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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UELIAN DE ABADIA-PEIXOTO, *et. al*, Plaintiffs, v. United States Department of Homeland Security, *et al.*,	No. 11-cv-4001 (RS) **DEFENDANTS' NOTICE OF MOTION; MOTION TO DISMISS** Date: November 17, 2011 Time: 1:30 p.m. Courtroom: Courtroom 3 - 17th Floor

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

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

Dated: October 11, 2011

Respectfully submitted,

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I. INTRODUCTION

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

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

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

F.3d 1005, 1013-14 (9th Cir 2007). "[T]he rule that courts may not permit a party to a jury trial to appear in court in physical restraints without first conducting an independent evaluation of the need for these restraints does not apply in the context of non-jury [] hearings." *Id.* at 14. Moreover, this rule applies even if restraints "effectuate[] some diminution of the liberty of [] detainees" or "detracts to some extent from the dignity and the decorum" of proceedings. *Id.* Thus, Plaintiffs' allegations regarding their restraints do not support a cognizable due process claim and therefore must be dismissed.

Second, Plaintiffs fail to allege any cognizable due process claim premised on their alleged inability to participate in their defense, to communicate freely with their attorneys, or dignitary harms. In the context of non-jury proceedings, these claims cannot serve as the basis of a due process claim where restraints are based on legitimate security concerns. *See id.* at 1008; *Howard*, 463 F.3d at 1006; *United States v. Zuber*, 118 F.3d 101, 104 (2d Cir. 1997). Even if they could, each named Plaintiff fails to allege, let alone plausibly, that their restraints have actually prejudiced them. This failure requires the dismissal of their claims, as without allegations of "actual prejudice," they cannot raise a cognizable due process claim. *United States v. Nicholas-Armenta*, 763 F.2d 1089, 1091 (9th Cir. 1985); *accord Howard*, 480 F.3d at 1013.

Because Plaintiffs' claims are premature and because Plaintiffs do not and cannot plausibly allege any actual prejudice their restraints have caused them, their claims fail as a matter of law and must be dismissed.

II. ISSUE PRESENTED

Whether Plaintiffs fail to allege a claim that Defendants' policy permitting the use of restraints on civil immigration detainees appearing in San Francisco Immigration Court violates Due Process, where detainees appear before Immigration Judges rather than juries and where Defendant U.S. Immigration and Customs Enforcement ("ICE"), the agency responsible for securing immigration proceedings, has concluded that such restraints are necessary to ensure the security of immigration proceedings.

III. STATUTORY AND FACTUAL BACKGROUND[1]

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.*

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

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

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

C. Plaintiffs' Specific Allegations

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

[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.

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

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

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

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

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

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

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

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

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

IV. STANDARDS OF REVIEW

A. Rule 12(b)(1)

Federal courts are courts of limited jurisdiction, and a lack of jurisdiction is presumed until the party asserting jurisdiction proves otherwise. *Kokkonen v.Guardian Life Ins. Co. Of Am.*, 511 U.S. 375, 377 (1994). "Unless the jurisdictional issue is inextricable from the merits of a case, the court may determine jurisdiction on a motion to dismiss for lack of jurisdiction under Rule12(b)(1) of the Federal Rules of Civil Procedure." *Kingman Reef Atoll Invs.,L.L.C. v. United States*, 541 F.3d 1189, 1195 (9th Cir. 2008). "[N]o presumptive truthfulness attaches to plaintiff's allegations." *Augustine v. United States*, 704F.2d 1074, 1077 (9th Cir. 1983) (internal quotation marks omitted). Moreover, "the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy*, 850 F.2d at 560; *see also Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983) (consideration of material outside the pleadings did not convert a Rule 12(b)(1) motion into one for summary judgment).

B. Rule 12(b)(6)

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

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

V. ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[6] The Ninth Circuit has indicated that even in the context of jury proceedings the argument that "due process requires that there be no restraint whatsoever without an 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.*

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

The Court rejected these claims in the context of non-jury proceedings. Although the Court observed that "the [restraints] policy 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," the Court nevertheless concluded that due process was not violated by restraints where the proceeding in question occurred before a judge, rather than a jury. *Id.* Adopting the reasoning of the Second Circuit in *United States v. Zuber*, the Court held that "the rule that courts may not permit a party to a jury trial to appear in court in physical restraints without first conducting an independent evaluation of the need for these restraints does not apply in the context of a non-jury [] hearing[s]." *Id.* (quoting *Zuber*, 118 F.3d at 102). Because the possibility "of juror bias 'constitutes the paramount concern' in cases requiring 'an independent, on the record, judicial evaluation of the need to employ physical restraints in court,'" the reasoning of those cases does not apply in non-jury cases.[7] *Id.* (quoting *Zuber*, 118 F.3d at 102). The Court separately observed that in *Zuber* it was entirely appropriate for the judges to defer to the Marshals Service's "judgment regarding 'precautions to be taken at hearings involving persons who are in custody,'" particularly because "'where, as here, the court defers without further inquiry to the recommendation of the Marshals Service that a defendant be restrained [], the court will not permit the presence of the restraints to affect its [] decision.'" *Id.* (quoting *Zuber*, 118 F.3d at 102). In short, *Howard* makes clear that where the agency or law enforcement body tasked with making security determinations during court proceedings makes such a determination, courts should defer to those determinations. 480 F.3d at 1013-14; *accord Zuber*, 118 F.3d at 102.

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

[7] Each of the cases cited by *Howard*, "turn[ed] in large part on fear that the jury will be prejudiced by seeing the defendant in shackles." 480 F.3d at 1013 (citing *Deck*, 544 U.S. at 630; *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)).

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

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

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

Howard governs the outcome here. As in *Howard*, immigration proceedings in San Francisco Immigration Court present serious security concerns. The Immigration Court is in a building open to the general public. As in *Howard*, many detainees appear simultaneously in Court at one time. *Id.* at ¶¶ 52, 56. Moreover, as in *Howard*, ICE personnel acting pursuant to a mandate to ensure a secure environment in all immigration courts. Ex. 1 at 1. Specifically, officers must ensure an environment in which all EOIR personnel, as well as the parties, witnesses, and the public are secure as to their personal safety at all times. *Id.* Pursuant to the 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.

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

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

[9] To the extent that Plaintiffs premise their claims for relief on the fact that ICE officials responsible for security are biased by virtue of the fact that other ICE employees are responsible for representing the Government's interests in removal proceedings, that distinction is meritless. The Ninth Circuit in *Howard* rejected this distinction. *Id.* at 1014. Indeed, *Howard* cited with approval a Second Circuit case, *DeLeon v. Strack*, 234 F.3d 84, 87-88 (2d Cir. 2000), which expressly rejected that argument. 480 F.3d at 1013. In particular, *Howard* cited *DeLeon* for the proposition that a judge need not exercise independent judgment as to the necessity for restraints where restraints will not be visible to a jury and where corrections officials have concluded restraints are necessary. *See id.* (quoting *DeLeon*, 234 F.3d at 87-88) (citing with approval *DeLeon* panel's rejection of "the argument that the state trial judge 'improperly delegated the decision regarding whether or how to restrain him to a corrections official rather than independently evaluating the need for the restraint,' and reasoning that, 'even if the state judge 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.

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

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

As explained above, such claims are not cognizable where detainees do not appear before a jury or where restraints are required by legitimate security concerns. *See Howard*, 480 F.3d at 1013. (holding that regardless of whether restraints "policy 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," where the "policy was adopted with an adequate justification of its necessity" and Plaintiffs fail to demonstrate prejudice, no due process claim arises); *Zuber*, 118 F.3d at 103 & n.2 (holding that although the restraints rule may serve other interests, including precluding an "affront to the very dignity and decorum of judicial proceedings" or impeding a defendant's "ability to communicate with his counsel," those interests do not provide the basis of a due process claim where the judge deferred to the judgment of the agency responsible for courtroom safety and where "no prejudice to the defendant will result."). Accordingly, Plaintiffs may not raise due process claims based on their restraints' alleged interference with their ability to participate in their proceedings, communicate with counsel, or dignitary interests. *See Howard*, 480 F.3d at 1013; 463 F.3d at 1006-07.

Assuming, *arguendo*, that such claims are cognizable, Plaintiffs' claims must 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

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

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

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

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

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

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

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

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

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

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

[10] Mr. Cifuentes does appear to allege that on one occasion he requested that his restraints be adjusted. Complaint at ¶ 80. The allegation is vague, and does not indicate if this request was made in court or made during transit. *Id.* Even so, the Mr. Cifuentes fails to link his claim 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.

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

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

The named Plaintiffs also make allegations regarding "dignitary" harms their restraints cause them. Complaint at ¶¶ 75, 83, 90, 96. These general allegations are not cognizable under the Due Process Clause in the context of immigration proceedings. It is true that the Ninth Circuit in *Howard* observed in passing that a restraints policy during arraignment "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." 480 F.3d at 1008. However, the

[11] Mr. Cifuentes' allegations fail to allege that the "consulting attorney" he refers to was his attorney or that he sought to establish an attorney/client relationship with him. It is unclear from that cursory allegation whether the "consulting attorney" was Mr. Cifuentes' counsel such that the use of restraints violated his due process right to counsel, let alone that his alleged inability to confer with that "consulting attorney" resulted in any sort of cognizable prejudice. In 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.

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

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

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

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

VII. CONCLUSION

For the reasons stated above, Defendants respectfully request that this Court dismiss Plaintiff's Complaint for failure to state a claim.

Dated: October 11, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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