The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

YOLANY PADILLA, IBIS GUZMAN, BLANCA ORANTES, BALTAZAR VASQUEZ,

Plaintiffs-Petitioners,

v.

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE); U.S. DEPARTMENT OF HOMELAND SECURITY (DHS); U.S. CUSTOMS AND BORDER PROTECTION (CBP); U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS); TAE D. JOHNSON, ACTING DIRECTOR OF ICE; ALEJANDRO MAYORKAS, SECRETARY OF HOMELAND SECURITY; TROY A. MILLER, ACTING COMMISSIONER OF CBP; UR JADDOU, DIRECTOR OF USCIS; ELIZABETH GODFREY, SEATTLE FIELD DIRECTOR OFFICE, ICE; MERRICK B. GARLAND, ATTORNEY GENERAL OF THE UNITED STATES; BRUCE SCOTT, WARDEN OF THE NORTHWEST DETENTION CENTER IN TACOMA, WASHINGTON; JAMES JANECKA, WARDEN OF THE ADELANTO DETENTION FACILITY,

Defendants-Respondents.

No. 2:18-cv-00928-MJP

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS FOURTH AMENDED COMPLAINT

NOTE ON MOTION CALENDAR: APRIL 17, 2023

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I. INTRODUCTION

In their opposition to Defendants' Motion to Dismiss the Fourth Amended Complaint ("4AC"), Plaintiffs downplay the relevance of *Dep't of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020), arguing that their claims should be characterized as "challenges to prolonged and arbitrary detention" rather than "challenges to admission and removal." ECF 202, at 1. But rather than turning on any distinction between detention and admission, *Thuraissigiam* unequivocally confirms that a noncitizen detained under 8 U.S.C. § 1225(b)(1) "has no entitlement to procedural rights other than those afforded by statute." 140 S. Ct. at 1964.

In short, the 4AC remains a challenge to Defendants' implementation of the expedited removal statute and must be dismissed for lack of subject matter jurisdiction. Plaintiffs ask this Court to find that the Government's credible fear ("CF") procedures violate due process, but those processes were adopted under § 1225(b)(1)(A)(ii) and are shielded from review by 8 U.S.C. § 1252(a)(2)(A)(iv). They also insist that due process guarantees a bond hearing within seven days to any inadmissible noncitizen apprehended shortly after illegally crossing the border, taking issue with § 1225(b)(1)(B)(ii), but their bond hearing claims are also unreviewable—except in the District of Columbia. *See* 8 U.S.C. § 1252(e)(3).

In addition to the jurisdictional barriers, the 4AC should be dismissed for failure to state any claim for relief. *Thuraissigiam* makes clear that a noncitizen on the threshold of entry has only those due process rights provided by statute, yet Plaintiffs do not identify any provision in § 1225(b)(1) that alludes to bond hearings. The same is true of their demand for speedier CF determinations: Plaintiffs seek to impose an arbitrary deadline of ten days by which all CF determinations would have to be rendered, but there is no statutory justification for their timeline. Because their claims fail as a matter of law, the Court should grant Defendants' Motion to Dismiss the 4AC.

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II. ARGUMENT

A. Plaintiffs' claims are foreclosed from this Court's review by 8 U.S.C. § 1252.

The Court should dismiss all of Plaintiffs' claims against Defendants' implementation of the expedited removal statute. Section 1252(a)(2)(A) bars judicial review of policies and actions taken to implement § 1225(b)(1). Section 1252(e)(3) preserves jurisdiction over questions concerning whether a regulation or written policy implementing § 1225(b)(1) violates the law, with the important caveat that such review is only available in the District of Columbia.

Plaintiffs argue that both this Court and the Ninth Circuit have either found or assumed that jurisdiction is proper over their claims and that Defendants provided "no reason to reverse course." ECF 202, at 2. All of those decisions, however, were issued prior to *Thuraissigiam*, where the Supreme Court held that the Due Process Clause did not confer jurisdiction to review "whether [the noncitizen] had a significant possibility of establishing eligibility for asylum." 140 S. Ct. at 1983 (cleaned up). A "major objective" of the law that codified § 1225(b)(1) "was to protect the Executive's discretion from undue interference by the courts"—indeed, that was "the theme of the legislation" itself. *Id.* at 1966 (cleaned up); *see id.* (noting that, "*[i]n accordance with that aim*," § 1252 bars judicial review over any claim regarding whether an individual subject to expedited removal is "entitled to any relief from removal," or over any "claim arising from or relating to the implementation or operation of" an expedited removal order (internal quotation marks omitted) (emphasis added)). With this understanding of the expedited removal statute, *Thuraissigiam* concludes that a noncitizen detained under § 1225(b)(1) "has no entitlement to procedural rights other than those afforded by statute." *Id.* at 1964, 1983.

Ignoring this key premise in *Thuraissigiam*, Plaintiffs assert that the decision has no bearing on their claims simply because it is a case about admission and not detention. But that narrow reading has been implicitly rejected by the Supreme Court, which vacated the Ninth Circuit's affirmance of the preliminary injunction in this case and remanded "for further consideration in light of [*Thuraissigiam*]." *See Immigration and Customs Enforcement v. Padilla*, 141 S. Ct. 1041, 1041-42 (2021). Plaintiffs offer no explanation as to why the Supreme Court would have ordered further analysis of the bond hearing claims "in light of" *Thuraissigiam* unless

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it found its precedent clearly on point for resolving the issues at bar.

Plaintiffs further argue that their claims are aimed at "practices that unlawfully prolong the length of their detention," positing that § 1252(e)(3) covers only broad challenges to the expedited removal process itself, and not any concomitant detention. ECF 202, at 3. Defendants already addressed that point, ECF 200, at 10-11, explaining that, to the extent Plaintiffs direct their bond hearing claims against *Matter of M-S-*, 27 I. & N. Dec. 509 (A.G. 2019), their challenge fails because *Matter of M-S-* simply interprets and applies § 1225(b)(1)(B)(ii), and § 1252(e)(3) directs all "determinations under [§ 1225(b)] *and its implementation*" to the District of Columbia. 8 U.S.C. § 1252(e)(3) (emphasis added).

Plaintiffs do not directly engage with this text, instead relying on *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), to argue that their claims are not barred under § 1252(e)(3) because they have "not ask[ed] for review of an order of removal," "challeng[ed] the decision to detain them in the first place," or "challeng[ed] any part of the process by which their removability will be determined." ECF 202 (quoting *Jennings*, 138 S. Ct. at 841). But the jurisdictional question in *Jennings* was a different one—concerning 8 U.S.C. § 1252(b)(9), which provides that "no court shall have jurisdiction" to review questions of law and fact "arising from" removal proceedings "[e]xcept as otherwise provided in th[e] section." 138 S. Ct. at 839-840. The Supreme Court found that § 1252(b)(9) did "not present a jurisdictional bar," largely based on the "staggering" and "absurd" outcomes that might result if the phrase "arising from" were read in an "extreme" way. *Id.* at 839-41. The range of conceivable outcomes is much narrower under § 1252(e)(3), since the provision, by its terms, bars only review of agency actions implementing § 1225(b), as opposed to any and all "*legal questions*" that might "arise from such an action."[1] *See Jennings*, 138 S. Ct. at 841 n.3 (emphasis added).

Even apart from § 1252(e)(3), Plaintiffs' claims are barred by § 1252(a)(2)(A), which

[1] As for the two out-of-district cases on which Plaintiffs rely, ECF 202, at 3-4, neither discusses § 1252, nor do they even attempt to grapple with the question of whether a challenge to certain terms of a noncitizen's detention while under an expedited removal order is at least "relat[ed] to the implementation or operation of" that order. *See* 8 U.S.C. § 1252(a)(2)(A)(i).

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similarly must be understood in light of *Thuraissigiam*'s explication that it was Congress's "aim" in passing the legislation that codified § 1252 to "protect[] the Executive's discretion from the courts." *Thuraissigiam*, 140 S. Ct. at 1966; *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999). In fact, *Thuraissigiam* specifically refers to each of the four romanettes in § 1252(a)(2)(A) to highlight the degree to which Congress chose to restrict "[r]eview relating to section 1225(b)(1)."[2] *Thuraissigiam*, 140 S. Ct. at 1966; 8 U.S.C. § 1252(a)(2)(A).

Thus, the authorities cited by Plaintiffs lend, at most, weak support for their claim that they are not subject to the statutory bars against review of any implementation of § 1225(b)(1). Because Plaintiffs fundamentally challenge *how* Defendants interpret and execute the expedited removal statute, they seek to overturn the "means by which" agencies "carry out, accomplish, or provide an instrument for" the detention and processing of "individuals subject to expedited removal proceedings." ECF 200, at 10 (quoting *Castellar v. Mayorkas*, No. 17-cv-00491-BAS-AGH, 2021 WL 4081559, at *6 (S.D. Cal. Sept. 8, 2021)).[3] And those are precisely the kinds of claims for which § 1252(e)(3) forecloses review.

Failing to make out a cogent case for review based on § 1252(e)(3)'s text, Plaintiffs note that Defendants "conceded" that noncitizens subject to expedited removal who are awaiting a CF interview may raise a habeas challenge to what they believe is prolonged detention. ECF 202, at 4 (citing ECF 92, at 5; ECF 76, at 6). But habeas remains available to anyone who believes they are

[2] While the phrase "arising from" has been regarded by some courts as requiring "more than a weak or tenuous connection to a triggering event," those same courts have also recognized that the phrase "related to" allows for a looser nexus. *See, e.g.*, *Aguilar v. U.S. Immigr. & Customs Enf't Div. of the Dep't of Homeland Sec.*, 510 F.3d 1 (1st Cir. 2007).

[3] Plaintiffs take issue with Defendants' reference to *Castellar*, noting that the court later concluded that the plaintiffs' "challenge was not barred by [s]ection 1252." ECF 202, at 3 n.2 (citing *Castellar v. Mayorkas*, No. 17-cv-00491-JO-AHG, 2022 WL 2973424, at *3-5 (S.D. Cal. July 27, 2022)). But both decisions in *Castellar* are relevant for the clarification they provide that "challenges that do not explicitly challenge expedited removal but challenge a policy that carries it out *also concern implementation of the expedited removal statute*." *Castellar*, 2022 WL 2973424, at *4 (emphasis added); *see Castellar*, 2021 WL 4081559, at *6. While the court did find jurisdiction to review the plaintiffs' claims, it did so strictly based on the fact that those claims concerned "the timing of the initial hearing in *regular* removal proceedings," which did not "even incidentally implicate" their detention. *Castellar*, 2022 WL 2973424, at *4 (emphasis added). Here, by contrast, § 1225(b)(1)'s detention requirement is precisely one of the statutory provisions that Plaintiffs ask this Court to interpret in deciding their claims. *See generally* ECF 198.

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subject to prolonged detention, even if, as the Supreme Court found in *Jennings*, § 1225(b) does not impose any limit on the length of detention and certainly says nothing about bond hearings. *See Demore v. Kim*, 538 U.S. 510, 513 (2003). Thus, to the extent Plaintiffs believe, even after *Thuraissigiam*, that they have viable due process claims for release from mandatory detention, those claims must be raised through individual habeas petitions, and not by asserting a general right to bond hearings on a highly expedited timeframe, which § 1225(b)(1) does not provide.

Finally, Plaintiffs argue that § 1252(a)(2)(A)(iv) does not preclude their CF claims because Defendants have not adopted "*any* policy or procedure to implement the statute's system of timely CF interviews for noncitizens in expedited removal." ECF 202, at 5. Notably, Plaintiffs do not refer to any part of the expedited removal statute that might require a CF determination within *ten days* of request, since, after all, § 1225(b)(1) contains no such requirement. The only statute that applies to their CF claims is § 1225(b)(1)(A)(ii), which simply mandates that a noncitizen subject to expedited removal be referred for a CF interview if he or she indicates a fear of persecution, without imposing any deadline.

In sum, where *Thuraissigiam* has elucidated the purpose of § 1252—making clear that the statute exists to limit review over claims relating to the implementation of § 1225(b)(1)—Defendants maintain that the Court should dismiss the Plaintiffs' 4AC under § 1252(a)(2)(A), or order transfer to the District of Columbia under § 1252(e)(3)

B. Plaintiffs do not have any due process right to a bond hearing.

Plaintiffs rest much of their due process argument on principles underlying "civil detention jurisprudence," including "settled usages and modes of proceedings existing in the common and statute law of England." ECF 202, at 7 (internal quotation marks omitted). But Supreme Court decisions are mandatory on this Court and far more salient for resolving the immediate issue—namely, whether due process supplies any basis on which the Bond Hearing Class ("BH Class") could claim an entitlement to bond hearings subject to various procedural strictures. Chief among those binding precedents is *Thuraissigiam*, where the Supreme Court decidedly held that noncitizens on the threshold of entry have "no entitlement to procedural rights other than those

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afforded by statute." 140 S. Ct. at 1964. *Thuraissigiam*, in fact, makes resolution of Plaintiffs' bond hearing claims relatively straightforward, given that § 1225(b)(1) makes no provision for bond hearings at all—let alone bond hearings that would have to be conducted within seven days. *See id.*

Plaintiffs contend that this Court previously found that when a party "challenges the legality of detention or seeks release from confinement," *Thuraissigiam* is rendered "inapposite." ECF 202, at 13 (citing *Jatta v. Clark*, No. 19-cv-02086-MJP-MAT, 2020 WL 7138006, at *2 (W.D. Wash. Dec. 5, 2020)) (cleaned up). They neglect to mention that the case in question centered on prolonged detention under 8 U.S.C. § 1231 and 8 C.F.R. § 241.13(i)(2) (which provides for the revocation of a noncitizen's release in certain circumstances), and that Jatta was not "on the threshold" of entry, having been admitted on a nonimmigrant visa almost two decades prior. *Jatta v. Clark*, No. 19-cv-02086-BJR-MAT, 2020 WL 7700226 (W.D. Wash. July 17, 2020). Here, the situation is different, where Plaintiffs are detained pursuant to § 1225(b)(1)—the very statute at issue in *Thuraissigiam*.

In support of their substantive due process claim, Plaintiffs also rely on cases from the civil commitment context that do not even implicate immigration. ECF 202, at 7-8. As Defendants explained, ECF 200, at 14-15, the Supreme Court has long recognized that immigration detention presents unique concerns, and *Thuraissigiam* succinctly explains that noncitizens like Plaintiffs, who are "on the threshold of initial entry," "cannot claim any greater rights under the Due Process Clause" than what is afforded by statute. 140 S. Ct. at 1963-64.

In their attempt to mitigate *Thuraissigiam*'s impact on their claims, Plaintiffs also cite *Zadvydas v. Davis*, 533 U.S. 678 (2001), for its discussion of the constraints on Congress's "plenary power", ECF 202, at 14, but their reliance on that case is misplaced. In discussing the plenary power, the Supreme Court implemented a framework for habeas review of challenges to post-removal-period detention, but it did not do what Plaintiffs suggest—lend support to the claim that due process entitles them to bond hearings within seven days of being detained pursuant to § 1225(b)(1)(B)(ii). Thus, far from being in tension, *Thuraissigiam* and *Zadvydas* are aligned in

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establishing that a noncitizen "detained shortly after unlawful entry cannot be said to have 'effected an entry'" and has only those procedural rights accorded to them by statute. *Thuraissigiam*, 140 S. Ct. at 1982-83 (quoting *Zadvydas*, 533 U.S. at 693).

Plaintiffs acknowledge that *Demore*—where the Supreme Court held that "[d]etention during removal proceedings is a constitutionally permissible part of that process," 538 U.S. at 530—does not fit into their line of civil commitment cases. ECF 202, at 8. But they assert that *Demore* is an outlier for several reasons, none of which succeed in establishing that the BH Class members are entitled to due process bond hearings. First, Plaintiffs argue that, in construing 8 U.S.C. § 1226(c), *Demore* emphasized the bail risk posed by individuals who "had committed specific crimes," whereas noncitizens like BH class members have "no criminal records." ECF 202, at 8 (citing *Demore*, 538 U.S. at 526, 527-28). That argument, however, assumes too much in its premise that noncitizens detained for expedited removal do not present similar concerns of criminality or potential for transgressions of the law—after all, their first act in this country was to enter illegally, and they may have criminal records from a previous time in the United States or from their home country. Further, the same governmental interest in ensuring that removals can be properly executed for noncitizens detained under § 1226(c) also exists for § 1225(b)(1)(B)(ii). Congress, notably, passed § 1225(b)(1)(B)(ii) after finding that "thousands" of noncitizens arrive in the United States each year, seek "asylum immediately upon arrival," and, when "released into the general population," "do not return for their hearings." H.R. Rep. No. 104-469, 117-18 (1995).

Plaintiffs also claim that *Demore* was predicated on the notion that mandatory detention of criminal noncitizens typically lasts only a few months, whereas the BH Class members here "can expect to spend a median time of five to six months for their protection claims to be adjudicated before the IJ." ECF 202, at 9. Setting aside that the gap between those two time frames is not all that significant, Plaintiffs misread Supreme Court precedent, which affirms the Government's authority to hold noncitizens without bond during the limited period needed to determine their removability. Even in cases where detention might not have a clear end point, the Supreme Court has held that constitutional concerns only become *implicated* after detention has become

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prolonged—which happens only after at least six months. *See Zadvydas*, 533 U.S. at 701.

As for Plaintiffs' procedural due process claim, they are unable to show that an analysis is even warranted. *See United States v. Salerno*, 481 U.S. 739, 746 (1987) (holding that only after a claim "*survives* substantive due process scrutiny" is a procedural due process analysis conducted (emphasis added)). *Thuraissigiam* makes clear that noncitizens at the threshold of entry are not guaranteed any due process rights beyond what statute affords them. Here, § 1225(b)(1) does not provide any right to a bond hearing, and there is no way for Plaintiffs to prevail on their theory that they are owed bond hearings within seven days of a request. *See Thuraissigiam*, 140 S. Ct. at 1964. Plaintiffs claim "a profound interest in preventing their arbitrary detention," relying on the balancing test in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). ECF 202, at 10. But the Supreme Court has "never viewed *Mathews* as an all-embracing test for deciding due process claims." *Dusenbery v. United States*, 534 U.S. 161, 167 (2002). Instead, the proper framework for analyzing the due process claims here is established by *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953): "Whatever the procedure authorized by Congress is, it is due process as far an alien denied [initial] entry is concerned."[4] *Id.* at 212 (internal quotation marks omitted).

Even if this Court were to utilize the *Mathews* test, Plaintiffs completely overlook the other side of the ledger, which asks whether there is a governmental interest, including "the fiscal and administrative burdens that the additional or substitute procedures would entail." 424 U.S. at 321. Here, Congress perceived the detention of inadmissible noncitizens apprehended shortly after entering the country illegally to be a solution to a pressing problem, and Plaintiffs do not dispute that the legislative intent of ensuring that such noncitizens establish an entitlement to enter the country before being released, and also show up for their removal proceedings, is a legitimate governmental interest. *See Salerno*, 481 U.S. at 747.

As for Plaintiffs' claim that the statutory parole process "creates an unacceptable risk of

[4] Plaintiffs argue that national security concerns featured prominently in *Mezei* and so its holding is inapplicable, but *Thuraissigiam* precludes that conclusion, where the Supreme Court cited *Mezei* simply for the broad principle that noncitizens "on the threshold of initial entry stand[] on a different footing" from noncitizens who have developed substantial ties to this country. *Thuraissigiam*, 140 S. Ct. at 1982, 1983; *Mezei*, 345 U.S. at 212.

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the erroneous deprivation of liberty," ECF 202, at 10, that, too, is susceptible to the rule set out in *Mezei* that whatever procedure authorized by Congress "*is* due process" for a noncitizen denied initial entry into the country. *Mezei*, 345 U.S. at 212 (emphasis added). Further, by asking this Court to overhaul the parole system by imposing various procedural constraints that have no statutory basis, Plaintiffs ignore the basic purpose of parole, which is available on a case-by-case basis for "urgent humanitarian reasons or significant public benefit," 8 U.S.C. § 1182(d)(5)(A), and is intended as an "express exception to mandatory detention," *Matter of M-S-*, 27 I. & N. Dec. at 517. The "essential safeguards" that Plaintiffs believe should accompany any consideration of parole—such as in-person hearings and the opportunity to call witnesses—would not only turn the parole process into something akin to full-blown removal hearings, but also impair the ability of agencies to use parole as intended to respond to exigent circumstances.

One other argument Plaintiffs make is that this Court should exercise *de novo* habeas review to determine if detention is unconstitutional. But Plaintiffs elected to bring their challenge as a class action, thereby preventing individualized review. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (holding that "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class"). Indeed, Plaintiffs seek only uniform relief, asking the Court to strike down Defendants' practices regarding CF determinations and bond hearings as unconstitutional on their face. ECF 198, ¶¶ 144, 148, 149, 159, 170, 171. However, "acts of Congress enjoy a strong presumption of constitutionality," and Plaintiffs cannot meet their heavy burden to show that § 1225(b)(1) violates due process. *See Schwenk v. Hartford*, 204 F.3d 1187, 1204 (9th Cir. 2000).

Finally, Plaintiffs claim that they are entitled not only to bond hearings, but to ones that must occur within seven days of request. ECF 202, at 18-19. But that argument, as Defendants have detailed, falls apart in light of *Thuraissigiam*. *See* 140 S. Ct. at 1964 ("no entitlement to procedural rights other than those afforded by statute"); 8 U.S.C. § 1225(b)(1) (no mention of bond hearings). Almost all of the cases Plaintiffs cite do not even arise in the immigration context. ECF 202, at 19. The one immigration case they do reference, *Saravia v. Sessions*, 905 F.3d 1137 (9th

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Cir. 2018), involved unaccompanied minors who enjoy special statutory protections and cannot be "simply process[ed] . . . as other immigrants caught crossing the border." *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1195-96 (N.D. Cal. 2017).

In sum, none of Plaintiffs' arguments alters the conclusion compelled by *Thuraissigiam* that noncitizens in the BH class are not constitutionally entitled to a bond hearing, where § 1225(b)(1) makes no provision for one. Accordingly, Plaintiffs' bond hearing claims—Counts I and II—should be dismissed.

C. Plaintiffs do not have any due process right to a credible fear determination within ten days of request.

In arguing that the Court can grant relief on Count IV, Plaintiffs begin by asserting that *Thuraissigiam* does not change the purported conclusion that due process entitles them to CF determinations within a strict ten-day window. ECF 202, at 20. But that is true only if Plaintiffs are right that *Thuraissigiam* does not bear on any challenge to "prolonged detention, including through delayed credible fear interviews." ECF 202, at 1. They are not. *Thuraissigiam* cannot be cabined just to non-detention-related cases. *See* Argument II.A. Thuraissigiam himself, after all, was a noncitizen *detained* for expedited removal, who, had he succeeded on his challenge "to obtain additional administrative review of his asylum claim," would potentially have been able "to obtain authorization to stay in this country." *Thuraissigiam*, 140 S. Ct. at 1959—Plaintiffs' ultimate goal in their proceedings.

All of the CF Class members are subject to an expedited removal order and will no longer be subject to that order *only* if they demonstrate a credible fear of persecution or torture, *see* § 1225(b)(1)(B)(iii)(I)—making the CF screening the very process through which they may seek relief from removability. Thus, they are different from the petitioners in *Jennings*, for instance, who challenged only the constitutionality of their detention, separate and apart from any aspect of their removal proceedings. Even if the Court were to conclude that Plaintiffs' claims are properly viewed as a challenge to prolonged detention, it would still be required to examine whether the challenge seeks alterations to the process through which the expedited removal order is entered, including the timing of CF determinations. Because such claims arise from—and certainly relate

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to—the implementation of expedited removal orders, even without "adopt[ing] factual allegations beyond those in the complaint," ECF 202, at 21, the Court can and should dismiss Plaintiffs' CF claims, along with the rest of the 4AC. *See* 8 U.S.C. § 1252(a)(2)(A).

D. The APA does not entitle Plaintiffs to any of the relief they seek.

As Plaintiffs concede, the Court already dismissed their claim, Count V, that they are entitled under the APA to CF determinations and bond hearings within their preferred timelines. ECF 91, at 11-13, 16-17. Nothing has changed as to their allegations of administrative delay that would affect the Court's dismissal of Count V.

With respect to both Counts V and VI, Defendants reassert the justiciability arguments from their Motion to Dismiss the 4AC, where they explained that there is no meaningful standard against which the Government's implementation of the expedited removal statute could be assessed.

Defendants also reassert their argument that Count VI is indistinguishable from Count I and, as such, should be dismissed for all the same reasons as Count I. Further, Defendants reassert their argument that Plaintiffs have not identified a final agency action in seeking to impose certain bond hearing procedures and, accordingly, that there is no review under 5 U.S.C. § 706(2).

III. CONCLUSION

For the foregoing reasons, the 4AC should be dismissed in its entirety.

Dated: April 17, 2023

Respectfully submitted,

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I certify that this memorandum contains 4,181 words, in compliance with the Local Civil Rules.

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I HEREBY CERTIFY that on April 17, 2023, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically filed Notices of Electronic Filing.

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