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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOSE ORLANDO CANCINO CASTELLAR, ANA MARIA HERNANDEZ AGUAS, MICHAEL GONZALEZ, Plaintiffs-Petitioners, vs. KIRSTJEN NIELSEN, Secretary, U.S. Department of Homeland Security, *et al.*, Defendants-Respondents.	Case No. 17-cv-00491-BAS-BGS TIME: TBD DATE: May 7, 2018 CTRM: 4B (Schwartz) **NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT** DEFENDANTS-RESPONDENTS' OPPOSITION TO PLAINTIFFS-PETITIONERS' MOTION TO RECONSIDER ORDER DISMISSING COMPLAINT

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INTRODUCTION

The Court should deny Plaintiffs' Motion to Reconsider Order Dismissing the Complaint (ECF No. 50), because the Supreme Court's recent opinion in *Jennings v. Rodriguez*, No. 15-1204, --- U.S. ---, 138 S. Ct. 830 (2018) supports this Court's well-reasoned order dismissing Plaintiffs' claims for lack of jurisdiction under 8 U.S.C. §§1252(a)(5) and (b)(9). *See* Dismissal Order ("Order"), ECF No. 49.

In *Jennings*, five justices agreed and reinforced that 8 U.S.C § 1252(b)(9) is not limited only to situations seeking "review of an order of removal," but also precludes jurisdiction over "challeng[es to] . . . *any* part of the process by which their removability will be determined," and, "challeng[es to Immigration and Customs Enforcement's] decision to detain [aliens] in the first place or to seek removal." 138 S. Ct. at 841 (emphasis added). As this Court previously noted, because Plaintiffs' unreasonable presentment delay claims arise from removal proceedings, Sections 1252(a)(5) and 1252(b)(9) require Plaintiffs to raise these claims in a petition for review, ECF No. 49, at 22-27, and *Jennings* does not alter the Court's analysis. Accordingly, the Court should deny Plaintiffs' motion to this Court to reconsider its February 8, 2018, Order, ECF No. 49.

BACKGROUND

The Court's February 8, 2018, Order.

In the challenged decision, this Court analyzed Plaintiffs' Fourth and Fifth Amendment challenges to the timing of an alien's first hearing before an immigration judge. *See* ECF No. 49. In analyzing Section 1252(b)(9), this Court properly reasoned that the presentment that the plaintiffs sought would require confirmation of the charges of removability by the immigration judge, which would "inevitably" bleed into aspects of the initial removal hearing. *Id.* at 27. Thus, the Court concluded that there was an insufficient basis to conclude that Plaintiff's claims were "independent of or collateral to removal proceedings." *Id*. The Court also rejected Plaintiffs' argument that their claims were independent of the "substantive merits" of removal hearings, and thus excepted from the statute. *Id*. Accordingly, the Court properly held that Plaintiffs' claims were

barred under Sections 1252(a)(5) and (b)(9). *Id*.

Despite their continued artful framing of their claims as challenges to prolonged detention, Plaintiffs' motion to reconsider fails to demonstrate why this Court should reconsider its Order. Indeed, contrary to Plaintiffs' assertions, *Jennings* supports this Court's conclusion, as Plaintiffs are challenging DHS's determination of probable cause – which is a direct challenge to DHS's decision to detain them or to seek removal. Additionally, because Plaintiffs seek an initial hearing before an immigration judge earlier than contemplated by 8 U.S.C. § 1229(b)(1), this request for relief runs contrary to the statute and is a direct attempt to interfere with the removal process. Accordingly, the Court should uphold its previous order dismissing Plaintiffs' claims and deny their motion to reconsider.

ARGUMENT

I. *Jennings* Supports the Court's Decision to Dismiss Plaintiffs' Claims Under 8 U.S.C. §§ 1252(a)(5) and (b)(9).

A. Plaintiffs' Request for a Prompt Initial Hearing Before an Immigration Judge to Determine Probable Cause is a Challenge to the Decision to Detain Them in the First Place.

This Court has previously observed that "the habeas relief requested by the Plaintiffs in this case is *fundamentally different*" from the claims in *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), the case on appeal in *Jennings*. ECF No. 49 at 38-39. Now, in their motion to reconsider, Plaintiffs assert that *Jennings* does not preclude jurisdiction over the claims before this Court because the claims in *Jennings* are "for jurisdictional purposes indistinguishable from the claims here." Pls.' Motion, ECF No. 50-1, at 1. However, as this Court has already noted, Plaintiffs' arguments are meritless.

In *Jennings*, the Supreme Court held that aliens detained pursuant to 8 U.S.C. §§ 1225(b), 1226(a), and 1226(c) are not entitled to bond hearings after six months of detention under the explicit language of those statutes. *Jennings*, 138 S. Ct. at 842-48. In reaching that conclusion, five justices rejected the notion that Section 1252(b)(9)

does not apply to claims in cases such as the one Plaintiffs bring here. Although Justice Alito – writing for himself, Chief Justice Roberts, and Justice Kennedy – found that Section 1252(b)(9) did not preclude jurisdiction in the case before the Court, he explained that Section 1252(b)(9) *is not* limited only to situations seeking "review of an order of removal," but also *precludes* jurisdiction over "challeng[es to] . . . any part of the process by which [aliens'] removability will be determined," and, "challeng[es to] the decision to detain them in the first place or to seek removal." *Id.* at 841 (emphasis added). Additionally, Justice Thomas, writing for himself and Justice Gorsuch, agreed, concluding that Section 1252(b)(9) is *not limited* "to challenges to the removal order itself," and reaches, at the least, the scenarios contemplated by Justice Alito's plurality opinion. *Id*. at 854.[1] Thus, in *Jennings*, five justices rejected the contention that Section 1252(b)(9)'s limitations only apply if an alien seeks review of a "final removal order[]." *Id*. Instead, *Jennings* reiterates that Section 1252(b)(9) forecloses district court "challeng[es to] the decision to detain [aliens] in the first place or to seek removal," and "any part of the process by which [an alien's] removability will be determined." *Jennings*, 138 S. Ct. at 841; *accord id*. at 854 (Thomas, J., concurring).

Here, because Plaintiffs are challenging the earliest part of the process by which their removability will be determined, under Justice Alito's language, the bar to jurisdiction prescribed in Section 1252(b)(9) continues to apply to these claims. *Jennings*, 138 S. Ct. at 841. Plaintiffs' request for a prompt initial hearing where an immigration judge will review DHS's determination of probable cause is indeed a "challeng[e to] the decision to detain them in the first place or to seek removal." *Id*. In an attempt to bring these claims under the veil of *Jennings*, Plaintiffs repeatedly classify their claims as a challenge to "prolonged detention," "[u]nder any statute," "because the relevant statutes do not clearly 'preclude

[1] Only Justices Breyer, Ginsburg, and Sotomayor accepted the position that section 1252(b)(9) does not bar challenges to detention. *Jennings*, 138 S. Ct. at 876 (8 U.S.C. § 1252(b)(9) "by its terms applies only with respect to review of an order of removal under § 1252(a)(1)") (internal marks omitted) (Breyer, J., dissenting).

prompt hearing or judicial review.'" ECF No. 50-1 at 7, 15-16.[2] Yet, as this Court previously found, Plaintiffs' complaint does not "assert a challenge to prolonged detention," and "the substance of their claims is far from a habeas challenge to the legality of their detention." ECF No. 49 at 38-39.[3]As this Court previously highlighted, "[t]he Complaint does not identify the statutory basis for any Plaintiffs' detention, it does not challenge the lawfulness of any immigration detention statute or regulation under which the Plaintiffs may be detained, nor does it assert a challenge to prolonged detention." *Id.* at 39.

No matter how you cut it, a challenge to probable cause is precisely that; it is a challenge to DHS's decision to detain someone in the first place and initiate removal proceedings. And a request for an earlier initial hearing before an immigration judge to examine probable cause absolutely "bleeds into" the substantive merits of their removal. As this Court properly concluded, "[t]he presentment Plaintiffs request cannot possibly occur without confirmation by an immigration judge of the charges of removability against an immigrant, . . . That confirmation inevitably bleeds into aspects of the initial removal hearing." ECF No. 49 at 27.

Indeed, Plaintiffs' arguments clearly "ignor[e] the statutory language" of the relevant detention statutes. *Jennings*, 138 S. Ct. 848. Neither the INA nor its implementing regulations provide a right to a "prompt" initial presentment hearing before an immigration

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[2] Notably, despite Plaintiffs' attempts to frame this as a challenge to prolonged detention, none of the Plaintiffs here experienced prolonged detention prior to seeing an immigration judge. Plaintiff Ana Maria Hernandez Aguas was detained for 39 days prior to her release after a bond hearing. Plaintiff Jose Orlando Cancino Castellar was detained for 35 days prior to his release after a bond hearing. Plaintiff Michael Gonzalez was detained 117 days before his first appearance. Plaintiffs' citations to cases discussing length of detention in the criminal context are inapposite. *See* Motion, ECF No. 50-1 at 9 (discussing *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), *Hayes v. Faulkner County*, 388 F.3d 669 (8th Cir. 2004), and *Coleman v. Frantz*, 754 F.2d 719 (7th Cir. 1985)). Moreover, Plaintiffs have not pleaded any facts to demonstrate that any of these individuals lacked probable cause and were therefore "wrongfully" detained during their brief periods of detention.

[3] After the Court dismissed Plaintiffs' claims, Plaintiffs have not amended their complaint.

judge. *See* 8 U.S.C. § 1229(b)(1); 8 U.S.C. § 1357(a)(2); 8 C.F.R. § 287.3(a)-(b), (d). To the contrary, the statute and implementing regulations provide that, in general, a review of probable cause within 48 hours of initial arrest, by an immigration officer other than the one who effectuated the arrest, not an immigration judge. *See* 8 U.S.C. § 1357(a)(2); 8 C.F.R. § 287.3(a)-(b), (d). Moreover, by statute, "the first hearing date in proceedings under section 1229a. . . 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). Thus, just like the statutory provisions on review in *Jennings* do not allow for bond hearings every six months, 138 S. Ct. 841-49, the statute at issue here explicitly precludes the relief Plaintiffs request – a prompt hearing or judicial review. Accordingly, Plaintiffs' assertions fail, and the Court should deny their motion to reconsider.

B. *Plaintiffs' Claims Are Not Unreviewable Through the Removal Process.*

In an attempt to bypass this Court's prior holding, Plaintiffs' motion to reconsider asserts that their claims would be "effectively unreviewable"[4] in the removal process as their "'excessive detention would have already taken place' by the time proceedings are terminated or removal is ordered."[5] ECF No. 50-1 at 3-7 (citing *Jennings*, 138 S. Ct. at 840). Plaintiffs argue that *Jennings* made it clear that the substance of their claims is a challenge to prolonged detention. *Id*. at 8. But *Jennings* did not, and indeed could not, reframe

[4] Plaintiffs incorrectly expand what Justice Alito determined in *Jennings*. Justice Alito considered 1252(b)(9)'s "arising from" language and concluded that an overly "expansive interpretation" of this language could "make claims of prolonged detention effectively unreviewable." *Jennings*, 138 S. Ct. at 840. Contrary to Plaintiffs' contention, *see* ECF No. 50-1 at 3-4, Justice Alito did not make any analysis or commentary on whether courts may consider whether claims are inextricably linked with removal proceedings; indeed, he never even mentioned "inextricably linked." *Id.*

[5] Contrary to Plaintiffs' assertions, all of Plaintiffs' claims regarding the process prescribed by the statute and implementing regulations to place them in removal proceedings and process their claims can be reviewed in a petition for review of their individual removal orders, including permissible statutory interpretation and constitutional issues, per the Ninth Circuit's decision in *J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016); *see also* ECF No. 49 at 29-32.

Plaintiffs' claims. As noted by the Court, "Plaintiffs' artful framing of their claims as a 'detention challenge' cannot save their claims from the jurisdiction-channeling of Section 1252(a)(5) and Section 1252(b)(9)." ECF No. 49 at 33. Even liberally construing Plaintiffs' Complaint, it is clear that Plaintiffs' claims are by their very nature challenges to the decision to "detain them in the first place or to seek removal" and to "a part of the process by which their removability will be determined." *Jennings*, 138 S. Ct. at 841.

In their motion, Plaintiffs fail to acknowledge the scope of Justice Alito's discussion of the extension of Section 1252(b)(9), as well as the express language directing its application that Justice Thomas included in his concurrence. *Jennings*, 138 S. Ct. at 841; *accord id.* at 854 (Thomas, J., concurring). Justice Alito noted that "the applicability of § 1252(b)(9) turns on whether the legal questions that [a court] must decide 'aris[e] from' the actions taken to remove the[] aliens." *Jennings*, 138 S. Ct. at 840. Plaintiffs point to Justice Alito's recognition that an "'expansive interpretation of § 1252(b)(9)' [] 'would lead to staggering results.'" ECF No. 50-1 at 2 (citing *Jennings*, 138 S.Ct. at 840). However, Justice Alito recognized that claims falling outside the scope of Section 1252(b)(9) include claims "under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)" or "based on allegedly inhumane conditions of confinement," such as those the Supreme Court addressed in *Ziglar v. Abbasi*, 582 U.S. —— , 137 S.Ct. 1843 (2017). *Jennings*, 138 S. Ct. at 840. He continued to include the situation in which "a detained alien brings a state-law claim for assault against a guard or fellow detainee." *Id.* None of these scenarios, however, present the type of claim Plaintiffs assert before this Court. Rather, this case addresses Plaintiffs' challenge to "the decision to detain them in the first place," under which circumstance, Justice Alito suggests, § 1252(b)(9) would "present a jurisdictional bar." *Id.* Justice Thomas took that concept further, and writing for himself and Justice Gorsuch, concluded that section 1252(b)(9) reaches, at the least, the scenarios contemplated by Justice Alito's plurality opinion. *Id*. at 854.

The Court should reject Plaintiffs' argument that this Court consider Justice Breyer's dissenting opinion and that this Court "need not explain which rationale [(Alito's or Breyer's)] is controlling." ECF No. 50-1 at 3. As the Supreme Court has explained, where there is no controlling opinion on an issue and "no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who *concurred* in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (emphasis added) (internal quotation marks omitted). Therefore, the combined concurring opinions of Justice Alito and Thomas – not the dissent, which by its very nature is just that, a *dissent* – provide the controlling decision of the Court. Plaintiffs' reliance on the *dissent* in *Jennings* is thus entirely misplaced, as a *dissent* cannot by any commonsense measure constitute a "position taken by those Members who *concurred* in the judgments on the narrowest grounds." *Id.* As the Ninth Circuit has explained in applying *Marks*, "the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices *who support the judgment*." *United States v. Davis*, 825 F.3d 1014, 1020 (9th Cir.2016) (en banc) (emphasis added); *accord Lair v. Bullock*, 697 F.3d 1200, 1205 (9th Cir. 2012) (stating the narrowest opinion must be the "logical subset of other, broader opinions") (internal citation and quotation marks omitted). "Stated differently, *Marks* applies when, for example, 'the concurrence posits a narrow test to which the plurality must *necessarily agree as a logical consequence* of its own, broader position.'" *Cardenas v. United States*, 826 F.3d 1164, 1171 (9th Cir. 2016) (internal citation omitted).

Both Justices Alito and Thomas concurred in the *judgment* in *Jennings*. Justice Thomas's concurrence was far broader than Justice Alito's on the scope of section 1252(b)(9). Accordingly, under *Marks* and binding Ninth Circuit precedent, Justice Alito's decision that section 1252(b)(9) at the very least precludes district court jurisdiction over claims seeking "review of an order of removal," challenges to *the*

decision to detain them in the first place or to seek removal," or "challeng[es to] any part of the process by [] removability will be determined" *Id.* at 841, is the controlling decision, and controls here. Thus, under Justice Alito's analysis of the term "arising from," Plaintiffs' claims here are precluded by *Jennings.* 138 S. Ct. at 841.

C. Plaintiffs' Request for a Prompt Initial Master Calendar Hearing at which They Will Receive Certain Advisals Is a Challenge to the Process by which Their Removability Will Be Determined.

In a further attempt to bring their complaint under the veil of *Jennings*, Plaintiffs now separate themselves from their request for a prompt initial master calendar hearing at which they can receive certain advisals. ECF No. 50-1 at 9-11 (noting that "the complaint . . . does not necessarily demand that the first appearance conform in all respects to a master calendar hearing"). Yet Plaintiffs clearly seek an initial master calendar hearing earlier than under the timeline prescribed by 8 U.S.C. § 1229(b)(1) as one of the forms of relief in their Complaint. *See* ECF No. 1 at ¶¶ 1 (seeking a prompt "initial hearing before an immigration judge" or a prompt "judicial review of probable cause for detention"), 2 ("Excessive delays in judicial presentment . . . prevent [immigration detainees] from exercising important rights and remedies, [and] impede the progress of removal proceedings"), 3 (discussing the first hearing before an immigration judge, including that "detainees can learn the charges against them, receive important advisals about their rights, contest threshold allegations about their status, custody, or bond; request the evidence the government intends to use against them; and improve their chances of securing *pro bono* counsel"), 24-34 (discussing the Initial Master Calendar hearing as a "crucial stage of removal proceedings" where detainees learn, *inter alia*, about "the nature of the removal hearing, the contents of the Notice to Appear . . . , the right to representation at his or her own expense, [] the availability of *pro bono* legal services . . . and provides [detainees] the first opportunity to request [the government's] evidence"); 35-37 (discussing the first appearance and its "value in protecting numerous rights"); 38-43 (discussing the procedural and substantive due process rights in an initial hearing); 44

("An unreasonable delay before the initial Master Calendar Hearing . . . violates substantive due process rights of immigration detainees."); 58 (discussing detainees who have not yet seen an immigration judge); 65 (discussing the "unreasonable delays in scheduling the initial Master Calendar Hearing for individuals in detention"); and 68-72 (defining the class as those detained for "more than 48 hours without a hearing before an immigration judge or judicial review . . . [of] probable cause").[6] Plaintiffs' claims, inasmuch as they seek an earlier initial hearing before an immigration judge at which immigration detainees can receive certain advisals, clearly are a challenge to "any part of the process by which their removability will be determined," and are therefore precluded by *Jennings*. 138 S. Ct. at 841.

Nonetheless, even ignoring Plaintiffs' repeated and numerous requests for a prompt initial master calendar hearing at which certain advisals are provided, Plaintiffs' request for a prompt initial hearing to determine probable cause does, as discussed

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[6] Indeed, Plaintiffs' Opposition to Defendants' Motion to Dismiss also supports that Plaintiffs seek what is essentially an earlier initial Master Calendar Hearing before an immigration judge. *See* ECF No. 35, at 1 (discussing the first hearing as "important for detainees," and noting that "[t]he first hearing notifies them of the charges; facilitates access to pro bono counsel; and provides them an opportunity to contest detention, seek a bond hearing, and request the evidence against them."); 2 (discussing detention without a prompt hearing and also discussing detention without review of probable cause); 6 (discussing DHS's failure to "provide a prompt first hearing that notifies detainees of these rights"); 9 (clarifying that they seek "'prompt judicial presentment' *and* 'prompt judicial determination of whether probable cause justifies detention.'") (emphasis added); 15 (acknowledging that "some of the benefits of a prompt hearing may be relevant to the merits"); 20 (discussing the initial hearing as "the first time the IJ will review the NTA to make sure it was properly served, . . . the first meaningful time many detainees will be able to challenge the government's detention authority or request a more robust custody review hearing if one has not been provided; the first time detainees will have a neutral adjudicator explain their rights, including their right to counsel and to see the evidence against them, . . . the first time a neutral adjudicator will determine whether the detainees have properly received a list of available free legal service providers . . . ."); 23 ("Plaintiffs simply seek a prompt first hearing, at which detainees may request custody review either immediately or later.").

above, challenge the decision to detain them or to seek removal, and is therefore precluded by *Jennings*. There is no way for the immigration judge to review DHS's determination of probable cause without getting into the merits of an individual's removal proceedings. Thus, Plaintiffs' attempts to disassociate themselves from part of the relief they originally sought – in a futile attempt to reframe their complaint – still does not cure the complaint of jurisdictional defects. Accordingly, the Court should deny Plaintiffs' motion to reconsider.

II. The Court Should Deny Plaintiffs' Motion to Reconsider Because There Is No Suspension Clause Violation.

Finally, Plaintiff's challenge to this Court's Order under the Suspension Clause, ECF No. 50-1 at 14-17, likewise fails. Plaintiffs argue that "the application of section 1252(b)(9) to this case would violate the Suspension Clause . . . if 1252(b)(9) were construed to deprive this Court of power to issue a writ of habeas corpus to cure the prolonged detention challenged in this case." *Id.* at 15. However, as discussed herein and in the Court's order, "the substance of [Plaintiffs'] claims is far from a habeas challenge to the legality of their detention," because "[t]he exceedingly limited nature of this relief and its inextricable connection with claims that substantively arise from removal proceedings confirms to this Court that Plaintiffs' asserted detention challenge is merely a challenge in the abstract." ECF No. 49 at 39. Because Plaintiffs are really challenging part of the process by which their removability will be determined – and in doing so, ignore the statutory and regulatory language relating to that process – the Court should deny their motion to reconsider.

CONCLUSION

This Court should deny Plaintiffs' Motion to Reconsider its February 2018 Order dismissing Plaintiffs' Complaint. As discussed above, *Jennings*, supports this Court's well-reasoned decision dismissing Plaintiffs' complaint for lack of jurisdiction. Plaintiffs' claims are precluded under the Section 1252(b)(9) because they seek to challenge DHS's decision to "detain them in the first place or to seek removal" and

challenge a "part of the process by which their removability will be determined." Accordingly, because, pursuant to Section 1252(b)(9), Plaintiffs' claims must be raised in removal proceedings and cannot be litigated in federal district court, the Court should deny Plaintiffs motion to reconsider.

DATED: April 23, 2018

Respectfully Submitted,

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