

1 TONY WEST
Assistant Attorney General
2 DAVID J. KLINE
Director, District Court Section
3 Office of Immigration Litigation
VICTOR M. LAWRENCE
4 Principal Assistant Director
THEODORE W. ATKINSON
5 Senior Litigation Counsel
JEFFREY M. BAUER
6 Trial Attorney
EREZ REUVENI
7 Trial Attorney

8 P.O. Box 868, Ben Franklin Station
Washington, DC 20044
9 Telephone: (202) 305-0899; FAX: (202) 616-8962

10 Attorneys for Defendants

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 UELIAN DE ABADIA-PEIXOTO, *et. al.*,)

No. 11-cv-4001 (RS)

15)
16 Plaintiffs,)

**DEFENDANTS' NOTICE OF
MOTION; MOTION TO DISMISS**

17 v.)

18)
Date: November 17, 2011

19 United States Department of Homeland)
Security, *et al.*,)

Time: 1:30 p.m.

Courtroom: Courtroom 3 - 17th Floor

20 _____)
21 **PLEASE TAKE NOTICE** that on November 17, 2011 at 1:30 p.m. or as soon thereafter
22 as the parties may be heard, before the Honorable Richard Seeborg in Courtroom 3, 17th Floor,
23 450 Golden Gate Avenue, San Francisco, California, 94102, Defendants will move the Court for
24 an order dismissing Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

25 Defendants' Motion is based on this notice, the points and authorities in support of this
26 motion, the pleadings on file in this matter, and on such oral argument as the Court may permit.

27 Dated: October 11, 2011

28 Respectfully submitted,

TONY WEST
Assistant Attorney General

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DAVID J. KLINE
Director, District Court Section
Office of Immigration Litigation

THEODORE W. ATKINSON
Senior Litigation Counsel

JEFFREY M. BAUER
Trial Attorney

By:

/s/ Erez Reuveni
EREZ REUVENI
Trial Attorney
U.S. Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
(202) 307-4293; 616-8962 (FAX)
Erez.R.Reuveni@usdoj.gov

TABLE OF CONTENTS

1

2 I. INTRODUCTION 1

3 II. ISSUE PRESENTED..... 2

4 III. STATUTORY AND FACTUAL BACKGROUND. 3

5 A. Statutory and Regulatory Background. 3

6 B. Specific Security Concerns at San Francisco Immigration Court. 4

7 C. Plaintiffs’ Specific Allegations. 5

8 IV. STANDARDS OF REVIEW..... 7

9 A. Rule 12(b)(1) 7

10 B. Rule 12(b)(6). 8

11 V. ARGUMENT..... 8

12 A. Plaintiffs’ Claims are Unripe As They Are Premised On Contingent Future

13 Events Which May Not Occur..... 8

14 B. Even Assuming Plaintiffs Claims Are Ripe They Allege a Facial Constitutional

15 Violation and Therefore Must Demonstrate that Defendants’ Restraints Policy

16 Violates the Constitution as to All Possible Detainees. 10

17 C. Restraining Civil Detainees in Immigration Proceedings Before Immigration

18 Judges Does Not Prejudice Detainees and Therefore Does Not Violate

19 Due Process..... 10

20 1. Immigration Judges Are Presumed, As A Matter of Law, Not to Be

21 Prejudiced By A Detainee’s Appearing Before Them in

22 Restraints..... 11

23 2. Restraining Detainees Before Immigration Judges Does Not Otherwise

24 Impede Any Legitimate Interest in Lawyer-Client Communications or the

25 Detainee’s Ability to Fully Participate in The Judicial Process.. 16

26 i. Plaintiffs Fail to Allege a Due Process Violation Premised on

27 Their Alleged Inability to Participate in their Defense. 17

28 ii. Plaintiffs Fail to Allege a Due Process Violation Premised on

 Their Alleged Inability to Confer Freely With Their

 Counsel. 18

 iii. Plaintiffs Fail to Allege a Due Process Violation Premised on Any

 Alleged Effects Restraints Have on their Dignitary Interest or the

 Decorum of Immigration Proceedings..... 20

 D. Eric Holder, EOIR, and Juan Osuna Are Not Proper Defendants. 20

VII. CONCLUSION. 21

TABLE OF AUTHORITIES

CASES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Ashcroft v. Iqbal,
129 S.Ct. 1937 (2009). 8

Augustine v. United States,
704 F.2d 1074 (9th Cir. 1983). 7

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007). 8, 14

Bell v. Wolfish,
441 U.S. 520 (1979). 14, 15, 17

Biotics Research Corp. v. Heckler,
710 F.2d 1375 (9th Cir. 1983). 7

Bova v. City of Medford,
564 F.3d 1093 (9th Cir. 2009). 1, 9

DeLeon v. Strack,
234 F.3d 84 (2d Cir. 2000). 15

Deck v. Missouri,
544 U.S. 622 (2005). 12, 13

Disabled Rights Action Committee v. Las Vegas Events, Inc.,
375 F.3d 861 (9th Cir. 2004). 3

Duckett v. Godinez,
67 F.3d 734 (9th Cir. 1995). 8, 13

El Rescate Legal Services, Inc. v. EOIR,
959 F.2d 742 (9th Cir. 1992). 1, 10, 12

INS v. Lopez-Mendoza,
468 U.S. 1032 (1984). 8

Illinois v. Allen,
397 U.S. 337 (1970). 13, 16, 17

Jones v. Meyer,
899 F.2d 883 (9th Cir. 1990). 13

Kingman Reef Atoll Invs., L.L.C. v. United States,
541 F.3d 1189 (9th Cir. 2008). 7

Knieval v. ESPN,
393 F.3d 1068 (9th Cir. 2005). 3

Kokkonen v. Guardian Life Ins. Co. Of Am.,
511 U.S. 375 (1994). 7

1 *McCarthy v. United States*,
 850 F.2d 558 (9th Cir. 1988). 3, 7

2

3 *Spain v. Rushen*,
 883 F.2d 712 (9th Cir. 1989). 13, 17, 21

4 *Swift v. Lewis*,
 901 F.2d 730 (9th Cir. 1990). 14, 16, 17

5

6 *Thomas v. Union Carbide Agric. Prods. Co.*,
 473 U.S. 568 (1985). 9

7 *U.S. v. Basher*,
 629 F.3d 1161 (9th Cir. 2011). 4

8

9 *United States v. Howard*,
 480 F.3d 1005 (9th Cir 2007) 2, passim

10 *United States v. Nicholas-Armenta*,
 763 F.2d 1089 (9th Cir. 1985). 2, passim

11

12 *United States v. Salerno*,
 481 U.S. 739 (1987). 10

13 *United States v. Zuber*,
 118 F.3d 101 (2d Cir. 1997). 2, passim

14

STATUTES

15 8 U.S.C. § 1226(c). 5

16

FEDERAL RULES OF CIVIL PROCEDURE

17 Rule 12(b)(1). 1, passim

18 Rule 12(b)(6). 1, 8, 26

19

REGULATIONS

20 8 C.F.R. 1003.19(h)(2)(i)(B). 6

21

22

23

24

25

26

27

28

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Plaintiffs Uelian De-Abadia-Peixoto, Esmar Cifuentes, Pedro Nolasco Jose, and Mi Lian
4 Wei (collectively “Plaintiffs”) are civil immigration detainees in various stages of their removal
5 proceedings in San Francisco Immigration Court. Plaintiffs allege that each of them have been
6 subject to metal restraints around their wrists, ankles and waists pursuant to a district-wide
7 policy requiring restraints during immigration proceedings. Complaint at ¶¶ 2, 4. They further
8 allege that “civil immigration detainees have a constitutional liberty interest in being free from
9 physical restraints” during their immigration proceedings. *Id.* at ¶ 99. On behalf of “all current
10 and future adult immigration detainees who have or will have proceedings in San Francisco
11 Immigration Court,” *id.* at ¶ 9, they seek a declaration that “Defendants’ policies and practices . .
12 . violate Plaintiffs’ rights under the Due Process Clause of the Fifth Amendment.” *Id.*, Prayer
13 for Relief, ¶ 3. In particular, they allege that regardless of the circumstances of each particular
14 civil immigration detainee’s case, no detainee may be restrained during their in-court
15 appearances “without an individualized determination that such restraints are necessary.”
16 *Id.* at ¶ 9.

17 Plaintiffs’ claims fail as a matter of law and should be dismissed pursuant to Fed. R. Civ.
18 P. 12(b)(1) and (6). As an initial matter, Plaintiffs’ claims are unripe. None of the named
19 Plaintiffs has alleged any instance of actual prejudice pursuant to the restraints policy sufficient
20 to satisfy the constitutional ripeness requirement. Rather, their claims “rest upon contingent
21 future events that may not occur as anticipated, or indeed may not occur at all.” *Bova v. City of*
22 *Medford*, 564 F.3d 1093, 1096 (9th Cir. 2009). Moreover, because, Plaintiffs’ blanket challenge
23 to Defendants’ restraints policy is a facial constitutional challenge, they “must establish that no
24 set of circumstances exists under which the [policy] would be valid.” *See El Rescate Legal*
25 *Services, Inc. v. EOIR*, 959 F.2d 742, 751 (9th Cir. 1992). Their allegations fail to do so.

26 As to their specific allegations, each named Plaintiff fails to assert any plausible claim for
27 relief. First, as the Ninth Circuit has already held, mandatory restraints during court appearances
28 are not prejudicial to detainees where no jury is involved. *See United States v. Howard*, 480

III. STATUTORY AND FACTUAL BACKGROUND¹

A. Statutory and Regulatory Background

The Department of Homeland Security (“DHS”) is responsible for providing security in all immigration courtrooms when detained aliens are brought before Immigration Judges. *See* Ex. 1 at 1-3 (Operating Policies and Procedures Memorandum 88-9: Courtroom Security). Pursuant to a Memorandum of Understanding (“MOU”) between the Executive Office for Immigration Review (“EOIR”) and the Immigration and Naturalization Service (now ICE), ICE is responsible for ensuring security during immigration proceedings held within ICE detention facilities and/or in EOIR’s base city courtrooms on behalf of DHS. *See Id.* at 1-3. In particular, ICE agents are charged with ensuring that all EOIR personnel as well as the parties, witnesses, and the public are secure as to their personal safety at all times. *Id.* at 1. ICE retains discretion to ensure such security and Immigration Judges lack the legal authority to challenge final ICE determinations regarding security in specific situations.² *Id.*

B. Specific Security Concerns at San Francisco Immigration Court

¹ The following is based on Plaintiffs’ Complaint, the 1988 Memorandum of Understanding between EOIR and ICE, and the Declaration of Jason M. McClay, which describes the procedural posture of their removal proceedings and is submitted in support of Defendants’ Motion to Dismiss Pursuant to Rule 12(b)(1). Because Plaintiffs reference the MOU in their Complaint, it is appropriate to attach it here. *See, e.g. Knievel v. ESPN*, 393 F.3d 1068, 1075 (9th Cir. 2005). Moreover, because the Declaration of Jason M. McClay is submitted as part of the Government’s Motion to Dismiss pursuant to Rule 12(b)(1), it is appropriate to consider it on a motion to dismiss without converting the motion into one for summary judgment. *See, e.g., McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). In any event the Court may take judicial notice of the facts declared. *See, e.g., Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n.1 (9th Cir. 2004) (taking judicial notice of “record of [] agencies and other undisputed matters of public record”).

² Pursuant to the MOU, Immigration Judges may ask ICE personnel to explain why specific security measures are necessary and may request modification of restraints. Ex. 1 at 2. However, ICE is the final decision making authority regarding whether modifications of restraints pose a security risk. *Id.*

1 The San Francisco Immigration Court at 630 Sansome Street is in a building open to the
2 general public which houses other federal agencies.³ Plaintiffs allege that all criminal detainees
3 brought before Immigration Judges for in-person hearings are restrained. Complaint at ¶¶ 1, 52,
4 56. Once detainees arrive at the courthouse, they are escorted through the building to the
5 courtroom where their hearings are scheduled. *Id.* at ¶ 51.

6 The type of restraints used depend on the type of proceeding. Complaint at ¶¶ 52, 56.
7 Master calendar hearings are group hearings where detainees often appear en masse, sometimes
8 sitting four to a bench. *Id.* at ¶ 52. Detainees are cuffed at the wrists and those cuffs are
9 connected to a “seat-belt”-style restraint fastened around the detainee’s waist. *Id.* Additionally,
10 each detainee’s ankles are chained together. *Id.* In the past, detainees have sometimes been
11 chained to other detainees.⁴ *Id.* Unlike master calendar hearings, when detainees at merits
12 hearings and bond-determinations are restrained, they are not chained to other detainees; they
13 are, however, cuffed on their wrists, and those cuffs are connected to a waist chain, and their
14 ankles are chained to each other. *Id.* at ¶ 56.

15 Despite Plaintiffs’ allegations that all detainees are to be placed in some type of
16 individual restraint during their in-person appearances in immigration court, ICE’s policy
17 governing the use of restraints permits ICE personnel to remove or adjust restraints in order to
18 allow the detainee to adequately participate in the proceeding. Ex. 1 at 3. However, if the
19 responsible security official determines that adjusting a detainee’s restraints is inappropriate, that
20 decision must be deferred to. *Id.*

21 **C. Plaintiffs’ Specific Allegations**

22
23
24 ³ See Visitor Information, Immigration Court San Francisco, California, at
25 www.justice.gov/eoir/sibpages/sfr/visitorinfo.htm. The Court may take judicial notice of this
26 fact. See *U.S. v. Basher*, 629 F.3d 1161, 1165 n.2 (9th Cir. 2011) (taking judicial notice of
27 information on web page “that is available to the public”).

28 ⁴ Plaintiffs’ allegations are contradictory. They allege that detainees are sometimes
“chained to on another” during master calendar hearings. Complaint at ¶ 52. They also allege
that detainees are handcuffed, rather than chained, to other detainees. *Id.* at ¶ 53. Regardless,
they concede that detainees are not always chained one to another. *Id.* at ¶ 52.

1 Plaintiffs are civil immigration detainees in various stages of their removal proceedings
2 before the San Francisco Immigration Court. Complaint at ¶¶ 14-19; 66-97. They allege that the
3 restraints policy violates the Due Process Clause of the Fifth Amendment because, regardless of
4 each Plaintiff's specific circumstances, no detainee may be restrained during in-court
5 appearances "without an individualized determination" that restraints are necessary. *Id.* at ¶ 9.

6 Ms. Abadia-Peixoto is a 35-year-old woman and native of Brazil currently in
7 immigration custody in Yuba County. *Id.* at ¶ 66. She has twice been convicted of possession
8 of cocaine, as well as driving under the influence and inflicting corporal injury on a spouse or
9 cohabitant.⁵ Ex. 2, Decl. of Jason M. McClay, at ¶¶ 4-5. She is currently detained without bond
10 pursuant to 8 U.S.C. § 1226(c) based on her controlled substance convictions. *Id.* She
11 specifically alleges that during one or more appearances in immigration court, she has been
12 restrained in "ankle and wrist restraints and a belly chain" and that on one occasion during
13 transit, but not in court, the restraints caused her to cry out in pain. Complaint at ¶¶ 71-72. She
14 alleges further that her restraints make her feel "like a violent criminal" and "treat[ed] like
15 nothing" and also cause her to remember incidents of domestic abuse. *Id.* at ¶¶ 73-74. Her next
16 court appearance is scheduled for November 2, 2011. Ex. 2 at ¶ 7.

17 Mr. Cifuentes is a 39-year-old man and native of Guatemala currently in immigration
18 custody in Yuba County. Complaint at ¶ 76. He is currently detained without bond, following
19 an Immigration Judge's determination that he poses a danger to the community. Ex. 2 at ¶¶ 9-
20 10. Mr. Cifuentes' prior criminal history includes driving under the influence twice, including
21 once with a blood alcohol level of .29%, possession of a controlled substance, furnishing a false
22 ID to a peace officer, and obstructing/resisting a peace officer. *Id.* He alleges that he appeared
23 in immigration court in "ankle and wrist restraints and a belly chain" on three occasions and that
24 on one occasion he was chained to other immigration detainees and "could not speak
25 confidentially with a consulting attorney." Complaint at ¶¶ 78-79. He further alleges that his
26 restraints cause him discomfort and that on one occasion he has asked ICE officers to adjust his

27 _____
28 ⁵ She has also been charged with, but not convicted of, disorderly conduct / prostitution
on two occasions. Ex. 2 at ¶¶ 4-5.

1 restraints, but was ignored, although he does not indicate if this was in court or in transit. *Id.* at ¶
2 80. He also alleges that the restraints make him feel “punish[ed]” and “humiliated” because
3 people might think he “did something wrong” and that this shame and discomfort make him too
4 embarrassed to answer questions in court. *Id.* at ¶¶ 82-83. Mr. Cifuentes’ next scheduled
5 hearing is on October 18, 2011. Ex. 2 at ¶ 12.

6 Ms. Nolasco is a 32-year-old transgendered woman and native of Mexico currently in
7 immigration custody in Yuba County. *Id.* at ¶ 85. She is currently detained without bond,
8 following an Immigration Judge’s determination that she poses a danger to the community. Ex.
9 2 at ¶¶ 14-15. She has been convicted of driving under the influence on three separate occasions.
10 *Id.* She alleges that she has been restrained in “ankle and wrist restraints and a belly chain” for
11 each of her immigration proceedings and that her restraints make it “difficult and uncomfortable
12 to walk.” Complaint at ¶ 89. She also alleges that her restraints cause her shame because she
13 believes they suggest she is a violent criminal and that her shame and discomfort distract her
14 from “participat[ing] and testify[ing] to her fullest ability.” *Id.* at ¶ 91. She will next appear in
15 immigration court for an asylum hearing on October 12, 2011. Ex. 2 at ¶ 17.

16 Ms. Wei is a 38-year-old woman and native of China, currently in immigration custody
17 in Sacramento County. Complaint at ¶ 92. She is currently detained without bond because of
18 her status as an arriving alien pursuant to 8 C.F.R. § 1003.19(h)(2)(i)(B). Ex. 2 at ¶¶ 19-20. She
19 was previously convicted of being an accessory to cultivation and possession of marijuana for
20 sale under California law. *Id.* She alleges that she has been restrained on “her wrists, ankles,
21 and waist” three times, and that during one trip to San Francisco, she complained to an agent
22 regarding her restraints. Complaint at ¶ 95. She also alleges that her restraints make her “heavy-
23 hearted,” and that while she has yet to engage the court, she fears because she has no attorney
24 her restraints will “interfere with her ability to present her positions” and make her appear to the
25 judge as a “crazy old lady.” *Id.* at ¶ 96. Ms. Wei is currently represented by counsel and is
26 scheduled to appear for a hearing on on December 1, 2011. Ex. 2 at ¶¶ 21-22.

27 All four Plaintiffs further allege that their restraints have caused them to suffer or
28 imminently suffer irreparable injury and seek a declaration enjoining the use of any restraints,

1 regardless of relevant security concerns, without an individualized determination that such
2 restraints are necessary. Complaint at ¶ 101; Prayer for Relief. As explained below, their claims
3 are without merit and should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

4 IV. STANDARDS OF REVIEW

5 A. Rule 12(b)(1)

6 Federal courts are courts of limited jurisdiction, and a lack of jurisdiction is presumed
7 until the party asserting jurisdiction proves otherwise. *Kokkonen v. Guardian Life Ins. Co. Of*
8 *Am.*, 511 U.S. 375, 377 (1994). “Unless the jurisdictional issue is inextricable from the merits of
9 a case, the court may determine jurisdiction on a motion to dismiss for lack of jurisdiction under
10 Rule 12(b)(1) of the Federal Rules of Civil Procedure.” *Kingman Reef Atoll Invs., L.L.C. v.*
11 *United States*, 541 F.3d 1189, 1195 (9th Cir. 2008). “[N]o presumptive truthfulness attaches to
12 plaintiff’s allegations.” *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (internal
13 quotation marks omitted). Moreover, “the district court is not restricted to the face of the
14 pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual
15 disputes concerning the existence of jurisdiction.” *McCarthy*, 850 F.2d at 560; *see also Biotics*
16 *Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983) (consideration of material
17 outside the pleadings did not convert a Rule 12(b)(1) motion into one for summary judgment).

18 B. Rule 12(b)(6)

19 Federal Rule of Civil Procedure 12(b)(6) permits a motion to dismiss a claim for “failure
20 to state a claim upon which relief can be granted[.]” “To survive a motion to dismiss, a
21 complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that
22 is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atlantic*
23 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). However, the court does not accept as true
24 allegations as to legal conclusions. *Iqbal*, 129 S.Ct. at 1949. Accordingly, “[t]hreadbare recitals
25 of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”
26 *Id.* (citing *Twombly*, 550 U.S. at 555). Rather, “[a] claim has facial plausibility when the
27 plaintiff pleads factual content that allows the court to draw the reasonable inference that the
28 defendant is liable for the misconduct alleged.” *Id.* at 1949 (citing *Twombly*, 550 U.S. at 556).

1 Factual allegations that only permit the court to infer “the mere possibility of misconduct” do not
2 survive a motion to dismiss. *Id.* at 1950.

3 V. ARGUMENT

4 A. Plaintiffs’ Claims are Unripe As They Are Premised On Contingent Future Events 5 Which May Not Occur.

6 A removal proceeding is a purely civil action in which the “various protections that apply
7 in the context of a criminal trial do not apply.” *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038
8 (1984). Thus, a removal proceeding need only conform with fundamental due process, meaning
9 that aliens receive a “full and fair” hearing prior to their removal. *United States v. Nicholas-*
10 *Armenta*, 763 F.2d 1089, 1091 (9th Cir. 1985). Therefore, Plaintiffs alleging due process
11 violations in removal proceedings must, as a matter of law, demonstrate “actual prejudice.” *See*
12 *Nicholas-Armenta*, 763 F.2d at 1091; *accord Howard*, 480 F.3d at 1013; *Duckett v. Godinez*, 67
13 F.3d 734, 749 (9th Cir. 1995).

14 For this reason, as an initial matter, Plaintiffs’ claims are unripe for adjudication, as they
15 fail to allege any actual prejudice they suffered as of the time of the filing of their Complaint.
16 “[A] claim is not ripe for adjudication if it rests upon contingent future events that may not occur
17 as anticipated, or indeed may not occur at all.” *Bova*, 564 F.3d at 1096 (internal quotation marks
18 omitted). Here, the named Plaintiffs allege that their appearance at their removal proceedings in
19 restraints has caused and will cause them to suffer or imminently suffer irreparable injury.
20 Complaint at ¶ 101. However, they do not allege any actual prejudice they have suffered in their
21 removal proceedings – namely that but for their restraints they would not have been ordered
22 removed – nor could they. They have not yet been ordered removed or denied relief they seek.
23 Accordingly their claims are unripe, as they do not, and cannot, allege any actual prejudice. *See*
24 *Nicholas-Armenta*, 763 F.2d at 1091. Any such prejudice remains “contingent [on] future events
25 that may not occur as anticipated, or indeed may not occur at all.” *Bova*, 564 F.3d at 1096; *cf.*
26 *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985) (finding ripeness satisfied
27 where issue is purely legal, and is not premised on “contingent future events” or require
28 clarification “by further factual development”).

1 The procedural posture of each Plaintiffs' proceeding makes this clear. Ms. Abadia-
2 Peixoto has yet to have a merits hearing. Ex. 2 at ¶ 7. Mr. Cifuentes is scheduled for a merits
3 hearing on October 18, 2011. *Id.* at ¶ 12. Ms. Nolasco's merits hearing is scheduled for October
4 12, 2011. *Id.* at ¶ 17. Ms. Wei's applications for relief will not be heard until December 1,
5 2011. *Id.* at ¶ 22. Thus no named Plaintiff can plausibly allege any actual prejudice, as their
6 hearings on their requested relief have yet to occur. Accordingly their claims should be
7 dismissed without prejudice as unripe.

8 Moreover, Plaintiffs not only fail, as they must, to allege any actual prejudice; they fail to
9 even allege that they have ever sought modification of their restraints during specific instances
10 where those restraints are alleged to have impeded their ability to participate in their removal
11 proceedings or communicate with their counsel. Indeed, Ms. Abadia-Peixoto, Ms. Nolasco, and
12 Ms. Wei fail to make any such allegation, let alone plausibly. *See* Complaint at ¶¶ 66-75; 85-91;
13 92-97. Mr. Cifuentes appears to allege that he has asked agents to adjust his restraints, *id.* at ¶
14 80, but fails to allege any actual prejudice related to this allegation. For this additional reason,
15 Plaintiffs' claims are unripe and should be dismissed pursuant to Fed. R. Civ. P 12(b)(1).

16 **B. Even assuming Plaintiffs Claims Are Ripe, They Allege a Facial Constitutional**
17 **Violation and Therefore Must Demonstrate that Defendants' Restraints Policy**
18 **Violates the Constitution as to All Possible Detainees.**

19 Assuming, *arguendo*, that Plaintiffs claims are ripe, they nevertheless fail to plead a
20 plausible claim for relief. Plaintiffs allege that "civil immigration detainees have a constitutional
21 liberty interest in being free from physical restraints" during their immigration proceedings in
22 San Francisco Immigration Court. Complaint at ¶ 99. On behalf of "all current and future adult
23 immigration detainees who have or will have proceedings in San Francisco Immigration Court,"
24 *id.* at ¶ 9, they seek a declaration that "Defendants' policies and practices . . . violate Plaintiffs'
25 rights under the Due Process Clause of the Fifth Amendment." *Id.*, Prayer for Relief, ¶ 3. In
26 particular, they allege that regardless of the individual circumstances of each civil immigration
27 detainee's case, no such detainee may be restrained during their in-court appearances "without
28 an individualized determination that such restraints are necessary." *Id.* at ¶ 9.

1 Plaintiffs' blanket challenge to Defendants' restraints policy is a facial constitutional
2 challenge. *See El Rescate*, 959 F.2d at 751 (viewing similar challenge to blanket-policies by
3 DHS in specific judicial districts as a facial challenge). Accordingly, the court should only
4 address whether the restraints policy "can be construed in such a manner that [it] can be applied
5 to a set of individuals without infringing upon constitutionally protected rights." *Id.* (quoting
6 *Rust v. Sullivan*, 500 U.S. 173, 183 (1991)). Plaintiffs "face a heavy burden in seeking to have
7 the [restraints policy] invalidated as facially unconstitutional since the challenger must establish
8 that no set of circumstances exists under which the [policy] would be valid." *Id.* (quoting *Rust*,
9 500 U.S. at 183); *accord United States v. Salerno*, 481 U.S. 739, 745 (1987). Because Plaintiffs
10 fail to demonstrate that under no set of circumstances would the restraints policy be valid, their
11 Complaint must be dismissed.

12 **C. Restraining Civil Detainees in Immigration Proceedings Before Immigration Judges**
13 **Does Not Prejudice Detainees and Therefore Does Not Violate Due Process.**

14 Even assuming Plaintiffs' claims are ripe and not subject to review under the standards
15 governing facial challenges, Plaintiffs nevertheless fail to allege any claims as to each specific
16 named Plaintiff sufficient to survive a motion to dismiss. Plaintiffs' claims fall into two
17 categories. First, Plaintiffs allege that appearing in restraints before an Immigration Judge
18 unfairly prejudices them by portraying them as violent criminals. Complaint at ¶ 38. Second,
19 Plaintiffs allege a series of harms arising from their restraints, including humiliation,
20 embarrassment, and physical pain, which impede their ability to participate in their defense and
21 threatens the privacy and privilege of the attorney-client relationship. *Id.* at ¶¶ 40-41. As
22 explained more fully below, Plaintiffs' allegations fail to state due process claims premised on
23 either type of harm.

24 **1. Immigration Judges Are Presumed, As A Matter of Law, Not to Be**
25 **Prejudiced By A Detainee's Appearing Before Them in Restraints.**

26 Plaintiffs allege that their appearing in restraints prejudices them because their restraints
27 suggest they are criminals or dangerous people. Complaint at ¶ 38, 75, 82, 90, 96. This claim
28 fails as a matter of law because judges are presumed to not be prejudiced by the sight of civil
litigant in restraints.

1 The general rule in criminal proceedings before a jury “is that a court may not order a
2 defendant to be physically restrained unless the court is persuaded by compelling circumstances
3 that some measure is needed to maintain security of the courtroom, and the court must pursue
4 less restrictive alternatives before imposing physical restraints.” *Howard*, 480 F.3d 1005, 1013
5 (9th Cir 2007) (internal quotations marks omitted). However, even in the criminal context,
6 where a defendant appears before a judge, without a jury, the fact that the defendant is in
7 restraints does not prejudice the defendant. This is so because “a judge in a pretrial hearing
8 presumably will not be prejudiced by seeing defendants in shackles.” *Id.*; *accord Deck v.*
9 *Missouri*, 544 U.S. 622, 626 (2005) (“the rule [does] not apply at the time of arraignment, or like
10 proceedings before the judge”); *United States v. Zuber*, 118 F.3d 101, 104 (2d Cir. 1997) (“We
11 traditionally assume that judges, unlike juries, are not prejudiced by impermissible factors.”).
12 Thus, “the rules regarding restraints do not apply in proceedings before a judge, rather than a
13 jury.”⁶ *Id.* at 1014.

14 The Ninth Circuit addressed this issue in *United States v. Howard*. There, criminal
15 defendants challenged a “district-wide restraints policy” which required pretrial detainees to
16 make their first appearance before a magistrate judge wearing leg restraints. 480 F.3d at 1008.
17 The policy was implemented by the United States Marshals Service for the Central District of
18 California after consultation with the magistrate judges, and sought to address security concerns
19 associated with multi-defendant proceedings in an unsecured, large courtroom in a district in
20 which the security personnel must cover several courthouses. *Id.* The defendants in *Howard*,
21 like the Plaintiffs here, contended that the restraints policy violated their due process rights. *Id.*
22 at 1013. Specifically, the defendants argued that “before a defendant can be shackled in front of
23 a jury, the court must be persuaded by compelling circumstances that some measure is needed to
24 maintain security, and that no less restrictive alternatives are available.” *Id.* They also argued

25
26 ⁶ The Ninth Circuit has indicated that even in the context of jury proceedings the
27 argument that “due process requires that there be no restraint whatsoever without an
28 individualized determination . . . may go farther than due process requires.” *Howard*, 480 F.3d
at 1013. However, the Court did not reach that issue, as *Howard*, like this case, “does not
involve the question of restraints in the presence of a jury or during a trial.” *Id.*

1 that due process requires that there be no restraint whatsoever without an individualized
2 determination. *Id.*

3 The Court rejected these claims in the context of non-jury proceedings. Although the
4 Court observed that “the [restraints] policy effectuates some diminution of the liberty of pretrial
5 detainees and detracts to some extent from the dignity and the decorum of a critical stage of a
6 criminal prosecution,” the Court nevertheless concluded that due process was not violated by
7 restraints where the proceeding in question occurred before a judge, rather than a jury. *Id.*
8 Adopting the reasoning of the Second Circuit in *United States v. Zuber*, the Court held that “the
9 rule that courts may not permit a party to a jury trial to appear in court in physical restraints
10 without first conducting an independent evaluation of the need for these restraints does not apply
11 in the context of a non-jury [] hearing[s].” *Id.* (quoting *Zuber*, 118 F.3d at 102). Because the
12 possibility “of juror bias ‘constitutes the paramount concern’ in cases requiring ‘an independent,
13 on the record, judicial evaluation of the need to employ physical restraints in court,’” the
14 reasoning of those cases does not apply in non-jury cases.⁷ *Id.* (quoting *Zuber*, 118 F.3d at 102).
15 The Court separately observed that in *Zuber* it was entirely appropriate for the judges to defer to
16 the Marshals Service’s “judgment regarding ‘precautions to be taken at hearings involving
17 persons who are in custody,’” particularly because “‘where, as here, the court defers without
18 further inquiry to the recommendation of the Marshals Service that a defendant be restrained [],
19 the court will not permit the presence of the restraints to affect its [] decision.’” *Id.* (quoting
20 *Zuber*, 118 F.3d at 102). In short, *Howard* makes clear that where the agency or law
21 enforcement body tasked with making security determinations during court proceedings makes
22 such a determination, courts should defer to those determinations. 480 F.3d at 1013-14; *accord*
23 *Zuber*, 118 F.3d at 102.

24 In an earlier decision in the *Howard* case, subsequently withdrawn, the *Howard* panel
25 articulated more specifically what constitutes the legitimate exercise of discretion in

26 ⁷ Each of the cases cited by *Howard*, “turn[ed] in large part on fear that the jury will be
27 prejudiced by seeing the defendant in shackles.” 480 F.3d at 1013 (citing *Deck*, 544 U.S. at 630;
28 *Illinois v. Allen*, 397 U.S. 337, 344 (1970); *Duckett*, 67 F.3d at 748; *Jones v. Meyer*, 899 F.2d
883 (9th Cir. 1990); *Spain v. Rushen*, 883 F.2d 712 (9th Cir. 1989)).

1 implementing a restraints policy. There, the Court held that regardless of the negative effects
2 appearing in restraints might have on an individual, including affecting their ability to
3 communicate with counsel or participate in proceedings, those restraints raise no due process
4 concern where the restraints are reasonably related to legitimate security concerns. 463 F.3d at
5 1006 (citing *Bell v. Wolfish*, 441 U.S. 520, 539 (1979); *Swift v. Lewis*, 901 F.2d 730, 733 (9th
6 Cir. 1990)). This showing is not onerous. The Government need only produce “some evidence”
7 that the policies are based on legitimate security concerns. *Id.* at 1007. Citing Supreme Court
8 precedent, the Court held that courts must generally defer to the professional expertise of
9 officials:

10 In determining whether restrictions or conditions are reasonably related to the
11 Government's interest in maintaining security and order and operating the
12 institution in a manageable fashion, courts must heed our warning that such
13 considerations are peculiarly within the province and professional expertise of
14 corrections officials, and, in the absence of substantial evidence in the record to
15 indicate that the officials have exaggerated their response to these considerations,
16 courts should ordinarily defer to their expert judgment in such matters.

17 *Id.* (quoting *Bell*, 441 U.S. at 540 n.23). Absent such “substantial evidence,” let alone
18 plausible allegations, that correctional officials are not in fact instituting a security policy
19 reasonably related to legitimate security interests, the Court must defer to the expertise of
20 those charged with securing the court room.⁸

21 *Howard* governs the outcome here. As in *Howard*, immigration proceedings in San
22 Francisco Immigration Court present serious security concerns. The Immigration Court is in a
23 building open to the general public. As in *Howard*, many detainees appear simultaneously in
24 Court at one time. *Id.* at ¶¶ 52, 56. Moreover, as in *Howard*, ICE personnel acting pursuant to a
25 mandate to ensure a secure environment in all immigration courts. Ex. 1 at 1. Specifically,
26 officers must ensure an environment in which all EOIR personnel, as well as the parties,
27 witnesses, and the public are secure as to their personal safety at all times. *Id.* Pursuant to the
28 MOU, EOIR defers to ICE’s expertise on the appropriate management of the detained

⁸ It is black letter law that where legitimate security interests exist, official action is not subject to “least restrictive” means analysis. *See Bell*, 441 U.S. at 551 n.32.

1 individuals. *Id.* Given that security measures are taken pursuant to that mandate and in reliance
2 on agency expertise, the San Francisco policy is a legitimate exercise of ICE’s responsibilities
3 and therefore cannot serve as the basis for any due process claim, regardless of whether that
4 claim is premised on prejudice before a jury, an alleged inability to participate in legal
5 proceedings, imposition on attorney-client relations, or dignitary interests.⁹ *See Howard*, 480
6 F.3d at 1013-14; 463 F.3d at 1006-07.

7 Regardless, because Plaintiff do not allege, let alone point to “substantial evidence [] that
8 the officials have exaggerated their response to” security considerations, the Court “should
9 “defer to their expert judgment in such matters.” *Bell*, 441 U.S. at 540 n.23. Indeed Plaintiffs’
10 complaint is devoid of any allegation, plausible or otherwise, that the restraints policy is
11 anything other than legitimate, let alone “exaggerated.” *Id.* Accordingly, they fail to plead a
12 plausible claim for relief sufficient to overcome the Government’s legitimate security concerns
13 in this case.

14
15
16 ⁹ To the extent that Plaintiffs premise their claims for relief on the fact that ICE officials
17 responsible for security are biased by virtue of the fact that other ICE employees are responsible
18 for representing the Government’s interests in removal proceedings, that distinction is meritless.
19 The Ninth Circuit in *Howard* rejected this distinction. *Id.* at 1014. Indeed, *Howard* cited with
20 approval a Second Circuit case, *DeLeon v. Strack*, 234 F.3d 84, 87-88 (2d Cir. 2000), which
21 expressly rejected that argument. 480 F.3d at 1013. In particular, *Howard* cited *DeLeon* for the
22 proposition that a judge need not exercise independent judgment as to the necessity for restraints
23 where restraints will not be visible to a jury and where corrections officials have concluded
24 restraints are necessary. *See id.* (quoting *DeLeon*, 234 F.3d at 87-88) (citing with approval
25 *DeLeon* panel’s rejection of “the argument that the state trial judge ‘improperly delegated the
26 decision regarding whether or how to restrain him to a corrections official rather than
27 independently evaluating the need for the restraint,’ and reasoning that, ‘even if the state judge
28 did not exercise independent judgment, it is not clear that such an independent exercise of
discretion is even required when restraints will not be visible to a jury”). This reasoning is
equally applicable here. EOIR, and by extension Immigration Judges in San Francisco, defer to
ICE’s determinations regarding security during immigration proceedings. Ex. 1 at 1-3. Not only
is that deference required by law, but it is entirely appropriate where, as here, the restrained
detainees appear before a judge, rather than a jury and the restraints further legitimate security
objectives. *See Howard*, 480 F.3d at 1013; *DeLeon*, 234 F.3d at 87-88. Accordingly, the fact
that ICE, rather than the Immigration Judges or EOIR, determined that restraints are necessary in
the first instance is irrelevant.

1 **2. Restraining Detainees Before Immigration Judges Does Not Otherwise**
2 **Impede Any Legitimate Interest in Lawyer-Client Communications or the**
3 **Detainee’s Ability to Fully Participate in The Judicial Process.**

4 Plaintiffs also allege generally that restraints impede an alien’s ability to participate in
5 their defense and to communicate freely with their attorneys. Complaint at ¶¶ 38-42; 66-97.
6 They allege that they suffer physical pain and discomfort, embarrassment, humiliation, mental
7 and emotional distress which impedes their “mental acuity, confidence, and energy necessary to
8 participate fully and fairly in immigration proceedings” and limits their ability to take notes,
9 raise their hands to be sworn in, or to gesture during proceedings. *Id.* ¶¶ 38, 40-41. They also
10 allege that their restraints impede the “privacy and privilege of the attorney-client relationship”
11 by forcing detainees to disclose personal information in front of other detainees or withhold that
12 information in situations where other detainees are close by. *Id.* at ¶ 41.

13 As explained above, such claims are not cognizable where detainees do not appear before
14 a jury or where restraints are required by legitimate security concerns. *See Howard*, 480 F.3d at
15 1013. (holding that regardless of whether restraints “policy effectuates some diminution of the
16 liberty of pretrial detainees and detracts to some extent from the dignity and the decorum of a
17 critical stage of a criminal prosecution,” where the “policy was adopted with an adequate
18 justification of its necessity” and Plaintiffs fail to demonstrate prejudice, no due process claim
19 arises); *Zuber*, 118 F.3d at 103 & n.2 (holding that although the restraints rule may serve other
20 interests, including precluding an “affront to the very dignity and decorum of judicial
21 proceedings” or impeding a defendant’s “ability to communicate with his counsel,” those
22 interests do not provide the basis of a due process claim where the judge deferred to the
23 judgment of the agency responsible for courtroom safety and where “no prejudice to the
24 defendant will result.”). Accordingly, Plaintiffs may not raise due process claims based on their
25 restraints’ alleged interference with their ability to participate in their proceedings, communicate
26 with counsel, or dignitary interests. *See Howard*, 480 F.3d at 1013; 463 F.3d at 1006-07.

27 Assuming, *arguendo*, that such claims are cognizable, Plaintiffs’ claims must
28 nevertheless be dismissed as they fail to allege, let alone plausibly, that their alleged inability to
 participate in their defense or to confer with counsel has caused them actual prejudice, meaning

1 the denial of the relief they seek in removal proceedings. In the context of non-jury proceedings,
2 criminal or otherwise, these claims cannot serve as the basis of a due process claim.

3 **i. Plaintiffs Fail to Allege a Due Process Violation Premised on Their**
4 **Alleged Inability to Participate in their Defense**

5 The Ninth Circuit has suggested, in the context of restraints before a jury, that a criminal
6 defendant's inability to participate in his or her defense could raise due process concerns where
7 restraints impair their mental faculties or cause physical pain. *See Spain v. Rushen*, 883 F.2d
8 712, 719 (9th Cir. 1989). As discussed, these cases have no bearing in the civil immigration
9 context given the absence of a jury and the existence of legitimate security concerns.
10 Regardless, such a claim, if cognizable, would at minimum require Plaintiffs to plausibly allege
11 that their restraints have in fact caused them actual prejudice.

12 Each Plaintiff alleges generally that they have appeared before Immigration Judges in
13 "ankle and wrist restraints and a belly chain." *Id.* at ¶¶ 71, 79, 89, 95. As to their ability to
14 participate in their defense, they specifically allege as follows: Ms. Abadia-Peixoto alleges that
15 the restraints aggravate a previous injury, remind her of prior domestic abuse, and make her feel
16 "like nothing." *Id.* at ¶¶ 72-75. Ms. Wei alleges that her restraints could render her nervous and
17 intimidated in future proceedings and leaves her "heavy-hearted." *Id.* at ¶ 96. Both Ms. Abadia-
18 Peixoto and Ms. Wei fail to plausibly allege that restraints actually impede their ability to
19 meaningfully participate in their immigration proceedings, let alone cause them actual prejudice
20 in the form of wrongful removal orders or denials of relief. Their claims thus fail as a matter of
21 law. *See Howard*, 480 F.3d at 1008; *see Nicholas-Armenta*, 763 F.2d at 1091.

22 Although Mr. Cifuentes and Ms. Nolasco do allege that their restraints affect their ability
23 to participate in their defense, their allegations also fail to allege actual prejudice. Mr. Cifuentes
24 alleges that his foot falls asleep and that his body aches as a result of restraints, causing him
25 discomfort and confusion. *Id.* at ¶¶ 80-83. Ms. Nolasco alleges that the restraints cause her
26 discomfort and embarrass her, making her nervous and impeding her ability "to participate and
27 testify to her fullest ability." *Id.* at ¶¶ 89-90. Neither Plaintiff articulates specific, plausible
28 factual matter from which the court could infer that Plaintiffs are in fact unable to participate in

1 their legal defense, let alone have suffered actual prejudice as a result. *See Nicholas-Armenta*,
2 763 F.2d at 1091. Accordingly, their claims fail as a matter of law.¹⁰ *See Howard*, 480 F.3d at
3 1008.

4 In addition, both Ms. Abadia-Peixoto and Mr. Cifuentes allege that their due process
5 rights have been violated by virtue of their restraints affecting their ability to raise their hand to
6 be sworn in for testimony. Ms. Abadia-Peixoto's claim is entirely hypothetical, as she does not
7 in fact allege that she has been unable to be sworn in. Rather, she alleges that in the event that
8 she does have to testify, she may not be able to raise her hand. Complaint at ¶ 71. Mr. Cifuentes
9 at least suggests that he in fact was not able to raise his hand to be sworn in during his bond
10 hearing. *Id.* at ¶ 79. But both fail to allege, let alone plausibly, that their hypothetical or actual
11 inability to raise their hands somehow actually impedes their ability to defend themselves. They
12 do not, and cannot, allege that they were unable to provide testimony in their defense as a result.
13 Absent such allegations, coupled with a showing of actual prejudice, these claims are meritless

14 **ii. Plaintiffs Fail to Allege a Due Process Violation Premised on Their**
15 **Alleged Inability to Confer Freely With Their Counsel**

16 The Ninth Circuit has also suggested, in the context of restraints before a jury, that a
17 criminal defendant's inability to confer with their counsel could raise due process concerns. *See*
18 *Spain*, 883 F.2d at 719. However, as discussed, these cases have no bearing in the civil
19 immigration context given the absence of any jury and the existence of legitimate security
20 concerns.

21 Even were such a claim cognizable, Plaintiffs fail to plausibly allege that their restraints
22 have in fact caused them actual prejudice. Ms. Abadia-Peixoto, Ms. Nolasco, and Ms. Wei make
23 no specific allegations whatsoever that their restraints have in any way impeded their ability to
24 communicate with their attorneys or that they have been forced to reveal personal or confidential

25 ¹⁰ Mr. Cifuentes does appear to allege that on one occasion he requested that his restraints
26 be adjusted. Complaint at ¶ 80. The allegation is vague, and does not indicate if this request
27 was made in court or made during transit. *Id.* Even so, the Mr. Cifuentes fails to link his claim
28 to any actual prejudice he has suffered. Ms. Abadia-Peixoto similar, and vaguely, alleges that
she requested that her restraints be modified on one occasion, but it appears that this allegation
refers to restraints during transit rather than in court. *Id.* at ¶ 72. In any event, she fails to link
this allegation to any actual prejudice she has suffered.

1 information in front of other detainees or otherwise withhold relevant information out of fear of
 2 embarrassment. *Id.* at ¶¶ 66-75; 85-97. Only Mr. Cifuentes makes any such allegation, asserting
 3 that on one occasion “he was chained to other immigration detainees in such a fashion that he
 4 could not speak confidentially with a consulting attorney.” *Id.* at ¶ 78. Because Plaintiffs limit
 5 their proposed class to individuals restrained during immigration proceedings, presumably this
 6 allegation refers to consulting an attorney during master calendar hearings.¹¹ Even so, Mr.
 7 Cifuentes fails to allege with any plausible specificity facts supporting the inference that this one
 8 alleged instance in any way actually prejudiced him. Indeed, the general policy in San Francisco
 9 is that ICE agents may modify detainee’s restraints if security so permits. *Ex. 1* at 2-3. Mr.
 10 Cifuentes makes no allegation that he made any such request, let alone that he was denied relief
 11 or wrongly ordered removed. Accordingly, all four named Plaintiffs fail to state a claim for
 12 relief based on any alleged harm their restraints caused their ability to communicate with
 13 counsel. *See Howard*, 480 F.3d at 1008.

14 **iii. Plaintiffs Fail to Allege a Due Process Violation Premised on Any**
 15 **Alleged Effects Restraints Have on their Dignitary Interest or the**
 16 **Decorum of Immigration Proceedings**

17 The named Plaintiffs also make allegations regarding “dignitary” harms their restraints
 18 cause them. Complaint at ¶¶ 75, 83, 90, 96. These general allegations are not cognizable under
 19 the Due Process Clause in the context of immigration proceedings. It is true that the Ninth
 20 Circuit in *Howard* observed in passing that a restraints policy during arraignment “effectuates
 21 some diminution of the liberty of pretrial detainees and detracts to some extent from the dignity
 22 and the decorum of a critical stage of a criminal prosecution.” 480 F.3d at 1008. However, the

23 ¹¹ Mr. Cifuentes’ allegations fail to allege that the “consulting attorney” he refers to was
 24 his attorney or that he sought to establish an attorney/client relationship with him. It is unclear
 25 from that cursory allegation whether the “consulting attorney” was Mr. Cifuentes’ counsel such
 26 that the use of restraints violated his due process right to counsel, let alone that his alleged
 27 inability to confer with that “consulting attorney” resulted in any sort of cognizable prejudice. In
 28 any event, as Plaintiffs appear to concede, “detainees typically are not shackled to other
 detainees during bond and individual merits hearings . . .” Complaint at ¶ 56. Accordingly,
 even if Mr. Cifuentes’ allegations are read to in fact assert an attorney/client relationship with
 the “consulting attorney,” by Plaintiffs’ own admission, the due process right to counsel would
 not be prejudiced. Mr. Cifuentes’ allegations therefore fail to raise a plausible claim of
 interference with attorney/client relations.

1 Court did not hold that such “are irrelevant in a non-jury context. *Id.* at 1012. Accordingly,
2 Plaintiffs may not allege a due process claim based on decorum, dignity interest, or otherwise,
3 and there claims should be di diminution of liberty” or detraction of “dignity” and “decorum”
4 raised due process concerns. Instead, the Court stated that such concerns smissed. *Howard*, 480
5 F.3d at 1113.

6 **D. Eric Holder, EOIR, and Juan Osuna Are Not Proper Defendants**

7 Assuming, *arguendo*, that Plaintiffs state plausible claims for relief, Defendants Eric
8 Holder, EOIR, and Juan Osuna must nevertheless be dismissed. Plaintiffs’ allegations and
9 request for relief regarding ICE’s restraints policy concern actions taken by ICE that are entirely
10 within ICE’s discretion. Neither EOIR or its Director, Mr. Osuna, nor the Department of Justice
11 or the Attorney General, have taken any action the Court can order them to remedy. *See Ex. 1 at*
12 *1-3*. Accordingly, they should be dismissed from this lawsuit.

13 Even assuming EOIR is an appropriate party, which it is not, Plaintiffs fail to allege any
14 plausible facts indicating EOIR caused them any harm. Plaintiffs conclusorily allege that EOIR
15 “has refused to exercise its legal responsibility to regulate the conduct of immigration court
16 hearings.” Complaint at ¶¶ 5, 64. According to Plaintiffs this includes making individualized
17 determinations regarding the need for restraints. Not only is this conclusory claim insufficient to
18 allege a plausible cause of action, but, as explained, no such constitutional requirement exists in
19 the non-jury context. *See, e.g., Howard*, 480 F.3d 1005, 1013-14. In any event, EOIR lacks
20 legal authority to modify final security determinations at specific proceedings. *Ex. 1 at 1-3*.
21 Accordingly, EOIR cannot remedy the alleged harms Plaintiffs complain of and should be
22 dismissed from this case.

23 **VII. CONCLUSION**

24 For the reasons stated above, Defendants respectfully request that this Court dismiss
25 Plaintiff’s Complaint for failure to state a claim.
26
27
28

1 Dated: October 11, 2011

Respectfully submitted,

2 TONY WEST
Assistant Attorney General

3 DAVID J. KLINE
4 Director, District Court Section
Office of Immigration Litigation

5 THEODORE W. ATKINSON
6 Senior Litigation Counsel

7 JEFFREY M. BAUER
Trial Attorney

8 By:

/s/ Erez Reuveni
EREZ REUVENI
Trial Attorney
U.S. Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
(202) 307-4293; 616-8962 (FAX)
Erez.R.Reuveni@usdoj.gov

12
13 **CERTIFICATE OF SERVICE**

14 I hereby certify that on this 11th day of October 2011, I electronically filed the foregoing
15 with the Clerk of Court by using the CM/ECF system, which provided an electronic notice and
16 electronic link of the same to all attorneys of record through the Court's CM/ECF system.

17
18 /s/ Erez Reuveni
EREZ REUVENI
Trial Attorney
Office of Immigration Litigation,
District Court Section
U.S. Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, DC 20044

22
23
24
25
26
27
28