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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOSE ORLANDO CANCINO CASTELLAR, et al.,

Plaintiff-Petitioners,

v.

KIRSTJEN NIELSEN, Secretary of Homeland Security, et al.,

Defendant-Respondents.

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF NOTICE OF MOTION AND MOTON TO RECONSIDER ORDER DISMISSING COMPLAINT

Date:	**May 7, 2018**
Time:	**TBD**
Courtroom:	**4B (Schwartz)**
Judge:	**Hon. Cynthia Bashant**

NO ORAL ARGUMENT UNLESS REQUESTED BY JUDGE

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I. INTRODUCTION

In light of the Supreme Court's recent decision in *Jennings v. Rodriguez*, No. 15-1204, 2018 WL 1054878 (U.S. Feb. 27, 2018), Plaintiffs respectfully seek reconsideration of the order granting the motion to dismiss this action. ECF No. 49 ("Order"). This Court has not entered final judgment and retains authority to reconsider the Order in light of a change in controlling law. *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 888 (9th Cir. 2001); *Singleton v. Kernan*, No. 16-cv-02462-BAS-NLS, 2017 WL 4922849, at *2 (S.D. Cal. Oct. 31, 2017).

According to *Jennings*, 8 U.S.C. § 1252(b)(9) does not bar claims that for jurisdictional purposes are indistinguishable from the claims here. Both *Jennings* and this case present challenges to prolonged detention without certain procedural safeguards. Plaintiffs respectfully submit that *Jennings* compels a finding that section 1252(b)(9) does not strip this Court of jurisdiction. As in *Jennings*, the claims here challenge prolonged detention that is otherwise unreviewable because the removal process cannot cure detention that has already taken place.

In light of *Jennings*, this Court has jurisdiction to decide whether prolonged detention is unlawful without a prompt first appearance or judicial determination of probable cause to detain. If the Court ultimately finds for Plaintiffs on the merits, it may grant a remedy that would prevent such detention without impeding removal proceedings. As in *Jennings*, this Court could grant that remedy without addressing any initial decision to charge or detain a particular person, the process for deciding that person's removability, or any order removing that person. Plaintiffs do not ask this Court to hold a first appearance for any immigration detainee or make any determination of probable cause to confine any such person. Instead, the Court would simply prohibit prolonged detention unless immigration judges hold prompt first appearances for detainees and determine probable cause to detain. In light of *Jennings*, this action properly seeks a writ of habeas corpus to cure prolonged detention without such safeguards. To hold otherwise after *Jennings* would violate the Suspension Clause.

Given this new authority from the Supreme Court, the Court should reconsider the Order and find it has jurisdiction.

II. ARGUMENT

A. In *Jennings*, the Court Held that Section 1252(b)(9) Does Not Preclude Jurisdiction over Claims of Prolonged Detention Without Procedural Safeguards.

In *Jennings*, the plaintiff was detained pending review of his removal order and claimed "he was entitled to a bond hearing to determine whether his continued detention was justified." 2018 WL 1054878 at *6. The case concerned a class of individuals detained for a prolonged time "pending completion of removal proceedings" who "have not been afforded a hearing to determine whether their detention is justified." *Id.* The Supreme Court held that section 1252(b)(9) "does not deprive us of jurisdiction" to address claims that such prolonged "detention without a bond hearing" is unlawful. *Id.* at *7 (Alito, J., joined by Roberts, C.J., and Kennedy, J.). Three other justices agreed jurisdiction "is unaffected by 8 U.S.C. § 1252(b)(9)." *Id.* at *44 (Breyer, J., dissenting, joined by Ginsburg and Sotomayor, JJ.). A majority of the Court thus found jurisdiction and rejected the position that "[c]laims challenging detention during removal proceedings . . . fall within the heartland of § 1252(b)(9)" on the ground that detention is an "aspect of the deportation process." *Id.* at *21 (Thomas, J., concurring in the judgment, joined by Gorsuch, J.).

As Justice Alito's opinion noted, it "may be argued" that a challenge to prolonged detention without a bond hearing "'aris[es] from any action taken or proceeding brought to remove an alien from the United States' … in the sense that if those actions had never been taken, the aliens would not be in custody at all." *Id.* at *7 (quoting 8 U.S.C. § 1252(b)(9)). But the opinion rejected such an "expansive interpretation of § 1252(b)(9)" that "would lead to staggering results" such as stripping jurisdiction over claims regarding "inhumane conditions of confinement," because

"judicial review of those questions" cannot occur during "the review of final removal orders." *Id.*

The same is true for challenges to prolonged detention. To interpret "'arising from' in this extreme way would also make claims of prolonged detention effectively unreviewable. By the time a final order of removal was 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." *Id.* at *8.

As Justice Alito wrote, the Court had jurisdiction to consider a challenge to prolonged detention without bond hearing, where "respondents are not asking for review of an order of removal; they are not challenging the decision to detain them in the first place or to seek removal; and they are not even challenging any part of the process by which their removability will be determined." *Id.*

According to Justice Breyer's opinion, section 1252(b)(9) did not apply because "[r]espondents challenge their detention without bail, not an order of removal." *Id.* at *44. Under Justice Breyer's rationale, this Court has jurisdiction simply because Plaintiffs do not challenge any order of removal. As explained below, the Court also has jurisdiction under, at minimum, Justice Alito's rationale. Therefore, this Court need not decide which rationale is controlling. *Cf. United States v. Davis*, 825 F.3d 1014, 1021-22 (9th Cir. 2016) (en banc).

B. Under *Jennings*, this Court Has Jurisdiction to Decide the Claims Pleaded in the Complaint, Which Challenge Detention that Is Effectively Unreviewable in the Removal Process.

Under Justice Alito's opinion, section 1252(b)(9) does not apply to claims that are "effectively unreviewable" because the removal process provides no "meaningful chance for judicial review" of those claims. *Jennings*, 2018 WL 1054878 at *8. The issue is whether claims are effectively unreviewable, a much easier question to answer than whether they are "inextricably linked" with removal proceedings. Order at 21:27

(quoting *Martinez v. Napolitano*, 704 F.3d 620, 623 (9th Cir. 2012)). Justice Alito's opinion thus opted for jurisdictional clarity by adopting the position that "section 1252(b)(9) does not bar claims that cannot be meaningfully heard in the administrative process." *Id.* at 29:7-8 (quoting ECF No. 35 at 14). Accordingly, the Court is respectfully requested to reconsider the Order and find it has jurisdiction to proceed with this action.

As in *Jennings*, the claims here are effectively unreviewable in the removal process. Plaintiffs claim their prolonged detention is unlawful without a prompt first appearance before an immigration judge or judicial review of probable cause to detain "by an immigration judge." ECF No. 1 at ¶ 4. Nothing in the removal process can cure prolonged detention without such appearance or determination, because "the allegedly excessive detention would have already taken place" by the time proceedings are terminated or removal is ordered. *Jennings*, 2018 WL 1054878 at *8.

On the facts pleaded, Plaintiffs were detained for several weeks "without appearance before a judge or a judicial determination of probable cause" to detain. ECF No. 1 at ¶¶ 47-49. This case challenges the "policy and practice of detaining individuals for extended periods" without such appearance or determination. *Id.* at ¶ 1. Consistent with that theory, the complaint repeatedly alleges prolonged detention without prompt hearing or judicial review of probable cause to detain. *See, e.g.*, *id.* at ¶¶ 8, 36, 42 ("detaining individuals for an unreasonable period before presentment to a judge or a judicial review of probable cause for their detention . . . detention for long and unreasonable periods before hearing is illegal . . . due process prohibits an extended detention, without initial appearance, following arrest"). The proposed class includes only persons "detained by DHS" and "confined in immigration detention facilities" without "prompt presentment to a judge or judicial review of probable cause to justify their detention." *Id.* at ¶¶ 68-70.

Accordingly, the claims expressly attack prolonged detention without a prompt hearing or judicial review of probable cause to detain. Plaintiffs allege the government

is violating (1) "the Due Process Clause by causing the detention of Plaintiff-Petitioners and the class members without prompt judicial presentment"; (2) "the Fourth Amendment by causing detention of Plaintiff-Petitioners and the class members without prompt judicial determination" of probable cause to detain; and (3) the Administrative Procedure Act ("APA") by subjecting Plaintiffs and class members to detention that violates the Constitution and applicable statutes. *Id.* at ¶¶ 78-79, 83, 85-89; *see also* ECF No. 35 at 36-37 (arguing "Plaintiffs state a claim under the APA" because "their extended detention without a prompt hearing or judicial review of probable cause violates the Constitution and applicable statutes"). Plaintiffs also seek a writ of habeas corpus commanding release from detention in violation of the Constitution and applicable statutes. ECF No. 1, Prayer for Relief at ¶ (g). As in *Jennings*, those claims challenge prolonged detention as unlawful without certain safeguards, and the claims are effectively unreviewable in the removal process.

Neither an immigration judge nor the Board of Immigration Appeals can retrospectively "undetain" individuals previously held without a prompt first appearance or judicial review of probable cause. Nor can the Court of Appeals cure 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." *I.N.S. v. Chadha*, 462 U.S. 919, 938 (1983). As understood in *Jennings*, the validity of a removal order is not contingent on the legality of detention before entry of the order, just as a conviction does not depend on the legality of pretrial detention. *See United States v. Crews*, 445 U.S. 463, 474 (1980) ("An illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction."); *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975) ("[A] conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause."); *United States v. Weissberger*, 951 F.2d 392, 396 (D.C. Cir. 1991) (noting that "order requiring pretrial detention" is "moot upon conviction

and sentence"); *United States v. Studley*, 783 F.2d 934, 937 (9th Cir. 1986) ("[A]n illegal arrest or detention does not void a subsequent conviction."). By challenging prolonged detention that is unreviewable in the removal process, this case does not seek a "bite of the apple with regard to challenging an order of removal." Order at 35:2-3.

In light of *Jennings*, a "bond hearing" or "custody redetermination" cannot provide effective relief for the claims alleged in the complaint. Order at 41:22-27. Under that process, if the detainee "objects to the [DHS] bond determination," the detainee may "request a bond redetermination" by an immigration judge. *Prieto-Romero v. Clark*, 534 F.3d 1053, 1058 (9th Cir. 2008) (citing 8 C.F.R. §§ 236.1(d), 1003.19(c)). That does not cure the violations alleged in this case, because as Plaintiffs argue, the government may not "shift the burden of requesting a hearing to persons deprived of liberty," and "Defendants must bear the burden to provide a prompt initial hearing." ECF No. 35 at 21-22. Nor can the right to prompt judicial review of probable cause to detain hinge on a request by the detainee.

In addition, a bond hearing cannot provide effective relief for the claims in this case because such a hearing addresses different issues. A bond hearing concerns the discretionary questions "whether an alien will be a flight risk or a danger to the community," *Prieto-Romero*, 534 F.3d at 1066, and what amount of bond is appropriate, *Hernandez v. Sessions*, 872 F.3d 976, 987-88 (9th Cir. 2017). None of those questions is at issue here. According to Plaintiffs, the government has no discretion to detain them for a prolonged time without a prompt first appearance or judicial review of probable cause to detain, and they are entitled to such safeguards regardless of whether a judge would grant them bond. For example, persons detained on capital charges may not be eligible for bond, *see, e.g.*, Cal. Const. art. I, §§ 12(a), 28(f)(3); Cal. Penal Code § 1270.5, but they retain the right to a prompt initial hearing and the right to prompt judicial review of probable cause to detain. By necessity, immigration detainees retain the same rights regardless of eligibility for bond. The administrative process to request a bond

hearing thus cannot vindicate the rights to a prompt initial hearing and judicial review of probable cause to detain.

For jurisdictional purposes, therefore, this case is controlled by *Jennings*. Here, Plaintiffs challenge extended detention without a prompt first appearance or judicial review of probable cause to detain. In *Jennings*, the plaintiff challenged extended detention without a bond hearing. Both cases involve claims that prolonged detention during removal proceedings is unlawful without certain safeguards. As the Supreme Court made clear, such challenges are "effectively unreviewable" through the administrative process. *Jennings*, 2018 WL 1054878 at *8.

In this action, Plaintiffs are not "asking for review of an order of removal; they are not challenging the decision to detain them in the first place or to seek removal; and they are not even challenging any part of the process by which their removability will be determined." *Id.* at *8. Instead, they ask the Court only to cure prolonged detention after initial arrest without prompt first appearance before an immigration judge and determination of probable cause to detain "by an immigration judge." ECF No. 1 at ¶ 83. As in *Jennings*, section "1252(b)(9) does not present a jurisdictional bar" to this case. 2018 WL 1054878 at *8.

C. This Case Is Indistinguishable from *Jennings* for Jurisdictional Purposes, and the Court Could Order a Remedy that Does Not Impair Removal Proceedings.

The Order resolved difficult jurisdictional questions against Plaintiffs. In *Jennings*, the Supreme Court pointed to the opposite result. Nothing presented in this case creates any material distinction from the jurisdictional holding of *Jennings*, because Plaintiffs raise claims that cannot be remedied "through the petition for review process." Order at 31:21-22. In light of *Jennings*, this Court's jurisdiction is not defeated by "examples of petitions for review challenging Fourth Amendment and Fifth Amendment violations resulting from the actions of immigration officers during initial arrest and detention, and violations of regulatory rights afforded to immigrants in

removal proceedings."[1] Order at 31:22-32:1. In those cases, the reviewing court could grant a remedy for the claimed violation, and therefore, unlike in *Jennings*, the issues presented were not "effectively unreviewable." 2018 WL 1054878 at *8.

For example, in reviewing denial of a "motion to suppress," Order at 32:1-11, a court may order suppression of the unlawfully obtained evidence and remand for a new hearing at which such evidence is inadmissible, providing the petitioner with the opportunity to contest removal in the absence of the prejudicial evidence. Likewise, in reviewing the "failure to advise petitioner of availability of free legal services," *id.* at 32:12-13, the court may "remand for further proceedings" at which such advice must be given, enabling a previously unrepresented person to seek counsel in defending against removal. *Leslie v. Attorney Gen. of U.S.*, 611 F.3d 171, 183 (3d Cir. 2010).

In such cases, the issues presented are not effectively unreviewable, because the court could grant relief that would restore the petitioners to a better position than they previously occupied. Here, by contrast, no such relief is available. Once an individual has been detained without prompt first appearance or judicial review of probable cause to detain, the administrative process cannot provide "any meaningful chance for judicial review," because the challenged detention "has already taken place" and cannot be undone. *Jennings*, 2018 WL 1054878 at *8. For that reason, Plaintiffs cannot obtain "judicial review" of their claims "in a petition for review." Order at 31:10. Accordingly, under *Jennings*, the Court has jurisdiction over this case.

In light of *Jennings*, it is now clear that the "substance" of Plaintiffs' claims is a "challenge to prolonged detention." *Id.* at 39:11. Plaintiffs seek to prevent the government "from detaining individuals for an unreasonable period before presentment to a judge or a judicial review of probable cause for their detention." ECF

[1] If the Court continues to consider Defendants' supplemental brief, ECF No. 45 (cited in Order at 31:23), Plaintiffs respectfully request that the Court reconsider its denial of leave to submit a response that explains why none of the cases cited by Defendants supports their position, especially after *Jennings*. ECF No. 47, 48.

No. 1 at ¶ 8. They are detained "for one to three months" without such presentment or review. Order at 7:11. Such detention qualifies as prolonged. *See, e.g., County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (discussing "prolonged detention" resulting from "custody for 30 days or more without a judicial determination of probable cause"); *Hayes v. Faulkner County*, 388 F.3d 669, 673 (8th Cir. 2004) (holding "38-day detention" was "prolonged detention" that violated due process without "prompt appearance in court"); *Coleman v. Frantz*, 754 F.2d 719, 724 (7th Cir. 1985) *abrogated on other grounds by Benson v. Allphin*, 786 F.2d 268, 279 n.26 (7th Cir. 1986) (holding that where plaintiff was detained 18 days without hearing, such "prolonged detention cannot be permitted"). The Court must construe the complaint in Plaintiffs' favor. *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013). So construed, the complaint challenges the legality of prolonged detention without prompt judicial presentment or determination of probable cause to detain.

Plaintiffs do not claim it is unlawful to delay "the initial Master Calendar Hearing" for all "immigrants" facing removal charges. Order at 39:13. They claim the government may not detain individuals for an extended time without a prompt first appearance or judicial review of probable cause to detain. Not all persons facing removal proceedings are detained. In fiscal year 2015, for example, the immigration court's non-detained docket made up 90 percent of its total caseload. *See* United States Government Accountability Office, *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges* ("GAO Report") at 64, June 2017, available at https://www.gao.gov/assets/690/685022.pdf. The proposed class covers only individuals "detained by DHS more than 48 hours without a hearing before an immigration judge or judicial review of whether their detention is justified by probable cause."[2] ECF No. 1 at ¶ 68. Plaintiffs make no claims for the numerous individuals in

[2] The "48 hour time period" is not tied purely to "regulation." Order at 26:12-13. It is grounded in case law. *See McLaughlin*, 500 U.S. at 56 (holding "judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the

removal proceedings who are detained less than 48 hours or not detained at all. It is extended detention that triggers the claims in this case, and Plaintiffs challenge extended detention without a prompt first appearance or judicial review of probable cause to detain.

A prompt first appearance for detainees need not necessarily mirror "the initial Master Calendar Hearing." Order at 23:12. While the complaint discusses current practice for such hearings as factual background, ECF No. 1 ¶¶ 27-34, it does not necessarily demand that the first appearance conform in all respects to a master calendar hearing. Instead, the complaint seeks to protect the fundamental "right to prompt presentment" by ensuring "a post-arrest hearing" is "sufficiently prompt to satisfy the Due Process Clause" and relevant statutes properly construed. *Id.* ¶¶ 39, 42.

Indeed, the term "master calendar hearing" does not appear in the "statute and regulations," Order at 23:15-16, which refer to "[r]emoval proceedings," 8 U.S.C. § 1229a, "the initial removal hearing," 8 C.F.R. § 1003.18(b), or the "removal proceeding," 8 C.F.R. § 1240.10(a). Instead, "master calendar hearing" appears in the Immigration Court Practice Manual § 4.15 at 73-74.[3] It serves docket management functions that need not be covered in a first appearance, such as "take pleadings," "identify and narrow the factual and legal issues," "set deadlines" for briefs and disclosures, and "advise the respondent of the right to appeal." *Id.* at 74-75. Accordingly, the first appearance of a detainee need not be identical to a master calendar hearing.

Isolated references in the complaint to excessive delay before the initial master calendar hearing might be misunderstood otherwise. ECF No. 1 at ¶¶ 44, 65.

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promptness requirement of *Gerstein*" for Fourth Amendment purposes); *Jordan v. Jackson*, 15 F.3d 333, 349 (4th Cir. 1994) ("Promptness is the touchstone of the [due process] analysis into the timeliness of post-deprivation review, as well as the Fourth Amendment inquiry into the constitutionality of delay in an independent probable cause determination.").

[3] *See* https://www.justice.gov/eoir/office-chief-immigration-judge-0.

However, the complaint must be construed favorably to Plaintiffs. It states "the factual basis" for their claims and may not be dismissed for any "imperfect statement of the legal theory supporting the claim[s] asserted." *Johnson v. City of Shelby*, 135 S. Ct. 346, 346-47 (2014). In any event, Plaintiffs would be entitled to leave to amend to cure any pleading defect in the relief sought. For the moment, Plaintiffs have not submitted an amended complaint on that point, because the leave to amend provided in the Order covered only claims relating to "detention conditions." Order at 33:10; *see Cholakyan v. Mercedes-Benz USA, LLC*, No. CV 10-5944 MMM (JCx), 2012 WL 12861143, at *7 (C.D. Cal. Jan. 12, 2012) (pleading should not "exceed the scope of a permitted amendment"). To the extent the Court might believe other amendment is needed to support its jurisdiction over Plaintiffs' prolonged detention claims in light of *Jennings*, the Court is respectfully requested to extend the deadline for amendment.

As a pleading matter, the complaint need not detail the precise form of "injunctive relief" which would follow from a decision that such detention is unlawful. Order at 27:4. To state a claim, Plaintiffs need only plead facts that when "taken as true must plausibly suggest an entitlement to relief." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). Therefore, at "the pleadings stage of litigation, Plaintiff[s] need only allege facts that could plausibly support injunctive relief," not draft the proposed injunction. *United States v. Hawaii*, No. CIV. 14-00214 JMS, 2015 WL 2186452, at *6 (D. Haw. May 11, 2015).

In principle, however, an injunction could prohibit the government from detaining class members for longer than a specified time unless it provided them with a prompt first appearance or judicial determination of probable cause to detain. The government could comply with that decree in one of several ways. For example, it could detain fewer people for shorter times, as it has acknowledged authority to do. ECF No. 28-1 at 5:7, 5 n.5 (citing 8 U.S.C. §§ 1182(b)(5), 1226(a)). Immigration officers "may arrest" individuals alleged to be removable, but they are not always required to do so, nor are they universally required "to maintain the alien in custody"

pending removal proceedings. Order at 3:14-22. With fewer individuals in custody, the government could prioritize timely first hearings for detainees and judicial review of probable cause for detention. As the Ninth Circuit recently noted, "[t]he costs to the public of immigration detention are 'staggering,'" and "reduced detention costs can free up resources to more effectively process claims in Immigration Court." *Hernandez*, 872 F.3d at 996. Alternatively, the government could reallocate its resources in another fashion to ensure detainees receive prompt hearings and judicial determinations of probable cause.

In neither case, however, would the injunction necessarily require "a process virtually indistinguishable from or substantially similar to the Initial Master Calendar Hearing, with the only difference being the timing of that hearing." Order at 27:17-18. In the criminal context, the first appearance typically includes review or setting of bail and notice to the defendant of the charge and the rights to counsel and remain silent, *Coleman*, 754 F.2d at 724, but unlike an arraignment it need not contain a plea, *see, e.g.*, Fed. R. Crim. P. 5(d)(4), 10; *United States v. Gaines*, 555 F.2d 618, 625 n.8 (7th Cir. 1977) (distinguishing between first appearance and arraignment); Cal. Penal Code §§ 825(a), 849(a) (first appearance), 988 (arraignment). Similarly, for example, a first appearance for immigration detainees need not "require the respondent to plead to the notice to appear by stating whether he or she admits or denies the factual allegations and his or her removability under the charges contained therein." 8 C.F.R. § 1240.10(c).

While "criminal detention cases provide useful guidance in determining what process is due non-citizens in immigration detention," *Hernandez*, 872 F.3d at 993, the precise contents of the first appearance may vary for criminal and immigration detainees. Plaintiffs claim only that a prompt first hearing of some kind is required. *See Armstrong v. Squadrito*, 152 F.3d 564, 575 (7th Cir. 1998) ("[D]ue process simply does not permit the state to detain an arrestee indefinitely without procedural protections. While the Constitution does not mandate the specific procedures accorded by Indiana

[for detention on civil warrant], neither does it tolerate the absence, following arrest, of any procedure whatsoever.").

At a minimum, the law requires a prompt first appearance to ensure a detainee "receives . . . information from a neutral source" that allows the detainee "to take appropriate legal action." *Id.* at 573. In finding it has jurisdiction, the Court need not decide the precise contours of the initial hearing, because currently the government is providing no prompt hearing at all. If the Court ultimately finds for Plaintiffs on the merits, it may direct the parties to meet and confer on a remedy or submit briefs on the issue. *See Lewis v. Casey*, 518 U.S. 343, 362-63 (1996). That is an issue to be addressed at or after decision on the merits, not at the pleading stage.

Similarly, the Court need not now decide the precise remedy in the event it ultimately finds a violation arising from failure to provide prompt judicial determination of probable cause to detain. In principle, however, a first appearance and judicial review of probable cause to detain need not occur together. While the Due Process Clause requires a prompt first appearance for detainees "whether or not there has been a valid determination of probable cause" to detain, *Coleman*, 754 F.2d at 724, the Fourth Amendment allows the probable cause determination to be made "without an adversary hearing," although the government may choose to have it made "at the suspect's first appearance before a judicial officer." *Gerstein*, 420 U.S. at 120, 123. Accordingly, the Fourth Amendment does not require the government "to present aliens in custody to an immigration judge" to "receive a 'probable cause' determination." Order at 27:6-8. Likewise, a first appearance may occur without a "probable cause determination" or "confirmation by an immigration judge of the charges of removability." *Id.* at 27:12-14. Though often combined as a matter of practice, *see McLaughlin*, 500 U.S. at 53-54; *Gerstein*, 420 U.S. at 123-24, the first appearance and determination of probable cause to detain are analytically distinct, derive from different constitutional sources, and need not occur together.

Judicial review of probable cause to detain does not "determine whether the evidence justifies going to trial," because "[t]he Fourth Amendment probable cause determination is addressed only to pretrial custody," not the question whether the prosecution may proceed. *Gerstein*, 420 U.S. at 119, 123. Because "illegal arrest" is not "a bar to subsequent prosecution," an immigration judge may find no probable cause to detain without preventing the government from pursuing removal. *Crews*, 445 U.S. at 474. The complaint seeks an end to prolonged detention without a "judicial finding of probable cause" to detain, not to interfere with prosecution of removal proceedings. ECF No. 1 at ¶ 45.

As a result, this Court would not impair removal proceedings by enjoining prolonged detention without a hearing or other process, just as courts do not impede criminal prosecution by addressing improper pretrial detention. *See Gerstein*, 420 U.S. at 107 n.9 (case not barred by *Younger* abstention because "injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution" and "could not prejudice the conduct of the trial on the merits"); *Arevalo v. Hennessy*, 882 F.2d 763, 766 (9th Cir. 2018) ("*Younger* abstention is not appropriate in this case because the issues raised in the bail appeal are distinct from the underlying criminal prosecution and would not interfere with it. Regardless of how the bail issue is resolved, the prosecution will move forward unimpeded."). Accordingly, an injunction to cure the prolonged detention at issue here would be appropriate if the Court ultimately finds for Plaintiffs on the merits.

D. After *Jennings*, the Order Should Be Reconsidered to Avoid a Suspension Clause Violation in Depriving Plaintiffs of Effective Judicial Review over the Challenged Detention, and Habeas is a Proper Remedy for which Exhaustion of Administrative Remedies Is Not Required.

In light of *Jennings*, the Order runs into conflict with the Suspension Clause by construing section 1252(b)(9) to bar Plaintiffs from seeking a writ of habeas corpus to

challenge their prolonged detention without a prompt hearing or judicial review of probable cause to detain. U.S. Const. art. I, § 9, cl. 2. Because *Jennings* makes clear that Plaintiffs' claims are effectively unreviewable in the removal process, that process is "inadequate [and] ineffective to test the legality of a person's detention" without prompt first appearance or judicial review of probable cause to detain. *Puri v. Gonzales*, 464 F.3d 1038, 1041 (9th Cir. 2006) (quoting *Swain v. Pressley*, 430 U.S. 372, 381 (1977)). The removal process cannot provide "the same scope of review as a habeas remedy" for the prolonged detention at issue, *id.* at 1042, because that process provides no "meaningful chance for judicial review" of detention that has "already taken place," *Jennings*, 2018 WL 1054878 at *8. As a result, the application of section 1252(b)(9) to this case would violate the Suspension Clause, because the removal process is "inadequate or ineffective to test the legality" of the challenged detention. *Swain*, 430 U.S. at 381.

"The writ of habeas corpus has always been available to review the legality of Executive detention," civil or criminal. *I.N.S. v. St. Cyr*, 533 U.S. 289, 305 (2001). A "serious Suspension Clause issue would be presented" if section 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.* The "canon of constitutional avoidance" requires this Court to follow *Jennings*, because "a construction of the statute is fairly possible by which the question may be avoided," under which section 1252(b)(9) does not apply to claims about prolonged detention that do not challenge "an order of removal" or are "effectively unreviewable" in the removal process. 2018 WL 1054878 at *8-9, *44.

To plead habeas claims for prolonged detention without prompt first appearance or judicial review of probable cause to detain, the complaint need not "identify the

statutory basis for any Plaintiff's detention."[4] Order at 39:8-9. Under any statute, Plaintiffs argue it is unlawful to detain anyone for a prolonged time without a prompt hearing or judicial review of probable cause. As Plaintiffs have discussed, because the relevant statutes do not clearly "preclude prompt hearing or judicial review," they "do not foreclose interpretation to avoid unconstitutionality." ECF No. 35 at 33:18-19.

Plaintiffs seek "release from custody *only* to the extent necessary" to comply with "constitutional and statutory obligations" because that is the nature of "habeas relief." Order at 40:3-5 (citing ECF No. 1 at 23). The writ is issued to cure "custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2241(c)(3), and therefore its scope is limited to that which is necessary "to correct the constitutional [or statutory] violation found by the court." *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987). If it ultimately finds for Plaintiffs on the merits, the Court may issue a conditional writ to give the government "an opportunity to correct" the violation by directing it to release detainees unless it provides them with a first appearance and judicial review of probable cause to detain within a specified time. *Douglas v. Jacquez*, 626 F.3d 501, 505 (9th Cir. 2010); *see also Irvin v. Dowd*, 366 U.S. 717, 729 (1961) (directing conditional writ so "defects which render discharge necessary may be corrected"); *Harvest v. Castro*, 531 F.3d 737, 741 (9th Cir. 2008) (noting "courts employ a conditional order of release in appropriate circumstances, which orders the State to release the petitioner unless the State takes some remedial action").

In light of *Jennings*, Plaintiffs need not exhaust "administrative remedies" because there are none "available" to cure the violations alleged in the complaint. Order at 41:15. The prudential exhaustion doctrine does not apply where "administrative remedies are inadequate or not efficacious" or "pursuit of administrative remedies would be a futile gesture." *Hernandez*, 872 F.3d at 988. Because neither the

[4] In any event, Plaintiffs identified applicable detention statutes and regulations in their complaint and opposition to motion to dismiss. ECF No. 1 at ¶ 22; ECF No. 35 at 32:8-16. The Court may also take judicial notice of relevant statutes and regulations.

immigration court nor the Board of Immigration Appeals can provide an effective remedy for detention that has "already taken place," *Jennings*, 2018 WL 1054878 at *8, the administrative process is incapable of curing the prolonged detention alleged in this case. Likewise, as discussed above, a "bond hearing" or "custody redetermination," Order at 41:24-28, cannot provide effective relief for Plaintiffs' claims because it concerns the discretionary question whether a detainee is eligible for bond, not the question whether the government has no discretion to engage in prolonged detention without a prompt first hearing or judicial review of probable cause. Accordingly, it would be futile for Plaintiffs to pursue an ineffective administrative process that cannot remedy the prolonged detention at issue.

III. CONCLUSION

For the foregoing reasons, the Court should reconsider the Order, find it has jurisdiction, extend the deadline for amending the complaint if necessary, and proceed with this action.

Dated: March 8, 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 motion and all attachments thereto has been served on March 8, 2018 to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Civ. L.R. 5.4(d). Any other counsel of record will be served by U.S. mail or hand delivery.

s/David Loy
DAVID LOY