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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UELIAN DE ABADIA-PEIXOTO, *et al.*, Plaintiffs, vs. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*, Defendants.	Case No. CV 11-4001 RS **CLASS ACTION** **OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** Hearing Date: Nov. 17, 2011 Hearing Time: 1:30 p.m.

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I. INTRODUCTION

Plaintiffs challenge Defendants' blanket policy and practice of subjecting them—and all other immigration detainees—to hard metal shackles around their wrists, waists, and ankles during their appearances in San Francisco Immigration Court, without a showing of need. Forcing Plaintiffs to appear, confront witnesses, and testify in chains violates their rights to substantive and procedural due process under the Fifth Amendment to the United States Constitution. Defendants raise a handful of arguments in their Motion to Dismiss, none of which can be sustained. In particular, Defendants' insistence on a showing of "prejudice" is misplaced because Plaintiffs seek prospective relief against ongoing due process violations. Plaintiffs have suffered and—unless the practice is enjoined—will continue to suffer physical and mental injuries, dignitary harms, and interference with their ability to participate fully and fairly in potentially life-altering immigration proceedings. Defendants' lead case, *United States v. Howard*, does not control this case, which presents a question of first impression: Does the Constitution allow imposition of shackles on detainees at all civil immigration hearings without individualized review as to their necessity for security purposes?

II. FACTUAL BACKGROUND

A. Immigration and Customs Enforcement: Guidelines Relevant to Shackling

Defendant Immigration and Customs Enforcement ("ICE") is a component of Defendant U.S. Department of Homeland Security ("DHS"). ICE issues Notices to Appear (the charging document that initiates removal proceedings) and makes initial custody determinations for persons charged with civil immigration violations. 8 U.S.C. § 1229(a) (2006); 8 C.F.R. § 287.3 (2011). DHS is deemed a party to proceedings before Immigration Courts, represented by ICE through ICE Trial Attorneys.[1]

ICE also oversees detention of immigrants in custody and transports them to their immigration proceedings. According to ICE's detention standards, ICE personnel (or their local agents) classify all immigration detainees according to security risk at the outset of detention:

[1] U.S. Dept. of Justice, Immigration Court Practice Manual, § 1.5(e), p. 9 (2009) (*available at* http://www.justice.gov/eoir/vll/OCIJPracManual/Practice_Manual Final_compressedPDF.pdf).

> Staff shall use facts and other objective, credible evidence documented in the detainee's A-file, criminal history checks, or work-folder during the classification process. Relevant considerations include current offense(s), past offense(s), escape(s), institutional disciplinary history, documented violent episodes and incidents, medical information, and a history of victimization while in detention.

U.S. Dept. of Homeland Security, 2008 Operations Manual ICE Performance Based National Detention Standards (2008) ("Detention Standards"), Ch. 5, "Classification System," p. 4.[2] Pursuant to ICE's detention standards on transportation, ICE agents must individually assess, record justifications in a log, and arrange detainees according to security risk while in transit. Detention Standards, Ch. 3, "Transportation (By Land)," p. 9. As a general rule, ICE agents are to refrain from handcuffing women, and must record facts and reasoning if they do decide to handcuff women. *Id.* at p. 12. ICE agents are only to use instruments of restraint in detention "as a precaution against escape during transfer," "for medical reasons," "or to prevent…injury" or "property damage." Detention Standards, Ch. 18, "Use of Force and Restraints," p. 3.

B. Executive Office of Immigration Review: Duties and Authority of Immigration Judges

Defendant Executive Office of Immigration Review ("EOIR") is the component of the Department of Justice charged with administering Immigration Courts nationwide.[3] Immigration Judges, who are part of EOIR, conduct hearings on removal and on petitions for affirmative immigration relief, such as asylum. 8 C.F.R. §§ 1208.2(b), 1208.14(a), 1240.1(a), 1240.31, 1240.41 (2011). Immigration Judges are authorized by statute and regulation to, *inter alia*:

- review ICE's custody determinations, including continuing detention, releasing the respondent, or setting the amount of bond if any;
- receive and consider material and relevant evidence, rule upon objections, and otherwise regulate the course of the hearing; and
- make credibility determinations based on the totality of the circumstances including "the demeanor, candor, or responsiveness of the applicant or witness."

8 U.S.C. §§ 1229a(b)(1), (c)(4)(C), 1158(b)(1)(B)(iii) (2006); 8 C.F.R. § 1240.1(c) (2011).

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[2] The full Detention Standards are available at http://www.ice.gov/detention-standards/2008/ and are divided into Parts, which are further divided into chapters. For the Court's convenience, we cite to particular chapter numbers within the Detention Standards and attach copies of the cited chapters in Plaintiffs' Request for Judicial Notice, filed herewith.

[3] U.S. Dept. of Justice, *supra* note 1, at 1-2, 7.

C. Immigration Detention

ICE runs the largest civil detention and supervised release program in the country, with more than thirty-one thousand immigrants in detention at more than three hundred facilities throughout the nation. Complaint, Dkt #1 ("Compl.") ¶ 42. Individuals are held in detention for a variety of reasons. They may initially be denied bond by an ICE agent, or be unable to post the bond set, and later be ordered released by an Immigration Judge. Compl. ¶ 43, 8 C.F.R. § 1236.1(d). They may be detained pending adjudication of an application for relief such as asylum, a visa under the Violence Against Women Act, or cancellation of removal based on family hardship. Compl. ¶ 45. They may be subject to mandatory detention based on minor, non-violent offenses. 8 U.S.C. § 1226(c) (2006); *Planes v. Holder*, 652 F.3d 991 (9th Cir. 2011) (conviction for passing bad check constituted "crime of moral turpitude"). In 2009, ICE reported that approximately 95% of immigration detainees were not violent felons. Compl. ¶ 45.

D. Challenged Practices and Impact on Plaintiffs

Despite ICE Detention Standards requiring classification of detainees according to security risk and limiting use of restraints, Defendants have a blanket practice of requiring all detained immigrants to appear in San Francisco Immigration Court in shackles—hard metal restraints around their ankles, wrists, and waists. This practice is applied across the board—to refugees fleeing persecution and torture in their native countries, the elderly, and the physically and mentally disabled—with no review of the need for restraints for particular detainees. Compl ¶¶ 4, 36. During master calendar hearings, detainees are often chained to one another in what is euphemistically called a "daisy chain." Compl. ¶ 52.

For many detainees, the shackles cause pain and discomfort. Compl. ¶¶ 72 (De Abadia-Peixoto suffers pain, bruising and swelling); 80 (Cifuentes suffers "intense pain," "bruises and marks"); 89 (Nolasco suffers raised veins, swelling, and pain); 95 (Wei complained that shackles were tight and left marks). In addition, shackling causes emotional and psychological injury such as humiliation and shame, and extremely serious injury for detainees who have been bound or tortured in the past. Compl. ¶¶ 39, 60, 73 (shackles reignite De Abadia-Peixoto's prior traumatic experiences of being bound and raped). Shackling impedes an individual's mental

acuity, confidence, and energy necessary to participate fully and fairly in immigration proceedings. Compl. at ¶¶ 40, 80, 83 (shackles distract Cifuentes from proceedings, negatively impacting his ability to concentrate and answer questions); 90 (Nolasco feels ashamed and finds it difficult to look at Immigration Judge's face during her hearing); 96 (shackles make Wei feel very unhappy, nervous and intimidated). Moreover, shackles interfere with a detainee's ability to take notes or manipulate documents. Compl. ¶ 41, 56, 57. Shackling burdens the privacy and privilege of the attorney-client relationship. It forces detainees to choose between disclosing personal, and sometimes humiliating, details within earshot of other detainees or withholding from their counsel information that could be crucial to their cases. Compl. ¶ 41, 53.

At the time the Complaint was filed, Named Plaintiffs Uelian De Abadia-Peixoto, Esmar Cifuentes, Pedro Nolasco Jose, and Mi Lian Wei were all in ICE custody, had been victims of ICE's blanket shackling practices, and had merits hearings scheduled in the near future in which they expected to be shackled in accordance with ICE's blanket practice. Compl. ¶¶ 7, 16-19. All of the Named Plaintiffs suffered physical injury, emotional and/or psychological injuries, or interference with their ability to fully and fairly participate in their immigration proceedings as a result of Defendants' conduct in shackling them. Compl. ¶¶ 70-75, 78-83, 88-90, 95-96. None of the Named Plaintiffs would pose any risk of flight or threat to the safety and security of the courtroom if allowed to appear without physical restraints. Compl. ¶ 74, 81, 91, 97.

III. ARGUMENT

A. Standards of Review

A jurisdictional attack under Federal Rule of Civil Procedure 12(b)(1) can prevail if the complaint on its face fails to allege facts sufficient to establish subject matter jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "Alternatively, a defendant may seek dismissal under Rule 12(b)(1) by presenting evidence to refute the jurisdictional facts alleged in the complaint." *Proofpoint, Inc. v. InNova Patent Licensing, LLC*, No. 5:11–CV–02288–LHK, 2011 WL 4915847 (N.D. Cal. Oct. 7, 2011), citing *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.,* 594 F.2d 730, 733 (9th Cir. 1979); *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 (9th Cir. 2003). However, where jurisdictional facts are intertwined with

the merits, defendants must proceed under either Rule 12(b)(6) or Rule 56, and the court should resolve relevant factual disputes only after discovery. *Augustine v. U.S.*, 704 F.2d 1074, 1079 (9th Cir. 1983).

In considering a motion to dismiss for failure to state a claim under Rule 12(b)(6), the Court must accept all factual allegations in the complaint as true, construe the pleadings in the light most favorable to the nonmoving party, and draw all reasonable inferences in favor of the plaintiff. *Ass'n for Los Angeles Deputy Sheriffs v. County of Los Angeles*, 648 F.3d 986 (9th Cir. 2011). Documents referred to in the complaint may be considered without converting the Rule 12(b)(6) motion into a motion for summary judgment, but any ambiguity in the documents must be resolved in favor of the plaintiffs. *Knievel v. ESPN*, 393 F.3d 1068, 1076-77 (9th Cir. 2005); *Int'l Audiotext Network, Inc. v. AT&T*, 62 F.3d 69, 72 (2d Cir. 1995). Plaintiffs succeed in stating a claim for relief by pleading "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

B. Plaintiffs' Claims Are Ripe

Defendants begin by challenging the ripeness of Plaintiffs' claims because Plaintiffs have not yet been ordered deported due to shackling at their merits hearings. Defendants' Motion to Dismiss filed October 11, 2011, Dkt. # 33 ("MTD") at 8:19-22.[4] This argument—and indeed Defendants' insistence on allegations of "prejudice" throughout their motion to dismiss—fundamentally misunderstands both Plaintiffs' claims and the Court's authority to prospectively enjoin an ongoing policy and practice of unconstitutional conduct. In fact, Plaintiffs have alleged cognizable injuries that do not depend on the outcome of their immigration proceedings.

[4] In support of their motion, Defendants submitted a declaration alleging facts about the Named Plaintiffs' immigration proceedings, immigration status, and arrest records. MTD, Exh. 2. However, the only facts submitted that are arguably relevant to Defendants' jurisdictional challenge are the dates of Plaintiffs' individual hearings. Defendants' submission of extraneous information was inappropriate, and these additional facts are not properly before the court for purposes of this motion. *See Augustine*, 704 F.2d at 1079; *Lopez v. HMS Host*, No. C 09-04930 SI, 2010 WL 199716, at *2 (N.D. Cal. Jan. 13, 2010) (facts contained in a declaration that are "immaterial to the Court's resolution" of a motion "are not appropriate for consideration.").

1. Plaintiffs' Injuries Are Immediate and Ongoing

The "basic rationale" of ripeness "is to prevent the courts . . . from entangling themselves in abstract disagreements" because of "premature adjudication." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Plaintiffs allege that they have been and will be shackled—pursuant to Defendants' blanket practice of shackling all detainees—at preliminary master calendars, bond hearings, and merits hearings. Defendants do not offer evidence to the contrary in support of their Rule 12(b)(1) motion, but instead imply that shackling at master calendar or bond hearings could not, as a matter of law, be prejudicial. However, due process is required at ***all*** stages of the deportation process. *See Singh v. Holder*, 638 F.3d 1196, 1208 (9th Cir. 2011) (due process requires record be made of bond hearing); *Khan v. Aschcroft*, 374 F.3d 825, 830 (9th Cir. 2004) (due process may, in some circumstances, require translation for master calendar hearing); *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 n.2 (9th Cir. 2004) (notice of right to counsel must be provided in Order to Show Cause and Notice to Appear).

Here, all of the Plaintiffs' cases are ongoing and their merits hearings are likely to be held and completed within a short period of time. In particular, Plaintiffs alleged, and Defendants' proffered evidence does not dispute, that Mr. Cifuentes's merits hearing began August 16, 2011. Compl. ¶ 84. Plaintiffs seek immediate class certification so that resolution of the Named Plaintiffs' cases does not defeat review of these ongoing due process violations against members of an inherently transitory class. If Defendants' understanding of ripeness doctrine were correct, Plaintiffs' claims would become moot before they were ever deemed ripe.[5] This untenable result would preclude review of ongoing, but inherently transitory, constitutional violations.

In addition, Plaintiffs allege cognizable injuries based on shackling ***itself***—apart from any impact on their proceedings. Compl. ¶¶ 1, 7, 16-19. Defendants' shackling practices have subjected and will continue to subject Plaintiffs to physical restraint, freedom from which has

[5] Because Plaintiffs have moved for class certification of an inherently transitory class, the "relation back" doctrine allows any Named Plaintiff whose removal proceedings or detention have ended to act as a class representative. *See Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975).

long been considered a fundamental interest. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). In addition to the constitutional injury of being denied such freedom without due process, it is well established that handcuffing a person without justification in a manner that causes pain is a cognizable injury. *Meredith v. Erath*, 342 F.3d 1057, 1063 (9th Cir. 2003) (officer not entitled to qualified immunity for unlawful detention claim founded upon allegations of painful handcuffing for thirty minutes). Where imposition of unlawful restraints also leads to public humiliation and emotional distress, such injuries are actionable. *H.C. by Hewlett v. Jarrard*, 786 F.2d 1080, 1088 (11th Cir. 1986) ("Emotional injury is actionable under section 1983 for humiliation, embarrassment, and mental distress resulting from the deprivation of a constitutional right").

Because Plaintiffs have suffered and will continue to suffer concrete harm from Defendants' shackling practices, Defendants' reliance on *Bova v. City of Medford*, 564 F.3d 1093 (9th Cir. 2009), is misplaced. There, city employees sued over the cancellation of retiree benefits and the court found that the plaintiffs might never be harmed for a variety of reasons: they might quit, face termination, or die before retirement; or the city might change its policy, if it was not first "force[d]...to do so" in a separate case brought by actual retirees. *Id.* at 1094, 1097. Because any one of these contingencies could foreclose the plaintiffs' harm, there was no "concrete and particularized" injury. *Id*. at 1097. Here, by contrast, there are no contingencies. Regardless of the impact shackling may have on the outcome of their removal hearings, the harm Plaintiffs seek to redress is immediate, concrete, and ongoing.

2. Defendants' Unconstitutional Shackling Practice Interferes with the Fairness of Immigration Proceedings and Can Be Enjoined Prospectively

The leitmotif of Defendants' entire motion to dismiss is that Plaintiffs' claims cannot move forward absent allegations that they have been prejudiced by having to appear in court in full shackles, and in particular, allegations that removal orders would not be issued against them ***but for*** the prejudice they suffer as a result of shackling. MTD at 8:19-22, 15:26-16:2; 16:16-22. This framing of Plaintiffs' claims, and the legal assumptions that underlie it, are incorrect.

Requirements of prejudice and the related "harmless error" analysis are tools of judicial efficiency that apply only when a party seeks to "undo" a prior decision. The federal "harmless

error" statute, for example, limits its application to appeals and writs of certiorari. 28 U.S.C. § 2111 (2006). The point of these tools is that a conviction or removal order need not be vacated due to a procedural error where the absence of error would not have led to a different result. *U.S. v. Hasting*, 461 U.S. 499, 508-509 (1983). For example, if a criminal defendant's un-*Mirandized* confession is wrongly admitted into evidence, but there is overwhelming and independent evidence of guilt, the conviction can stand. *See U.S. v. Gonzalez-Sandoval*, 894 F.2d 1043 (9th Cir. 1990). This does not mean that admission of the confession complied with the Constitution. Nor does it mean that courts are powerless to prevent ongoing constitutional errors.

Harmless versus prejudicial error rules do not apply in cases seeking injunctive relief against a pattern and practice of due process violations. In a class action challenge to state procedures for terminating welfare benefits in Delaware, the court rejected a similar argument:

> Defendants do not dispute the basic principle that claimants must receive notice of the issues to be discussed at the hearing. Instead, defendants argue that plaintiffs have not shown, in each illustrative case discussed by plaintiffs, that DES did not have adequate grounds for its decisions based on the issues of which claimants were given notice. This contention, a type of "harmless error" argument, is without merit in this context. Plaintiffs are not seeking to relitigate each illustrative case, and it is irrelevant that adequate grounds may have existed in individual cases to reach the same decision. The point is that defendants regularly follow a practice that is inconsistent with plaintiffs' due process rights.

Ortiz v. Eichler, 616 F.Supp. 1046, 1063 (D.C. Del. 1985); *see also Edwards v. Balisok*, 520 U.S. 641, 648 (1997) (requests for prospective relief may not 'necessarily imply' the invalidity of the punishment imposed and so may properly be brought under 28 U.S.C. § 1983); *Powers v. Hamilton County Pub. Defender Comm'n*, 501 F.3d 592, 605, 618 (6th Cir. 2007) (certifying class to challenge public defenders' systematic failure seek indigency hearings for persons incarcerated for failure to pay fines or court fees regardless of named plaintiff's "guilt or innocence in failing to pay his court-ordered fine.").[6]

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[6] *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), a civil class action that established the 48-hour limit on warrantless detentions without a probable cause determination and *Powell v. Nevada,* 511 U.S. 79 (1994), a criminal appeal in which failure to retroactively apply the *McLaughlin* rule was error, illustrate how civil plaintiffs can seek prospective relief against an unconstitutional policy and practice, while the same violation may be deemed harmless error if it occurs in the course of a criminal proceeding. *See Powell*, 511 U.S. at 84-85 (failure to apply 48-hour rule does not mean defendant should be "set free").

Here, Plaintiffs seek only prospective relief enjoining the blanket shackling of immigration detainees. Unlike the petitioners in the cases cited by Defendants, Plaintiffs do not seek to "relitigate" the outcomes of their removal proceedings. *Cf. United States v. Nicholas-Armenta*, 763 F.2d 1089 (9th Cir. 1985) (in challenge to conviction for reentry after deportation based on due process violations in immigration proceedings, defendant was required to show that mass deportation hearing prejudiced the outcome of his case); *Duckett v. Godinez*, 67 F.3d 734 (9th Cir. 1995) (habeas petitioner challenging conviction based on unconstitutional shackling during jury trial remanded to district court for harmless error analysis). Given Supreme Court precedent in the criminal context, Plaintiffs plausibly allege that detainees are prejudiced by Defendants' blanket shackling practices—both because of the physical, emotional, and dignitary harms attending this form of physical restraint, and because of the impact the restraints have on the fairness of their proceedings. *See Deck v. Missouri*, 544 U.S. 622, 635 (2005) ("shackling is 'inherently prejudicial,'" and—like forcing a defendant "to stand trial while medicated—[its] effects 'cannot be shown from a trial transcript'") (citations omitted).[7]

C. The Facial Challenge Doctrine Does Not Bar Plaintiffs' Claims for Relief

1. Plaintiffs Challenge Defendants' Systematically Unconstitutional Practices Rather than a Legislative Act or Agency Interpretation.

Defendants contend that Plaintiffs must establish that "no set of circumstances" exists in which the EOIR Memo delegating shackling decisions to ICE would be valid in order to bring a facial challenge under *United States v. Salerno*, 481 U.S. 739, 745 (1987). MTD at 10:1-11, Exh. 1. In fact, this Court need not reach the question of whether the EOIR Memo is

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[7] Defendants suggest, without citation to relevant authority, that Plaintiffs claims are not ripe because they have not sought to have their shackles removed. MTD at 9:8-11. However, no exhaustion requirement can bar Plaintiffs' challenge to the blanket practice of shackling all detainees where, as here, there is no meaningful process to exhaust. *See* Compl. ¶ 5 ("detainees' requests to have their shackles removed during their immigration hearings have been a futile exercise"); MTD Ex. 1, p.2 (EOIR has no authority to order Plaintiffs released from restraints); *El Rescate Legal Servs., Inc. v. Executive Office of Immigration Review*, 959 F.2d 742, 747 (9th Cir. 1991) (exhaustion not necessary where resort to agency would be futile); *Singh v. Ashcroft*, 362 F.3d 1164, 1169 (9th Cir. 2004) ("It is axiomatic that one need not exhaust administrative remedies that would be futile or impossible to exhaust."). Nevertheless, Plaintiffs are prepared, if necessary, to amend their complaint on this point.

unconstitutional on its face because Plaintiffs challenge it as applied. Facial challenges "raise the risk of premature interpretation of statutes on the basis of factually barebones records." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) (internal quotation marks omitted). For this reason, courts address as-applied challenges before a facial challenge to avoid unnecessarily striking down a rule of law on its face. *See U.S. v. Frederick*, No. 10-30021-RAL, 2010 WL 2179102, at *7 (D. S.D. May 27, 2010); *Doe v. Heck*, 327 F.3d 492, 527-28 (7th Cir. 2003). In the instant case, Plaintiffs challenge ICE's blanket ***practice*** of shackling all adult immigration detainees—a practice that is but one application of the policy set forth in EOIR memorandum granting ICE authority to control courtroom security. A challenge to the systematically unconstitutional operation of a written policy is an as-applied challenge. *See Tipton v. University of Hawaii*, 15 F.3d 922, 927 (9th Cir. 1994); *El Rescate*, 959 F.2d at 752 (remanding to explore whether EOIR "applies" facially valid policy to systematically deny constitutional rights). The Court therefore need not reach the question whether the EOIR Memo is unconstitutional on its face.

Moreover, *Salerno*'s "no set of circumstances" test does not apply to this case because the EOIR Memo is not a legislative rule. Under the *Salerno* analysis, a court examines the text of the challenged statute in conjunction with legislative intent. *See Salerno*, 481 U.S. at 746, 751 (holding the Bail Reform Act constitutional on its face because Congress intended it to be regulatory, not punitive, and the text of the statute set forth sufficient procedures for a defendant to challenge an adverse determination); *Rust v. Sullivan*, 500 U.S. 173, 184 (1991) (analyzing challenge to regulations).

Plaintiffs' challenge to the blanket shackling practice in this case is also distinguishable from *El Rescate*. *Cf.* MTD at 10 (citing *El Rescate*, 959 F.2d at 751). In *El Rescate*, the court considered a Board of Immigration Appeal policy concerning translation requirements for immigration hearings.[8] 959 F.2d 742. EOIR argued that the policy "represents the [agency's]

[8] The Board of Immigration Appeals is the "highest administrative tribunal adjudicating immigration and nationality matters," and is "responsible for applying the immigration and nationality laws uniformly throughout the United States." U.S. Dept. of Justice, *supra* n.1 at 2.

construction of the statute it is entrusted to administer." *Id.* at 748. The court declined to substitute its judgment for that of the agency's because "the BIA's policy conforms to the [Immigration and Naturalization Act], its interpretive regulations and the Constitution." *Id.* at 752. Here, the EOIR Memo does not construe a particular statutory provision or agency regulation pertaining to security in immigration proceedings. On the contrary, the EOIR Memo delegates authority conferred by regulation on Immigration Judges to ICE. *See* 8 C.F.R. § 1003.10(b) (2011) (powers and duties of Immigration Judges include to "exercise their independent judgment and discretion" and "take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases"). Because the EOIR Memo cited by Defendants is neither a legislative act nor an agency interpretation of its own regulations, and even undermines some of the duties and authorities Congress delegated to Immigration Judges, it should not be analyzed under the *Salerno* test.

2. The EOIR Memo Cedes Authority Over the Courtroom to ICE, Undermining Due Process in Shackling Decisions on its Face

Although the Court need not consider whether the EOIR Memo is unconstitutional on its face, in fact, the EOIR Memo *is* invalid under any set of circumstances because it improperly grants authority to ICE to make final decisions about the use of physical restraints in court. The Ninth Circuit has instructed that application of physical restraints in the courtroom is reserved for ***judicial*** discretion. *See Gonzalez v. Pliler*, 341 F.3d 897, 902 (9th Cir. 2003) (trial court committed constitutional error by deferring to bailiff's recommendation to use stun belt); *see also infra* Part III.D.2.a.iii. The EOIR Memo precludes Immigration Judges from making this determination:

> In instances where the security precautions taken appear excessive, the presiding Immigration Judge may ask the supervisory security officer, prior to the commencement of the hearing, to explain why specific security measures are being taken. If unpersuaded by the explanation, the Immigration Judge may request modification of the existing security measures. However, if the responsible security official declines to honor the request, the Immigration Judge will nonetheless commence the hearing.

MTD Exh. 1, p. 2 (emphasis in original). Not only does the EOIR Memo's delegation of authority contradict the rule that judges must decide whether physical restraints are to be used at

trial, it delegates that authority to the ***prosecuting*** agency in removal proceedings. *See Zavala v. Ridge*, 310 F.Supp.2d 1071, 1078 (N.D. Cal. 2004) (procedure that stayed release of immigration detainee pending government appeal improperly "conflates the functions of adjudicator and prosecutor."). Because this grant of authority undermines an essential aspect of due process required for the imposition of shackles in court, the EOIR Memo is facially invalid.

D. Plaintiffs Have Stated A Claim for Violation of Due Process

"[A]liens in removal proceedings are entitled to both substantive and procedural due process of law." *Dahn v. Demore*, 59 F.Supp.2d 994, 998 (N.D. Cal. 1999) (citing *Reno v. Flores*, 507 U.S. 292, 306 (1993)). Freedom from physical restraint, such as "shackles, chains, or barred cells" has "always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Flores*, 507 U.S. at 302. Under procedural due process, Plaintiffs challenge Defendants' shackling practice because it deprives them of liberty without any individualized determination ***and*** because it interferes with Plaintiffs' access to full and fair removal hearings. Plaintiffs challenge Defendants' shackling practice on substantive due process grounds because shackling Plaintiffs who pose no risk of flight or threat to security is not "narrowly tailored to serve a compelling state interest." *Id.*

The tests for procedural and substantive due process are fact-intensive inquiries that are not appropriate for resolution on a motion to dismiss. *See, e.g., Gilbert v. Homar,* 520 U.S. 924, 930 (1997) ("It is by now well established that due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.") (internal quotation marks omitted); *City of Oakland v. Abend*, No. C-07-2142 EMC, 2007 WL 2023506, at *8 (N.D. Cal. Jul. 12, 2007) (*Mathews v. Eldridge* factors "require factual analysis and is not susceptible to a 12(b)(6) motion."); *Washington v. Glucksberg,* 521 U.S. 702, 721-22 (1997) ("complex balancing of competing interests" required where fundamental right is implicated in substantive due process challenge). Before demonstrating that the allegations of the Complaint state claims under each of these theories, Plaintiffs will first address the case upon which Defendants' Motion to Dismiss rests: *United States v. Howard*, 480 F.3d 1005 (9th Cir. 2007).

1. Criminal Law Jurisprudence on Shackling Supports Plaintiffs' Claims

a. *United States v. Howard* Does Not Control

In *United States v. Howard*, the Ninth Circuit considered appeals from seventeen separate orders denying the Federal Public Defender's motions for defendants to appear without restraints and upheld a general policy of imposing ankle restraints on pretrial detainees to address "legitimate security concerns." 480 F.3d at 1014. *Howard* is distinguishable from this case on a number of critical grounds, including:

- The policy allowed only ankle restraints and only at initial appearances;
- The policy "leaves in place the option for a defendant to move the court for removal of the shackles, and an individualized determination may be made at the time of the motion as to whether extenuating circumstances warrant removal of the shackles";
- The district court's decisions were made based upon an evidentiary record; and
- The magistrate judge in front of whom defendants appeared would not be the ultimate trier of fact.

Id. at 1014. Plaintiffs here seek relief against Defendants' use of hard metal restraints on their wrists and waists, in addition to ankles, which prevent Plaintiffs from taking notes, signaling to counsel, or gesturing in communications to the court. Compl. ¶¶ 52, 58. Plaintiffs have alleged—and Defendants have already conceded—that Plaintiffs have no recourse to Immigration Judges for an individualized determination of whether shackles may be removed in particular cases. Compl. ¶ 5, MTD Ex 1, p. 2. There is no record to support Defendants' claim that "serious security concerns" justify the challenged practices in this case. Plaintiffs must be permitted to test this claim through discovery, especially considering that one of the two security concerns Defendants mention—that "Immigration Court is in a building open to the general public"—is also true of every courthouse in the country. *Cf.* MTD at 13:19-21 (citing as only basis for security concerns that Immigration Court is in a public building and that "many detainees appear simultaneously in Court at one time"). Finally, unlike *Howard*, which did "not involve the question of shackling in the presence of a jury ***or*** during a trial," immigration detainees are shackled when they provide testimony at bond and merits hearings, in the presence

of witnesses, and before the ultimate trier of fact in their cases, who, unlike in criminal court, is the Immigration Judge himself. 480 F.3d at 1013 (emphasis added); Compl. ¶¶ 56-61.

Even without challenging the general presumption that judges are not prejudiced by the appearance of a person in shackles, Plaintiffs allege that shackling impacts the Immigration Judge's evaluation of an immigration detainee's case by undermining the detainee's own performance. By statute, Immigration Judges are charged with making credibility determinations based upon, *inter alia*, the "demeanor, candor or responsiveness of the applicant or witness," and, since the passage of the REAL ID Act of 2005, reviewing courts have increasingly deferred to Immigration Judges' evaluations of demeanor to deny immigration relief. 8 U.S.C. §§ 1229a(c)(4)(C), 1158 (2006).

> The deference that the REAL ID Act requires makes sense because IJs are in the best position to assess demeanor and other credibility cues that we cannot readily access on appeal . . . 'All aspects of the witness's demeanor – including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication – may convince the observing trial judge that the witness is testifying truthfully or falsely. These same very important factors, however, are entirely unavailable to a reader of the transcript, such as the Board [of Immigration Appeals] or the Court of Appeals.'

Shrestha v. Holder, 590 F.3d 1034, 1041-42 (9th Cir. 2010) (citations omitted). Shackles can greatly alter an immigration detainee's ability to communicate with the judge, even if the judge is not otherwise influenced by the appearance of shackles. *See People v. Burleson*, No. A091076, 2003 WL 1233132, at *26 (Cal. Ct. App. Mar. 18, 2003) (unpublished decision) (clinical psychologist testified that "restraints may cause a person to have difficulty concentrating and communicating" and that use during trial could increase "anxiety level and impair [defendant's] ability to communicate effectively."). Plaintiffs have alleged such impact on their own hearings, and those allegations that must be credited for purposes of the instant motion. Compl. ¶¶ 80, 83, 90, 96.

b. Most Criminal Court Rationales for the Presumption Against In-Court Shackling Apply in Immigration Court

"Generally, a criminal defendant has a constitutional right to appear before a jury free of shackles." *Spain v. Rushen*, 883 F.2d 712, 716 (9th Cir. 1989). Before a court may order the use

of physical restraints on a defendant, "the court must be persuaded by compelling circumstances that some measure is needed to maintain the security of the courtroom," and "must pursue less restrictive alternatives before imposing physical restraints." *Gonzalez*, 341 F.3d at 901 (citation omitted). With the exception of *Howard*, shackling has only been approved in the Ninth Circuit where there has been "evidence of disruptive ***courtroom*** behavior, attempts to escape from custody, assaults or attempted assaults while in custody, or a ***pattern*** of defiant behavior toward corrections officials and judicial authorities." *Gonzalez*, 341 F.3d at 900 (quoting *Duckett*, 67 F.3d at 749) (emphasis supplied by *Gonzalez*).

The reasons for this rule in criminal proceedings are that 1) physical restraints may cause jury prejudice, reversing the presumption of innocence, 2) shackles may impair the defendant's mental faculties, 3) physical restraints may impede the communication between the defendant and his lawyer, 4) shackles may detract from the dignity and decorum of the judicial proceedings, and 5) physical restraints may be painful to the defendant. *Spain*, 883 F.2d at 721; *accord Deck v. Missouri*, 544 U.S. 622, 630-32 (2005) (applying presumption against shackling to penalty phase of criminal proceeding before jury). All of these rationales save the first apply with equal force in immigration proceedings as in a criminal trial.

Moreover, the Ninth Circuit has acknowledged that the impact of restraints on a defendant's ability to fully participate in his trial can be sufficiently prejudicial to overturn a conviction ***even absent jury prejudice***. In *Gonzalez*, the Ninth Circuit remanded a habeas petition to the District Court for an evidentiary hearing on prejudice based on improper use of a stun belt on the defendant even though it accepted as true the trial court's finding that the stun belt was not visible to the jury. 341 F.3d at 903. Analyzing the use of a stun belt under the general rule for physical restraints on criminal defendants at trial, the Court of Appeals recognized that—apart from whether the restraint was visible to the jury—the stun belt could have unconstitutionally prejudiced the defendant's ability to participate fully in his defense, communicate with counsel, and "concentrate adequately on his testimony because of the stress, confusion and frustration over wearing the belt." *Id.* at 903-905.

Similarly, California courts have addressed shackling during non-jury proceedings and found it presumptively improper. *Tiffany A. v. Superior Court*, which was decided after *Howard*, involved a blanket policy of requiring juveniles to appear in ankle restraints. 150 Cal. App. 4th 1344 (2007). Despite the fact that juvenile proceedings are held before judges, and not juries, the Court of Appeal held that that "any decision to shackle a minor who appears in the Juvenile Delinquency Court for a court proceeding must be based on the non-conforming conduct and behavior of that individual minor" and could not be justified solely on the inadequacy of courtroom facilities or lack of security personnel. *Id.* at 1359; *see also People v. Fierro*, 1 Cal. 4th 173, 219-20 (1991) (principles against shackling without individualized justification apply to preliminary hearings where jury is not present).

Finally, the Ninth Circuit has implicitly cautioned against broad reliance on *Howard*, in a later case involving the use of restraints at initial appearances:

> A criminal defendant's first and sometimes only exposure to a court of law occurs at his initial appearance. The conditions of that appearance establish for him the foundation for his future relationship with the court system, and inform him of the kind of treatment he may anticipate, as well as the level of dignity and fairness that he may expect. We have recognized that shackling defendants at such time "effectuates some diminution of the liberty of pretrial detainees and detracts to some extent from the dignity and the decorum of a critical stage of a criminal prosecution." *United States v. Howard*, 480 F.3d 1005, 1008 (9th Cir. 2007). We have not, however, fully defined the parameters of a pretrial detainee's liberty interest in being free from shackles at his initial appearance, or the precise circumstances under which courts may legitimately infringe upon that interest in order to achieve other aims, such as courtroom safety.

United States v. Brandau, 578 F.3d 1064, 1065 (9th Cir. 2009). The shackling policy at issue in *Brandau* was revised during the litigation and ultimately required individualized determinations of necessity prior to the use of physical restraints on defendants for their initial appearances, outside the presence of the jury. *See* Req. for Judicial Notice, Exhs. 5-6. Because Defendants' shackling practice conflicts with the "ancient rule" against the in-court use of shackles, and because *United States v. Howard* is easily distinguished from the instant case, Defendants' motion to dismiss should be denied. *Deck*, 544 U.S. at 627 (citing Blackstone's "ancient" English rule that only "in extreme and exceptional cases, where the safe custody of the prisoner and the peace of the tribunal imperatively demand, the manacles may be retained.").

2. Due Process Requires Individualized Determinations of Need Prior to In-Court Shackling of Civil Immigration Detainees

a. Plaintiffs State A Claim for Violations of Procedural Due Process

Plaintiffs allege that Defendants' failure to limit the in-court use of shackles to immigration detainees whose backgrounds would reasonably suggest a likelihood of courtroom violence, disruption, or attempted flight deprives them of liberty without due process and undermines the fairness of their immigration hearings. To determine whether a governmental action violates procedural due process, a court must consider: 1) the nature of the private interest affected by the government action; 2) the risk of an erroneous deprivation of the interest as a result of the procedures used and the probable value of additional or substitute safeguards; and 3) the government's interest in using its own procedures and the fiscal and administrative burdens by additional or substitute safeguards. *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976). Plaintiffs' allegations in the Complaint are sufficient to state a claim under this test.

i. Plaintiffs Have Significant Interests in Appearing in Court Unshackled

Plaintiffs have alleged two categories of harm caused by Defendants' blanket shackling practices. First, Plaintiffs have a fundamental interest in being free from physical restraints. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (freedom from imprisonment and other forms of physical restraint lies at the heart of the liberty the Due Process Clause protects). Although Plaintiffs and proposed class members are, by definition, in custody, they retain a cognizable interest in avoiding further restrictions on their liberty. *See Youngberg v. Romeo*, 457 U.S. 307, 321-23 (1982) (due process required for imposition of bodily restraints on person committed to mental institution); *H.C. by Hewlett v. Jarrard*, 786 F.2d 1080 (11th Cir. 1986) (juvenile's due process rights violated when placed in isolation and shackled without notice and a hearing).

In addition, the United States Supreme Court has recognized that the interests of respondents in immigration proceedings are "weighty." *Landon v. Placensia,* 459 U.S. 21, 34 (1982). Deportation "visits a great hardship on the individual" and "[m]eticulous care must be exercised lest the procedure by which [an alien] is deprived of that liberty not meet the essential

standards of fairness." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). Plaintiffs have alleged that shackles interfere with detainees' access to counsel, their ability communicate effectively with the court, and their ability to take notes and manage documentation in the courtroom. Compl. ¶¶ 52-61.

ii. ICE's Blanket Shackling Policy Creates a High Risk of Erroneous Deprivation of Plaintiffs' Liberty Interests

Defendants' shackling practice imposes physical restraints on all detainees in court proceedings, without regard for individual circumstances, at great risk of erroneously depriving Plaintiffs' of their liberty.[9] Guidance from criminal and civil commitment case law counsels that shackles should only be imposed where necessary to maintain the security of the courtroom, and less alternative measures must be considered. *Hamilton v. Vasquez*, 882 F.2d 1469, 1472 (9th Cir. 1989); *Tyars v. Finner*, 709 F.2d 1274, 1284 (9th Cir. 1983). As a matter of law, the fact that a person has been convicted of a felony—even homicide—is not enough by itself to justify the use of physical restraints in trial. *Deck*, 544 U.S. at 635 (due process violation to shackle convicted double murderer before jury during sentencing).

As described above and in the Complaint, the reasons immigrants are held in detention vary. *See supra* Part II.C. In the vast majority of cases, the reasons purportedly justifying immigration ***detention*** are not sufficient to justify ***shackling*** to prevent in-court violence or disruption or risk of flight. Compl. ¶ 45; *see also* Compl. ¶¶ 74, 81, 91, 97 (Named Plaintiffs would pose no threat to the safety and security of the courtroom or threat of flight if allowed to appear without physical restraints). Defendants' practice of shackling ***all*** persons in immigration custody therefore presents an extremely high risk that Plaintiffs and others who pose no security threat are erroneously being deprived of their liberty interests.

[9] This high risk of ***erroneous*** deprivation of liberty is the reason for Plaintiffs' challenge. Although Defendants imply differently, Plaintiffs seek only a process that would limit the application of shackles to detainees who present an actual risk of courtroom disruption or flight. Plaintiffs do ***not*** seek a remedy that would prohibit the use of shackles under any circumstances. *Cf.* MTD at 1:13-15.

iii. The Challenged Shackling Practice Provides No Process to Protect Plaintiffs' Significant Liberty Interests

While the Court must determine what relief is ultimately available based on evidence presented, due process always requires notice and an opportunity to be heard. *Mullane v. Central Hanover Bank and Trust Co.,* 339 U.S. 306, 314-15 (1950). The amount of process due depends on the deprivation at stake, and often includes an opportunity to present evidence, consult with counsel, and confront witnesses. *See, e.g., King v. Higgins*, 702 F.2d 18, 19 (1st Cir. 1983) (prison disciplinary hearing violated due process where plaintiff was not afforded "prior notice of the hearing, nor advised of his right to seek the advice of counsel, to confront the complaining officer and to present witnesses on his own behalf" prior to fifteen-day isolation penalty). Given the nature of the deprivation at issue in this case and its impact on detainees' right to a fair hearing, restraints should only be applied where there is recourse to a neutral decision-maker, *i.e.*, an Immigration Judge, to weigh evidence presented by the parties. *See Hamilton*, 882 F.2d at 1472 (opportunity to challenge shackling decision required to effectuate rule that shackles only used as last resort).

Defendants' citation to the ***withdrawn*** Ninth Circuit opinion in *United States v. Howard* notwithstanding, due process requires more than deferral to the prosecuting agency to authorize the use of full metal shackles on every detained immigrant. *See* MTD at 13 (citing *United States v. Howard*, 463 F.3d 999 (9th Cir. 2006), *withdrawn*, 480 F.3d 1180 (9th Cir. 2007)); *Gonzalez*, 341 F.3d at 902 (application of restraints to be determined by court, rather than bailiff).[10] Having recourse to a neutral decision-maker to challenge the imposition of shackles is necessary to our "concept of ordered liberty," and to preserve the dignity and credibility of our immigration courts. *Washington v. Glucksberg*, 521 U.S. at 721, citing *Palko v. Connecticut,* 302 U.S. 319,

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[10] Defendants cite the withdrawn panel opinion in *Howard* (and its citation to *Bell v. Wolfish*, 441 U.S. 520, 540 (1979)) to argue that not only the Immigration Court, but also ***this*** Court "must defer to the expertise of those charged with securing the court room." MTD at 13:16-17. But deferring to the expertise of correctional officers with respect to prison facilities is quite different from deferring to them on constitutional due process requirements in the courtroom. The fact that the replacement opinion in *United States v. Howard* declined to cite *Bell* is evidence enough that the Ninth Circuit intentionally chose not to extend *Bell*'s reasoning to the courtroom setting. *Howard*, 480 F.3d 1180.

325, 326 (1937); *Deck*, 544 U.S. at 631 ("The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue . . . and the gravity with which Americans consider any deprivation of an individual's liberty").

At this stage of the case, Plaintiffs need only withstand Defendants' motion to dismiss. Compared to the blanket shackling Plaintiffs challenge, ***nearly any*** procedure Defendants could use to tailor their use of restraints would be an improvement. While discovery is needed to explore Defendants' capacity for individualized determinations of detainees' security risk, two preliminary points are worth noting. First, Plaintiffs seek no more than criminal defendants receive as a matter of course in state and federal courts throughout the land. Second, ICE Detention Standards already contemplate security assessments for all immigration detainees based on particular factors and particular evidence.[11] Plaintiffs have more than plausibly alleged that their significant liberty interests in avoiding unnecessary shackling outweigh Defendants' interests in shackling all detainees and have thereby stated a claim that the challenged practice violates Plaintiffs' rights to procedural due process.

b. Plaintiffs State A Claim for Violations of Substantive Due Process

The substantive component of the Due Process Clause "forbids the government to infringe certain fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Flores*, 507 U.S. at 302. Heightened scrutiny applies to infringements on freedom of movement.[12] For example, in *Zavala v. Ridge*, an immigration regulation that permitted the government to stay release of detainees upon appeal of an Immigration Judge's decision granting immigration relief violated substantive due process because "no special justification exists that outweighs the individual's constitutionally protected interest in avoiding physical restraint." 310 F.Supp.2d at 1076

[11] Detention Standards, Ch. 5, "Classification System," p. 4.

[12] The more protective substantive due process standard, rather than the Eighth Amendment prohibition on cruel and unusual punishment, applies to treatment of civil detainees like Plaintiffs. *Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir. 2004); *Lijadu v. I.N.S.*, No. 06-0518, 2009 WL 508040, at *4 (W.D. La. Feb. 26, 2009) (constitutional rights of immigration detainees and pretrial detainees analyzed alike).

(quoting *Zadvydas*, 533 U.S. at 690); *see also Sell v. U.S.*, 539 U.S. 166, 180 (2003) (administration of antipsychotic drugs permitted only where necessary to further important governmental interests, where drugs will significantly further those interests, and where medically appropriate).

Plaintiffs have alleged physical restraints on their freedom of movement, invoking a fundamental liberty interest. *Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment . . . detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects."). Even assuming Defendants have a compelling interest in security, they still need a "special justification" to apply intrusive metal shackles to any particular detainee, and each Plaintiff has alleged that he or she poses "no threat to the safety and security of the courtroom or risk of flight if allowed to appear without physical restraints." Compl. ¶¶ 74, 81, 91, 97. Regardless of the process used by Defendants, these Named Plaintiffs, as well as many other members of the proposed class who similarly pose no threat to court security, are suffering a deprivation of liberty that serves ***no*** compelling or important governmental interest.

Plaintiffs' claims also succeed under the standard derived from *Bell v. Wolfish*, a standard that the Ninth Circuit notably avoided relying on in *Howard*. *See supra* note 10. Again, assuming the government's purpose is security, shackling Plaintiffs—who, for purposes of this motion, must be presumed not to pose any risk of flight, disruption, or to security—is "excessive" in relation to the purpose. *See* Compl. ¶¶ 74, 81, 91, 97; *see also Bell*, 441 U.S. at 539 n.20 (noting that "loading a detainee with chains and shackles and throwing him in a dungeon" to secure his presence at trial would imply an intention to punish in violation of due process).

3. International Law Prohibits Shackling Before Administrative Tribunals and Provides Protections Against Degrading Treatment

The United States is a signatory to the International Covenant on Civil and Political Rights ("ICCPR") and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), which afford all persons basic human rights protections, regardless of their immigration status. This Nation's international obligations also include

special protections for certain categories of immigrants, such as asylum seekers. *See Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 170 n.19 (1993) (United States acced*ed to United Nations Protocol Relating to the Status of Refugees, binding it to Articles 2 through 34 of the Convention Relating to the Status of Refugees). The United States Supreme Court and lower federal courts increasingly have turned to international law for guidance in articulating the parameters of our own Constitutional rights. *See, e.g.*, *Graham v. Florida*, 130 S. Ct. 2011, 2032 (2010) (considering "global consensus against" juvenile life without parole sentences); *Lawrence v. Texas*, 539 U.S. 558 (2003) (referencing European Court of Human Rights decision in support of conclusion that a Texas sodomy law violated plaintiff's privacy rights under the due process clause of the Fourteenth Amendment).

Directly relevant to Plaintiffs' claims are the United Nations Standard Minimum Rules for the Treatment of Prisoners.[13] Rule 33 specifically prohibits the use of "chains or irons" as a form of restraint, and permits the use of other types of restraints only in the following limited circumstances:

> a. As a precaution against escape during a transfer, provided that ***they shall be removed when the prisoner appears before a judicial or administrative authority***;
> b. On medical grounds by direction of the medical officer;
> c. By order of the director, if other methods of control fail, in order to prevent a prisoner from injuring himself or others or from damaging property; in such instances the director shall at once consult the medical officer and report to the higher administrative authority.

(Emphasis added.) Thus, international law speaks clearly and unequivocally to the question presented. Under international standards, "chains" should not be used on immigration detainees and detainees must be unshackled for appearances before judges in immigration court.[14]

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[13] United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611 (Aug. 30, 1955) (hereinafter "Standard Minimum Rules"), *available at* http://www.unhcr.org/refworld/pdfid/3ae6b36e8.pdf. The Standard Minimum Rules have been cited by U.S. courts as persuasive authority. *See Lareau v. Manson*, 507 F. Supp. 1177, 1193 (D. Conn. 1980); *see also Estelle v. Gamble*, 429 U.S. 97, 103 n.8 (1976) (citing the Standard Minimum Rules as evidence of "contemporary standards of decency"); *Detainees of the Brooklyn House of Detention for Men v. Malcolm*, 520 F.2d 392, 396 (2d Cir. 1975).

[14] Standard Minimum Rule 34 places temporal restrictions on the use of authorized instruments of restraint, noting that they "must not be applied for any longer time than is strictly necessary," and Rule 94 requires that non-criminal detainees "shall not be subjected to any greater restriction or severity than is necessary to ensure safe custody and good order. Their treatment shall be not less favourable than that of untried prisoners."

As a signatory to the ICCPR and CAT, the United States is bound to the mandate that "all persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person" and the prohibition against "cruel, inhuman or degrading treatment or punishment."[15] In a case from Turkey, the European Court held that the arrest and handcuffing of the complainant in front of his office building and before onlookers amounted to degrading treatment because "the wearing of handcuffs in public, can affect a person's self-esteem and cause him or her psychological damage. . ." The court noted the importance of determining whether the person would "attempt to flee" or cause injury because the use of handcuffs would only raise a concern regarding degrading treatment if it exceeded what was "reasonably necessary" in the circumstances. *Erdoğan Yağiz v. Turkey*, App. No. 27473/02, ¶¶ 40–48 (2007).[16] The challenged conduct here involves the systematic humiliation and debasement of immigrant detainees who are forced to plead their cases with their wrists, waists, and ankles painfully bound in metal chains. *See* Compl. ¶¶ 72–73, 75, 80, 82, 83, 90, 96. International law and practice that explicitly prohibit courtroom shackling and condemn the unnecessary and humiliating use of shackles as cruel, inhuman, or degrading treatment support Plaintiffs' Constitutional claims.

E. Plaintiffs Have Named the Proper Defendants

Defendants argue, citing no authority, that EOIR, its director Juan P. Osuna, and Attorney General Eric Holder are improperly named because none "have [*sic*] taken any action the Court

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[15] International Covenant on Civil and Political Rights, Arts. 7 and 10, Dec. 16, 1966, 999 U.N.T.S. 171, *available at* http://www2.ohchr.org/english/law/ccpr.htm; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 16(1), Dec. 10, 1984, 1465 U.N.T.S. 85, *available at* http://www2.ohchr.org/english/law/cat.htm. The United States has ratified both of these instruments.

[16] *Available at* http://www.echr.coe.int/ECHR/EN/hudoc (follow "HUDOC Database" hyperlink; then complete application number field for full text of opinion). *See also Tyrer v. United Kingdom*, App. No. 5856/72, 2 Eur. H.R.Rep. 1, ¶¶ 32, 33 (1978) (in case involving private, legally sanctioned caning as a punishment, public humiliation is relevant, but not strictly necessary, to finding of inhuman or degrading treatment and "it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others;" and "although the applicant did not suffer any severe of long-lasting physical effects, his punishment – whereby he was treated as an object in the power of the authorities – constituted an assault on . . . [his] dignity and physical integrity"), *available at* http://www.coe.int/t/dg3/children/corporalpunishment/CPLegalTexts_en.asp.

can order them to remedy." MTD at 19:10-11. Defendants specifically claim that EOIR "cannot remedy [Plaintiffs'] alleged harms" because it "lacks legal authority to modify final security determinations at specific proceedings." MTD at 19:19-22.

Defendants' focus on EOIR's authority at "specific proceedings" is misplaced. In fact, EOIR is "the federal agency responsible for supervising the Office of the Chief Immigration Judge and the Board of Immigration Appeals," and thus sets policy for all immigration courts. *El Rescate*, 959 F.2d at 745 n.1; *Recinos De Leon v. Gonzales*, 400 F.3d 1185, 1193 (9th Cir. 2005) (noting EOIR's responsibility for adjudicating cases in immigration court). EOIR has authority to rescind the EOIR Memo that delegates shackling decisions to ICE, but instead allows ICE's blanket shackling practice to erode class members' due process rights, shirking its "legal responsibility to regulate the conduct of immigration court hearings and safeguard the due process rights of detainees appearing in its courtrooms." Compl. 5; *see also* 8 C.F.R. § 1003.10(b) (2011). EOIR is therefore a proper defendant in this action. *See* Fed. R. Civ. P. 8(a)(2).

Plaintiffs have also properly named Defendants Osuna and Attorney General Holder. Mr. Osuna, as Director of EOIR, "is responsible for EOIR's practices, policies and procedures," and is therefore directly responsible for EOIR's refusal to modify the EOIR memo and its failure to safeguard detainees' due process rights in Immigration Court. Compl. ¶ 27; *see Gadda v. Ashcroft*, No. C–01–3885 PJH, 2001 WL 1602693, at *2 (N.D. Cal. Dec. 7, 2001) ("The Director of [EOIR] is responsible for the general supervision of the BIA and the Office of the Chief Immigration Judge in the execution of their duties."). Attorney General Holder shares "responsibility for implementation and enforcement of the immigration laws" with Defendant Janet Napolitano, Secretary of Homeland Security, and is responsible for appointing and overseeing Immigration Judges as well as enforcing immigration laws generally. Compl. ¶ 25; *see* 8 U.S.C. § 1101(b)(4) (each Immigration Judge is "an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings"); *Abebe v. Gonzales*, 493 F.3d 1092, 1097 n.8 (9th Cir. 2007) ("Responsibility for enforcement of the immigration laws" rests with "the

Department of Justice and the Attorney General."). Like EOIR, Mr. Osuna and Attorney General Holder are proper defendants in this action.

Dated: November 1, 2011

Respectfully submitted,

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