decision to arrest cannot itself justify prolonged imprisonment. If "warrantless arrest by itself does not constitute an adequate, neutral 'procedure'" justifying "detention of a vehicle" pending forfeiture proceedings, the same is true for imprisonment of a person pending removal proceedings. *Krimstock*, 306 F.3d at 53; *see also Armentero v. INS*, 412 F.3d 1088, 1088 (9th Cir. 2005) (Ferguson, J., concurring) ("Administrative agents cannot be vested with the authority to render decisions concerning the length of detention. Such decision-making power rests in the hands of a judicial officer."). In either case, a hearing is required "at an early point after seizure." *Krimstock*, 306 F.3d at 53.

Although detainees can in theory request a custody hearing before initial presentment, they often lack knowledge of that right. ECF No. 1 ¶ 31. In any event, due process does not allow the government to shift the burden of requesting a prompt hearing to persons deprived of liberty. *Oviatt*, 954 F.2d at 1476 (right to prompt hearing does not depend on "protestation by the prisoner, his family, or his lawyer"); *Doe v.*

Gallinot, 657 F.2d 1017 (9th Cir. 1981) (prompt review of civil commitment does not depend "on the initiative and competence of the persons committed").

To condition the right to a prompt hearing "on the request of the individual reverses the usual due process analysis in cases where potential deprivation is severe and the risk of error is great." *Doe v. Gallinot*, 486 F. Supp. 983, 993 (C.D. Cal. 1979), *aff'd*, 657 F.2d 1017 (9th Cir. 1981). "It is inconceivable that a person could be arrested on criminal charges and held for up to 17 days without a hearing unless he requested it." *Id.* The same is true for immigration detainees, who suffer no less loss of liberty than criminal detainees. "Even in civil cases where the deprivation is of property rather than liberty, the State must initiate the hearing." *Id.* Therefore, Defendants must bear the burden to provide a prompt initial hearing. *Fuentes v. Shevin,* 407 U.S. 67, 80 (1972) (striking down statute that "allows a post-seizure hearing if the aggrieved party shoulders the burden of initiating one"); *Krimstock*, 306 F.3d at 59 (City may not "place the onus on each plaintiff to bring a separate civil action in order to force the City to justify its seizure and retention of a vehicle").

c. The Government Has No Legitimate Interest in Delaying First Appearance and if Necessary May Relieve Itself of any Alleged Burden by Detaining Fewer People.

On the facts pleaded, the government has no legitimate interest in delaying first appearance for one to three months. Defendants speculate that to guarantee a prompt initial hearing "may ultimately impede immigration judges' ability to provide prompt hearings" for other detainees. RMTD at 15:15-16. At best, Defendants assert disputed facts that cannot be considered on a motion to dismiss. At this stage, Plaintiffs are entitled to a reasonable inference that Defendants may adjust their policies and practices to ensure prompt first appearance without undue burden and that any burden would be, at most, a brief inconvenience during initial implementation that would have no lasting impact once the docket normalizes. *Armstrong*, 152 F.3d at 573 ("[W]hen a

state provides for a first appearance, it would place a small burden on the state to ensure the timeliness of that appearance.").

While simply advancing the first MCH might not be unduly burdensome, the first appearance need not mirror the non-statutory MCH, as Plaintiffs have explained. ECF No. 50-1 at 10:12-21. The first appearance need only conform to a constitutional minimum. *Armstrong*, 152 F.3d at 573 (first appearance ensures arrestee receives minimum necessary "information from a neutral source" that allows "arrestee to take appropriate legal action"). It need not involve entry of a plea, narrowing of issues for merits hearing, evidentiary stipulations, or other matters typically discussed in a MCH. ECF No. 50-1 at 10:16-21, 12:9-20. As the Court noted, Plaintiffs "aver that the first presentment need not be an initial MCH." ECF No. 56 at 14:18-19.

Therefore, any burden of ensuring a prompt first appearance is insubstantial compared to the overwhelming interest in liberty. *Gallinot*, 657 F.2d at 1024 ("We do not believe [the government's] speculations… suffice to demonstrate an administrative burden substantial enough to outweigh the interests served by a mandatory hearing."). As the Ninth Circuit has held, "'administrative convenience' is a thoroughly inadequate basis for the deprivation of core constitutional rights." *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 785 (9th Cir. 2014). Although it may impose "some costs in time, effort, and expense" to ensure prompt hearings, "these rather ordinary costs cannot outweigh the constitutional right" to due process. *Fuentes*, 407 U.S. at 92 n.22. As a result, any "additional expense" of prompt hearings "does not justify denying a hearing" promptly after arrest. *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970).

In any event, the alleged burden is a problem of the government's own making, since it largely controls the number of people it chooses to imprison and has authority to release or parole many detainees. RMTD at 5 n.6, 6:6-9; *Damus v. Nielsen*, 313 F. Supp. 3d 317, 323 (D.D.C. 2018). DHS has abundant alternatives to incarceration at

significantly less expense.[6] Under these circumstances, any alleged burden cannot justify systemic delays of one to three months in first appearance. *See United States v. Minero-Rojas*, No. 11CR3253-BTM, 2011 WL 5295220, at *7 (S.D. Cal. Nov. 3, 2011) (first appearances may not be "systematically delayed" because of "process that no longer is effective to protect" detainees' rights.).

B. Plaintiffs Challenge Policies and Practices, and the Relevant Statutes Can Be Readily Construed to Avoid the Constitutional Problem of Prolonged Incarceration Without Prompt Presentment.

The Court need not "find that the existing statutory scheme is unconstitutional." RMTD at 12:7. Plaintiffs challenge unconstitutional policies and practices of agencies that cause prolonged imprisonment without prompt presentment. The fault is in those policies and practices, not necessarily the relevant statutes, which may easily be construed as consistent with the Constitution. If construed to preclude prompt presentment, as Defendants suggest, the statutes would be unconstitutional for the reasons explained above, but the Court need not reach that issue because Congress did not intend for the statutes to preclude prompt presentment.

Generally, "an alien may be arrested and detained" pending decision on removal. 8 U.S.C. § 1226(a). The government "shall take into custody" noncitizens with certain criminal histories pending removal proceedings. 8 U.S.C. § 1226(c). Arriving noncitizens who have "a credible fear of persecution … shall be detained" pending decision on asylum, and if "an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained" for removal proceedings, subject to potential parole. 8 U.S.C. §§ 1182(d)(5), 1225(b)(1)(B)(ii), (b)(2)(A).

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[6] DHS Office of Inspector General, OIG-15-22 *U.S. Immigration and Customs Enforcement's Alternatives to Detention (Revised)* at 4 (Feb. 4, 2015) (concluding alternatives to detention are effective and estimating costs of electronic monitoring to be roughly $13/day per participant), https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf; DHS Office of Inspector General, OIG-14-116 (Revised), *ICE's Release of Immigration Detainees* at 7 (Aug. 2014)("ICE's budget assumes detention beds cost $122 a day on average.), https://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-116_Aug14.pdf.

These statutes authorize or require detention, as the case may be, but they are silent on the constitutional prerequisite of prompt presentment. If not construed to incorporate that prerequisite, the statutes "would raise a serious constitutional problem." *Zadvydas*, 533 U.S. at 690. The Court must presume that a statute is not "intended to infringe constitutionally protected liberties." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council,* 485 U.S. 568, 575 (1988). When a statute "raises a serious doubt as to its constitutionality," the Court must "ascertain whether a construction of the statute is fairly possible by which the question may be avoided," because an interpretation "that avoids invalidation best reflects congressional will."[7] *Zadvydas*, 533 U.S. at 689.

This Court has "the power to adopt narrowing constructions of federal legislation" and "the duty to avoid constitutional difficulties by doing so if such a construction is fairly possible." *Boos v. Barry*, 485 U.S. 312, 331 (1988). Here, such construction is fairly possible, because the statutes give no "clear indication of congressional intent" to preclude a prompt first appearance. *Zadvydas*, 533 U.S. at 697.

By discussing detention while remaining silent on prompt presentment during such detention, the statutes are "susceptible of more than one construction." *Clark v. Martinez*, 543 U.S. 371, 385 (2005). On the one hand, they could be read to authorize detention with prompt presentment. On the other, they could be read to authorize detention without prompt presentment. Both constructions are plausible; neither is precluded. The former is constitutional; the latter is not. Therefore, the Court must adopt the former. *Id.* at 381 (given "competing plausible interpretations of a statutory text," court must apply "reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.").

If the Constitution can "require the addition of an element or elements to the definition of a criminal offense in order to narrow its scope," it requires the more

[7] The complaint need not cite "the canon of constitutional avoidance." RMTD at 12 n.14. Argument need not be pleaded. *Johnson v. City of Shelby*, 135 S. Ct. 346, 347 (2014).

modest step of construing immigration detention statutes to require prompt presentment. *Ring v. Arizona*, 536 U.S. 584, 606 (2002). Despite the "absence of express statutory language," the Supreme Court "has readily construed statutes that authorize deprivations of liberty or property to require" procedural protections. *Burns v. United States*, 501 U.S. 129, 137 (1991). To avoid constitutional problems, a federal civil commitment statute has been construed "to contain an implicit requirement" for "hearing before a neutral decisionmaker … within a reasonable period of time after any detention." *United States v. Shields*, 522 F. Supp. 2d 317, 336 (D. Mass. 2007). To avoid the constitutional problems caused by Defendants' policies and practices, the immigration detention statutes must be construed likewise.

Nothing in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), forecloses that result. In *Jennings*, the Supreme Court held the immigration detention statutes could not be read to require "periodic bond hearings every six months" at which the government "must prove by clear and convincing evidence that the alien's continued detention is necessary." *Id.* at 847. The Court reached that holding in three steps, none of which precludes Plaintiffs' position, which is more modest than the detailed requirements sought in *Jennings*.

First, the Court rejected the premise that 8 U.S.C. §§ 1225(b)(1) and (b)(2), which require detention of applicants for admission, "contain an implicit 6-month limit on the length of detention." *Id.* at 842. Unless the government exercises its parole authority for "humanitarian reasons or significant public benefit," those provisions "mandate detention" until conclusion of removal proceedings, and "neither provision can reasonably be read to limit detention to six months." *Id.* at 844. In *Jennings*, the statutory language was not silent on length of detention and precluded the six-month limit. In this case, by contrast, the statutes are silent on presentment and therefore do not preclude prompt presentment, which itself does not preclude the government from continuing to detain individuals for any length of time otherwise authorized or require it to bear any burden of proof to justify detention.

Second, the Court held that § 1226(c), which requires detention of persons falling into "enumerated categories involving criminal offenses and terrorist activities" was also inconsistent with a six-month limit on detention. *Id.* at 846. The statute was "*not* 'silent' as to the length of detention" because it "mandates detention" pending decision on removal, "and it "expressly prohibits release from that detention except for narrow witness-protection purposes." *Id.* (citation and quotation marks omitted). Here, again, the statutes are silent on prompt presentment and do not prohibit it, and a requirement for prompt first hearing does not prevent the government from exercising mandatory detention as otherwise authorized, just as prompt presentment does not prevent detention of criminal defendants without bail as otherwise authorized.

Third, the Court held that § 1226(a), which generally authorizes detention pending removal and provides for release on bond, did not support additional bond hearings every six months. *Id.* at 847. The statute and its implementing regulations were not silent on bond hearings because they already provided for "bond hearings at the outset of detention," and the Court declined to "rewrite" the statute to require additional bond hearings every six months with the burden and standard of proof sought by the plaintiffs. *Id.* at 836, 847. Here, by contrast, the detention statutes are silent on prompt presentment and do not foreclose such a requirement, which does not require the government to carry any burden of proof. All it does is ensure the settled constitutional minimum of a prompt first appearance, which is implicit in any detention authority and simply facilitates access to existing bond hearings. Accordingly, the detention statutes are readily interpreted to require prompt presentment and avoid the constitutional problem of construing them otherwise.

Likewise, the statute on initiation of removal proceedings, 8 U.S.C. § 1229, is readily construed not to foreclose prompt presentment of imprisoned immigrants. For persons in or out of detention, it prescribes a detailed "notice to appear" and advice of the right to retain counsel. 8 U.S.C. § 1229(a)(1). Consistent with the right to retain counsel, the statute provides, "In order that an alien be permitted the

opportunity to secure counsel before the first hearing date in proceedings under section 1229a of this title, the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests in writing an earlier hearing date." 8 U.S.C. § 1229(b)(1). By "proceedings under section 1229a," the statute refers to proceedings on the merits "for deciding the inadmissibility or deportability of an alien." 8 U.S.C. § 1229a(a)(1).

Taken in context and properly construed to avoid the constitutional problem of delaying presentment of detainees, the ambiguous term "hearing" in § 1229(b)(1) means the merits hearing on removal, not the more limited first appearance. *See Maringo v. Holder*, 364 F. App'x 903, 906 (5th Cir. 2010) (interpreting "first hearing date" under section 1229(b) to mean "removal hearing" on merits, not earlier "initial calendar hearing"). Given that § 1229(b) and a first appearance both facilitate access to counsel, ECF No. 1 ¶¶ 3, 29, 33, it would "unreasonably impute to Congress … a Kafkaesque sense of humor about aliens' rights" to construe the statute as requiring delay in scheduling the first appearance for detainees. *Dent v. Holder*, 627 F.3d 365, 374 (9th Cir. 2010). In any case, even if § 1229(b) somehow forbids a first appearance for detainees within 10 days of arrest, Plaintiffs have alleged delays far greater than 10 days.

C. The So-Called "Entry Fiction" Does Not Deprive Arriving Noncitizens of the Constitutional or Statutory Right to Prompt Presentment.

When the government arrests an alleged noncitizen "who arrives in the United States," 8 U.S.C. § 1225(a)(1), such as Mr. Gonzalez, that individual retains the due process right to prompt presentment, which is independent of the question of "admission or exclusion." RMTD at 18:10. As a result, the "entry fiction" does not preclude a substantive or procedural due process claim for such individuals.

The "Due Process Clause applies to all who have entered the United States—legally or not." *United States v. Raya-Vaca*, 771 F.3d 1195, 1203 (9th Cir. 2014). Under the so-called "entry fiction," a person "seeking admission to the United States" is deemed not to have "'entered' the United States, even if the alien is in fact physically

present" in the country under detention or parole. *Kwai Fun Wong v. United States*, 373 F.3d 952, 971 (9th Cir. 2004).

The "entry fiction" does not apply to this case. It pertains only to "the narrow question of the scope of procedural rights available in the admission process" for deciding the merits of admission or exclusion, which are not at issue, "and is not necessarily applicable with regard to other constitutional rights." *Id.* It is "a fairly narrow doctrine that primarily determines the procedures that the executive branch must follow before turning an immigrant away. Otherwise, the doctrine would allow any number of abuses to be deemed constitutionally permissible merely by labelling certain 'persons' as non-persons." *Id.* at 973. It does not "deny all constitutional rights to non-admitted aliens" or extinguish rights separate from the question of admissibility, such as the right to prompt presentment after arrest.[8] *Id.* at 971.

While perhaps Mr. Gonzalez's ultimate "right to enter the United States" on the merits of his asylum claim "depends on the congressional will," *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206, 216 (1953), his right to prompt presentment after arrest does not. Because this case does not concern "the validity of the procedures used to admit or exclude" individuals from the United States, an arriving noncitizen remains "a 'person' for purposes of the Fifth Amendment," entitled to prompt presentment after arrest. *Chi Thon Ngo v. INS*, 192 F.3d 390, 396 (3d Cir. 1999).

Even assuming otherwise, the relevant statute, properly construed, guarantees prompt presentment as explained above. That construction applies to arriving noncitizens even if the Constitution does not, because the statute cannot be construed differently for different people. The statute for detention of arriving noncitizens,

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[8] Defendants cannot rely on *Alvarez-Garcia v. Ashcroft*, 378 F.3d 1094 (9th Cir. 2004), because the petitioner was challenging only "the procedures afforded her in the admission process," which are not at issue here. *Id.* at 1098. Defendants find no help in *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir. 1995), which held that arriving aliens subject to indefinite detention had no right to be paroled into the United States. First, that holding has been superseded. *Xi v. U.S. I.N.S.*, 298 F.3d 832, 837-39 (9th Cir. 2002). Second, this case seeks only prompt first appearance, which is independent of and more modest than parole from custody.

8 U.S.C. § 1225(b), applies both to persons who have never entered the United States and to persons who have previously resided here and whose due process rights are unquestionable. *Rodriguez v. Robbins*, 715 F.3d 1127, 1141-42 (9th Cir. 2013) (citing cases). The statute thus guarantees prompt presentment to both groups. Where "one possible application of a statute raises constitutional concerns, the statute as a whole should be construed through the prism of constitutional avoidance." *Id.* at 1141 (citing *Clark*, 543 U.S. at 380); *see also Nadarajah v. Gonzales*, 443 F.3d 1069, 1078 (9th Cir. 2006) (section 1225(b) cannot be read as "treating some detentions authorized by the same statute differently, depending on the identity and status of the detainee"). Because § 1225(b) covers persons not subject to the "entry fiction," it guarantees prompt presentment to arriving noncitizens even if the Constitution does not.

D. On both Constitutional and Statutory Grounds, the Complaint States Claims for Equitable Relief or Writ of Habeas Corpus as well as Violation of the APA.

Because Defendants are detaining plaintiff class members without prompt presentment in violation of the Constitution and relevant statutes, Plaintiffs state claims for equitable relief or writ of habeas corpus. 28 U.S.C. § 2241(c)(3); *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015); *Solida v. McKelvey*, 820 F.3d 1090, 1096 (9th Cir. 2016); *Magana-Pizano v. INS*, 200 F.3d 603, 609 (9th Cir. 1999).

As Plaintiffs have explained, the Court need not decide the remedy to find Plaintiffs state a claim. ECF 50-1 at 11:13-20. If it ultimately finds liability, the Court could craft a remedy tailored to the evidence with input from all parties, or alternatively issue a conditional writ of habeas corpus. *Id.* at 11:21-12:10; 16:6-20.

Plaintiffs also state a claim under the APA, under which the Court shall "hold unlawful and set aside agency action" that is unconstitutional or unauthorized by statute. 5 U.S.C. § 706(2). As discussed above, prolonged detention without prompt presentment violates the Constitution and relevant statutes. The only question for APA purposes is whether such detention is final agency action subject to APA review.

Under the APA, "agency action" includes a "sanction." 5 U.S.C. §§ 551(13), 701(2). A "sanction" is any "prohibition, requirement, limitation, or other condition affecting the freedom of a person" or taking "restrictive action." 5 U.S.C. §§ 551(10), 701(2). The detention of Plaintiffs is a "sanction" because it "'affects' their freedom, as well as constitutes 'restrictive action.'" *Muniz-Muniz v. U.S. Border Patrol*, No. 3:09 CV 2865, 2012 WL 5197250, at *5 (N.D. Ohio Oct. 19, 2012), *rev'd on other grounds*, 741 F.3d 668 (6th Cir. 2013).

To be reviewable under the APA, the agency action must be "final" and have "no other adequate remedy in a court." 5 U.S.C. § 704. The decision to detain plaintiffs without prompt hearing meets this standard. The finality inquiry is "pragmatic and flexible." *Rhea Lana, Inc. v. Dep't of Labor*, 824 F.3d 1023, 1027 (D.C. Cir. 2016). Read favorably to Plaintiffs, the facts pleaded state a claim that Defendants decided to arrest and detain individuals without providing a prompt hearing. ECF No. 1 ¶¶ 1, 6, 63-67. That policy represents the "consummation of the agency's decision making process" from "which rights or obligations have been determined, or from which legal consequences flow." *Muniz-Muniz*, 2012 WL 5197250 at *5. The policy "need not be in writing to be final and judicially reviewable." *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 184 (D.D.C. 2015) (unwritten ICE detention policy subject to APA review).

There is no other adequate remedy under the narrowly construed § 704. *Id.* at 185. While regulations may allow custody review upon request, they offer "no adequate remedy for the period of unlawful detention members of the class suffer *before* receiving this review—the central injury at issue in this case." *Id.* "APA and habeas review may coexist." *Id.* A remedy is inadequate where "the relief would be individualized, not class wide," and as here, the challenge focuses on agency procedures rather than a decision to detain a particular individual. *Cohen v. United States*, 650 F.3d 717, 732 (D.C. Cir. 2011) (en banc). Accordingly, Plaintiffs state a claim for violation of the APA.

V. CONCLUSION

For the foregoing reasons, the Court should deny the motion to dismiss.

Dated: November 26, 2018

ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES

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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 26, 2018 to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Civ LR 5.4(d). Any other counsel of record will be served by U.S. mail or hand delivery.

Dated: November 26, 2018

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