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

24 JOSE ORLANDO CANCINO
25 CASTELLAR, ANA MARIA
26 HERNANDEZ AGUAS, MICHAEL
27 GONZALEZ,

28 Plaintiff-Petitioners,

v.

JOHN F. KELLY, Secretary of Homeland
Security; THOMAS HOMAN, Acting
Director, U.S. Immigration and Customs
Enforcement; KEVIN K. McALEENAN,

Case No.

**COMPLAINT – CLASS ACTION
AND PETITION FOR WRIT OF
HABEAS CORPUS**

1 Acting Commissioner, U.S. Customs and
2 Border Protection; GREGORY J.
3 ARCHAMBEAULT, Director, San Diego
4 Field Office, U.S. Immigration and
5 Customs Enforcement; JEFFERSON B.
6 SESSIONS III, Attorney General of the
7 United States; JUAN P. OSUNA, Director,
8 Executive Office for Immigration Review,

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Defendant-Respondents.

1 **INTRODUCTION**

2 1. This suit challenges Defendant-Respondents’ policy and practice of
3 detaining individuals for extended periods without promptly presenting them for an
4 initial hearing before an immigration judge or promptly seeking judicial review of
5 probable cause for detention. As a result, many individuals—including people with
6 claims to U.S. citizenship, longtime lawful permanent residents, individuals who have
7 been in the United States since childhood, and asylum seekers fleeing persecution—
8 routinely languish in detention for two months or longer before they see a judge, in
9 violation of the Constitution and applicable law.

10 2. The requirement of prompt presentment after arrest “stretches back to
11 the common law, when it was ‘one of the most important’ protections ‘against unlawful
12 arrest.’” *Corley v. United States*, 556 U.S. 303, 320 (2009). Excessive delays in judicial
13 presentment deprive immigration detainees of due process, prevent them from
14 exercising important rights and remedies, impede the progress of removal proceedings,
15 and bear no reasonable relation to any valid purpose.

16 3. The first hearing before an immigration judge, like first appearance in
17 criminal court, is critical to ensuring due process. For example, it ensures that
18 detainees can learn the charges against them;¹ receive important advisals about their
19 rights;² contest threshold allegations about their status, custody, or bond; request the

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21 _____
22 ¹ See EOIR Immigration Judge Benchbook (“IJ Benchbook”), *Advisals*, available at
23 <https://www.justice.gov/sites/default/files/coir/legacy/2014/08/15/Advisals.pdf>; IJ
24 Benchbook, *Initial Hearing*, available at
<https://www.justice.gov/coir/page/file/924086/download>

25 ² At the initial hearing, immigration judges may identify relief available to detainees and,
26 for unrepresented individuals, must provide appropriate guidance as to how they may
27 prove they are eligible for it. See *Agyeman v. I.N.S.*, 296 F.3d 871, 883-84 (9th Cir.
28 2002).

1 evidence the government intends to use against them;³ and improve their chances of
2 securing *pro bono* counsel.⁴ The current delays in providing the first appearance prevent
3 detainees from receiving those important protections and advisals in a timely manner.

4 4. Furthermore, the Department of Homeland Security (DHS) has a policy
5 and practice of detaining individuals without seeking or obtaining judicial review of
6 probable cause promptly after arrest, as required by the Fourth Amendment. Instead,
7 the decision to retain a person in custody is made by DHS officials alone without
8 prompt judicial review. “Judicial review” in this context includes at least review by an
9 immigration judge.

10 5. The United States Immigrations and Customs Enforcement (ICE), a
11 component of DHS, currently operates two large immigration detention centers in the
12 Southern District of California where individuals are subjected to civil detention: (1) the
13 Otay Detention Facility and (2) the Imperial Regional Detention Facility. The United
14 States Customs and Border Protection (CBP), another component of DHS, also
15 detains individuals without final removal orders beyond 48 hours, many of whom will
16 be placed in removal proceedings in various facilities throughout the Southern District
17 of California. Plaintiff-Petitioners are examples of around 1,500 alleged non-citizens
18 detained by DHS in this district on any given day. The vast majority of such detainees
19 have waited or are currently waiting between one to three months for a first hearing
20 before a judge, and most are indigent and unrepresented by counsel.

21 6. Plaintiff-Petitioners’ lengthy detention without judicial appearance or
22 determination of probable cause results from several actions of Defendant-

23
24 ³ See *Dent v. Holder*, 627 F.3d 365, 374 (9th Cir. 2010); 8 U.S.C. § 1229a(c)(2)(B).

25 ⁴ At the initial hearing, the immigration judge ensures that the individual has received a
26 list of available free legal service providers. 8 C.F.R. § 1240.10(a)(2). In addition, *pro se*
27 appearance at the initial hearing places individuals on a list of unrepresented detainees
28 generated by Executive Office of Immigration Review, which it may then circulate to
non-profit organizations that represent indigent detainees.

1 Respondents. First, DHS detains individuals allegedly subject to removal without
2 regard for the immigration court's ability to commence and process the cases promptly.
3 Second, it confines individuals for removal proceedings without meaningful judicial
4 oversight, such as a judicial finding of probable cause or automatic custody review
5 hearing before an immigration judge. Third, DHS relies on the immigration court
6 system to set the initial hearing date and takes no responsibility for presenting detainees
7 to the court promptly.

8 7. Defendant-Respondents' policy and practice results in unreasonable
9 extended detention for Plaintiff-Petitioners and those similarly situated to them without
10 prompt presentment to a judge or a judicial review of probable cause.

11 8. Therefore, Plaintiff-Petitioners seek declaratory, injunctive, and habeas
12 corpus relief that will prevent Defendant-Respondents from detaining individuals for
13 an unreasonable period before presentment to a judge or a judicial review of probable
14 cause for their detention.

15 PARTIES

16 9. Plaintiff-Petitioner Jose Orlando Cancino Castellar is presently detained
17 by DHS at the Otay Detention Facility. DHS alleges he is a native and citizen of
18 Mexico and subject to removal from the United States.

19 10. Plaintiff-Petitioner Ana Maria Hernandez Aguas is presently detained by
20 DHS at the Otay Detention Facility. On information and belief, DHS alleges she is a
21 native and citizen of Mexico and subject to removal from the United States.

22 11. Plaintiff-Petitioner Michael Gonzalez is presently detained by DHS at the
23 Otay Detention Facility. On information and belief, DHS alleges he is a native and
24 citizen of Mexico and subject to removal from the United States.

25 12. Defendant-Respondent John F. Kelly is the Secretary of the U.S.
26 Department of Homeland Security, an agency of the United States with several
27 components responsible for enforcing United States immigration laws. Secretary Kelly
28

1 is a legal custodian of Plaintiff-Petitioners and other members of the proposed class.
2 He is sued in his official capacity.

3 13. Defendant-Respondent Thomas Homan is the Acting Director of U.S.
4 Immigration and Customs Enforcement, a component of DHS. ICE is responsible
5 for, among other things, the seizure and detention of alleged noncitizens for removal
6 proceedings and for prosecuting those removal proceedings. Acting Director Homan
7 is a legal custodian of Plaintiff-Petitioners and other members of the proposed class.
8 He is sued in his official capacity.

9 14. Defendant-Respondent Kevin K. McAleenan is the Acting Commissioner
10 of U.S. Customs and Border Protection, a component of DHS. CBP is responsible for,
11 among other things, the seizure and detention of alleged noncitizens believed to be in
12 the United States in violation of the law or at a port of entry seeking asylum. Acting
13 Commissioner McAleenan is a legal custodian of members of the proposed class. He is
14 sued in his official capacity.

15 15. Defendant-Respondent Gregory Archambeault is the Field Office
16 Director for the San Diego Field Office of ICE, a component of DHS. Director
17 Archambeault has custody of Plaintiff-Petitioners and other members of the proposed
18 class, who are primarily detained in the Otay Detention Facility and the Imperial
19 Regional Detention Facility, both of which are within the jurisdiction of ICE's San
20 Diego Field Office. He is sued in his official capacity.

21 16. Defendant-Respondent Jefferson B. Sessions III is the Attorney General
22 of the United States and the most senior official in the U.S. Department of Justice
23 (DOJ). He has the authority to interpret the immigration laws and adjudicate removal
24 cases. The Attorney General delegates this responsibility to the Executive Office for
25 Immigration Review (EOIR), which administers the immigration courts and the Board
26 of Immigration Appeals. He is sued in his official capacity.

1 Protection are the two main agencies within DHS that are authorized to initiate
2 removal proceedings. *See* 8 C.F.R. § 239.1.

3 22. Congress has authorized DHS to initially take an alleged non-citizen into
4 custody without a warrant (1) if the individual enters or attempts to enter the United
5 States in violation of the immigration laws in the officer's presence or view, or (2) if the
6 officer reasonably believes the individual is in the United States in violation of the
7 immigration laws and is likely to escape before an arrest warrant can be obtained. 8
8 U.S.C. § 1357(a)(2). However, after 48 hours DHS must determine whether to
9 continue to keep the person in custody and issue a Notice to Appear. 8 C.F.R.
10 § 287.3(d). DHS also purports to have authority under applicable regulations to arrest
11 and take into custody an alleged non-citizen pursuant to an administrative warrant "at
12 the time of issuance of the Notice to Appear, or at any time thereafter." 8 C.F.R.
13 § 1236.1(b). DHS policy and practice is that its agents and officers need not obtain a
14 judicial warrant prior to arrest or a judicial finding of probable cause after arrest.

15 23. Individuals arriving at a port of entry and seeking asylum take a slightly
16 different procedural route before DHS issues them a Notice to Appear. If DHS takes
17 the position that individuals arriving at a port of entry have no valid documentation or
18 right to enter the United States, those individuals are generally processed for so-called
19 "expedited removal," for which a hearing before an immigration judge is allowed in
20 very limited circumstances. 8 U.S.C. § 1225(b)(1)(A); 8 C.F.R. §§ 235.3(b)(2)(ii),
21 (b)(5)(iv). However, when such an individual expresses a fear of persecution if
22 removed, expedited removal is not permitted, and he or she is referred for a credible
23 fear interview before an asylum officer with United States Citizenship and Immigration
24 Services. 8 C.F.R. § 235.3(b)(4). If the asylum officer determines that the individual
25 has a credible fear, then the case is referred to the immigration court through the
26 issuance and filing of the Notice to Appear. 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R.