UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

ARACELY ZAMORA-GARCIA, *et al*,	§	
	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. M-09-73
	§	
MARC MOORE, *et al*,	§	
	§	
Defendants.	§	

ORDER GRANTING IN PART AND DENYING IN PART PETITIONERS'/PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING IN PART AND DENYING IN PART FEDERAL RESPONDENTS'/DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. Introduction

Now before the Court are Petitioners'/Plaintiffs' Motion for Summary Judgment on their claims against Federal Respondents/Defendants (Doc. 251) and Federal Respondents'/Defendants' Cross-Motion for Summary Judgment on those claims (Doc. 256).[1]

In its Order Granting in Part and Denying in Part Petitioners'/Plaintiffs' Motion to Certify Federal Classes, the Court certified four classes with claims against Respondents/Defendants Marc Moore, District Director for Interior Enforcement, Department of Homeland Security; and Eric H. Holder Jr., United States Attorney General, in their official

[1] This case has spanned three separate cause numbers. Petitioners/Plaintiffs originally filed the action as *Zamora-Garcia v. Trominski*, Cause No. M-02-144, on April 16, 2002. On September 30, 2005, the Court severed Petitioners'/Plaintiffs' Third Amended Petition into a separate cause, *Zamora-Garcia v. Moore*, Cause No. M-05-331. On February 20, 2009, the Court severed the claims against Federal Respondents/Defendants into a separate action, *Zamora-Garcia v. Moore*, Cause No. M-09-73. Unless otherwise noted, the citations to the record are to Cause No. M-05-331, in which the motions for summary judgment were filed.

capacities. (Doc. 138).[2] Petitioners Maria Francisca Arce Cedeno, Norma Pena de Herrera, and Isidro Herrera represent the "Supervision Class," defined as:

> those immigrants who are or will be under final orders of removal and whom, for humanitarian reasons, Federal Respondents did not or will not remove during the 90-day removal period, notwithstanding that the immigrants did not obtain a judicial stay of removal during that period, or otherwise obstruct removal.

(Doc. 138). The named Petitioners and the Supervision Class seek an injunction requiring that, upon request of the class member, and in the absence of individual factors which would warrant the refusal to do so, Respondents place the class members under Orders of Supervision. (Docs. 114, 138).

The Court also certified three "Cash Bond Classes": the "Obligor Cash Bond Class," "Immigrant Cash Bond Class A," and "Immigrant Cash Bond Class B." (Doc. 138). Plaintiff Adrianna Echavarria represents the "Obligor Cash Bond Class," defined as:

> (a) all Obligors who posted an immigration Cash Bond,
> (b) which bond was breached on or after July 28, 1998, following a demand made on the Obligor which was returned undelivered to the Federal Defendants, and
> (c) where the Immigrant appeared at all hearings and other required appearances of which s/he received appropriate notice, and
> (d) where the Federal Defendants did not make additional efforts to provide actual notice of the demand to the Obligors, as would be required by *Jones v. Flowers*, 126 S.Ct. 1708 (2006).

Id. Plaintiff Jorge Echavarria represents the "Immigrant Cash Bond Class A," defined as:

> (a) all Immigrants released on a Cash Bond,
> (b) which bond was breached on or after July 28, 1998, following a demand made on the Obligor which was returned undelivered to the Federal Defendants, and
> (c) where the Immigrant appeared at all hearings and other required appearances of which s/he received appropriate notice, and
> (d) where the Federal Defendants did not make additional efforts to provide actual notice of the demand to the Obligors, as would be required by *Jones v. Flowers*, 126 S.Ct. 1708 (2006).

[2] Pursuant to Federal Rule of Civil Procedure 25(d), Holder is substituted for Michael B. Mukasey as Defendant.

Id. Mr. and Mrs. Echavarria and the classes they represent seek injunctive and declaratory relief requiring Defendants to reinstate the breached bonds posted by members of the Obligor Cash Bond Class (if proceedings are ongoing) or reinstate and cancel the breached bonds (if proceedings have been completed). (Docs. 114, 138). Finally, Plaintiff Juan Larin-Ulloa represents the "Immigrant Cash Bond Class B," defined as:

> all Immigrants released on a Cash Bond that is still outstanding, and all Immigrants who will, in the future, be released on cash bonds.

(Doc. 138). Larin-Ulloa and the class seek injunctive and declaratory relief requiring Defendants to make efforts to provide notice of a demand on a bond consistent with *Jones v. Flowers*, *supra*. (Docs. 114, 138).

II. Standard of Review

A district court will grant summary judgment when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). A party moving for summary judgment has "the initial responsibility of informing the district court of the basis for its motion and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)(citing FED. R. CIV. P. 56(c)). Once the moving party fulfills this responsibility, the non-movant must "go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting FED. R. CIV. P. 56(e)).

III. Analysis

A. Supervision Class

The Court addressed the claims asserted by the Supervision Class (also referred to hereinafter as "Petitioners") in both predecessor actions to the instant cause. That history is set forth in the Court's class certification order and is incorporated herein. (Doc. 138 at pp. 6-16). In moving for summary judgment, Respondents again challenge both the Court's jurisdiction to entertain Petitioners' claims and the Court's prior determination that Petitioners are statutorily entitled to receive Orders of Supervision ("OOS"). (Doc. 256). Petitioners assert that the Court correctly decided the merits of their claims and request summary judgment in their favor. (Doc. 251). The Court will now revisit whether it has jurisdiction over Petitioners' claims, and whether Respondents are required by statute to issue OOS to Petitioners, in light of the parties' additional briefing and the current evidentiary record. The Court will also consider Respondents' new argument that summary judgment is warranted because the class representatives' claims are moot. (Doc. 256).

1. Jurisdiction

a. 28 U.S.C. § 1441

Respondents first contend that the Court does not have habeas corpus jurisdiction over the claims of the Supervision Class. (Doc. 256). The habeas corpus statute, 28 U.S.C. § 2241, gives district courts jurisdiction to entertain petitions for habeas relief from persons "in custody in violation of the Constitution or laws or treaties of the United States." *Maleng v. Cook*, 490 U.S. 488, 490 (1989); 28 U.S.C. § 2241(c)(3). In order to satisfy the "in custody" requirement and obtain habeas relief, a petitioner need not be physically detained. *Rosales v. Bureau of Immigration & Customs Enforcement*, 426 F.3d 733, 735 (5th Cir. 2005), *cert. denied*, 546 U.S.

1106 (2006)(citing *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Jones v. Cunningham*, 371 U.S. 236, 239-40 (1963)). Rather, "other restraints on…liberty…not shared by the public generally" may constitute custody for habeas purposes. *Cunningham*, 371 U.S. at 240. In fact, the Fifth Circuit has joined other Circuits in determining that the issuance of a final deportation order against an alien subjects him to a restraint on liberty sufficient to place him "in custody." *Rosales*, 426 F.3d at 735 (citing cases).[3]

The Supervision Class consists of aliens under administratively final orders of removal who challenge Respondents' practice of refusing to grant OOS to Petitioners while they remain in the United States as a matter of Respondents' discretion. The undisputed record before the Court demonstrates that the restrictions on Petitioners' liberty resulting from the denial of OOS are no less onerous than those inherent in the removal order itself. As a result of Respondents'

[3] Respondents draw the Court's attention to the following language in *Rosales*:

> The federal government has placed a significant restriction on Rosales's liberty by issuing a final order of deportation against him. It must detain him once his removal period begins at his release from state prison. 8 U.S.C. § 1231(a)(1)(B)(iii), (a)(2). He is therefore 'in custody' under § 2241.

Rosales, 426 F.3d at 735. Respondents argue that this language indicates that a removal order constitutes custody for habeas purposes only where it will result in mandatory detention. (Doc. 256). However, the case relied on by *Rosales* in reaching its holding clarifies that the threat of mandatory detention becomes relevant to the custody inquiry only when determining whether the federal government "has in its custody a state prisoner it has ordered removed." *Simmonds v. INS*, 326 F.3d 351, 354-56 (2d Cir. 2003). Absent these circumstances, a final removal order itself constitutes custody. *See Simmonds*, 326 F.3d at 354-55 ("various courts of appeals have agreed that subjecting an alien to a final order of removal is to place that alien in custody within the meaning of the habeas statute"); *Aguilera v. Kirkpatrick*, 241 F.3d 1286, 1291 (10th Cir. 2001)("Although the petitioners in this case are not being 'detained,' they are 'in custody' for habeas purposes because they are subject to final deportation orders."); *Mustata v. U.S. Dep't of Justice*, 179 F.3d 1017, 1021 n.4 (6th Cir. 1999)(even though aliens not literally in custody at any point, "the final deportation order against them places them constructively 'in custody,' given the specialized meaning those words have in the context of an immigration-related habeas petition"); *Nakaranurack v. United States*, 68 F.3d 290, 293 (9th Cir. 1995)("We have broadly construed 'in custody' to apply to situations in which an alien is not suffering any actual physical detention; *i.e.*, so long as he is subject to a final order of deportation, an alien is deemed to be 'in custody….'").

refusal to issue OOS, Petitioners cannot obtain employment authorization,[4] Texas drivers' licenses,[5] or any form of proof that they have permission to remain in the United States, resulting in the threat of removal at any time.[6] This Court has previously determined that the restrictions placed on Petitioners as a result of Respondents' failure to issue OOS constituted restraints on their liberty not shared by the public at large, and thus within the meaning of *Cunningham*, *supra*. Cause No. M-02-144 at Doc. 124. In the absence of clear authority to the contrary, the Court will not alter that determination. The Court therefore finds that Petitioners have satisfied the requirement of custody, in alleged violation of federal law, sufficient to invoke the Court's habeas jurisdiction.

b. 8 U.S.C. § 1252(g)

Respondents next argue that 8 U.S.C. § 1252(g) deprives the Court of jurisdiction over the claims of the Supervision Class. (Doc. 256). Section 1252(g) states as follows:

> (g) Exclusive jurisdiction
>
> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, *no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.*

8 U.S.C. § 1252(g)(emphasis added). The Court first addressed the implications of this provision in *Zamora-Garcia v. Trominski*, *supra*. Cause No. M-02-144 at Docs. 20, 61. Then, as now, the Supreme Court's decision in *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999), provided the controlling interpretation of § 1252(g). In *American-Arab*, the Court

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[4] *See* 8 C.F.R. § 274a.12, and in particular, § 274a.12(c)(18).
[5] *See* 37 TEX. ADMIN. CODE § 15.24.
[6] Petitioners provide evidence that class representative Norma Pena de Herrera was deported "by mistake" in 2002. (Doc. 227, Deposition of Norma Pena de Herrera at p. 16). Mrs. Herrera testified that she illegally returned the following day to care for her daughter, age 10 at the time, who required continuous medical care. *Id.* at pp. 16-17.

cautioned that § 1252(g) did not apply to the "universe of deportation claims" but rather to "three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *American-Arab*, 525 U.S. at 482 (emphasis in original). The Court further explained that

> [t]here are of course many other decisions or actions that may be part of the deportation process—such as the decisions to open an investigation, to surveil the suspected violator, to reschedule the deportation hearing, to include various provisions in the final order that is the product of the adjudication, and to refuse reconsideration of that order. It is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings.

Id.

This Court agrees with Respondents that the "decision or action to execute removal orders" includes Respondents' discretionary decision *not* to execute the removal orders of Petitioners for humanitarian reasons. *See American-Arab*, 525 U.S. at 943-44; *Alvidres-Reyes v. Reno*, 180 F.3d 199 (5th Cir. 1999)(§ 1252(g) deprived court of jurisdiction where challenge to Attorney General's refusal to initiate proceedings against the plaintiffs, adjudicate them deportable, and consider their applications for suspension of deportation "necessarily calls for judicial intervention to reverse the Attorney General's exercise of her discretion to not commence proceedings…and to not adjudicate [the plaintiffs'] deportations"). However, Petitioners do not challenge this decision, but rather object to Respondents' refusal to grant OOS. The question therefore becomes whether Petitioners' claims "arise from" the decision not to remove Petitioners, thus invoking § 1252(g). Admittedly, Petitioners' claims would not exist but for Respondents' decision not to execute Petitioners' removal orders. However, *American-Arab* makes clear that "but for" is not the test. Implicitly recognizing this, the Fifth Circuit has held that § 1252(g) does not bar courts from reviewing an alien's detention pending removal because "the detention, while intimately related to efforts to deport, is not itself a decision to 'execute

removal.'" *Zadvydas v. Underdown*, 185 F.3d 279, 285 (5th Cir. 1999), *vacated on other grounds*, 533 U.S. 678 (2001). In other words, a decision that "does not implicate the actual execution of [a removal order]" does not invoke § 1252(g). *Cardoso v. Reno*, 216 F.3d 512, 517 (5th Cir. 2000). This reading of § 1252(g) is consistent with its congressional aim, which is "to protect from judicial intervention the Attorney General's long-established discretion to decide whether and when to…execute removal orders." *Alvidres-Reyes*, 180 F.3d at 201; *see also American-Arab*, 525 U.S. at 485 n.9 ("Section 1252(g) was directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion."). Here, in attempting to enforce the alleged statutory requirement that they be granted OOS, Petitioners are not challenging Respondents' discretionary decision not to execute their removal orders. Whether or not Petitioners receive OOS, Respondents maintain the discretion to determine whether and when Petitioners may no longer remain in the United States. Therefore, § 1252(g) does not bar Petitioners' claims.

2. Mootness

Although Respondents maintain that they are not required to issue OOS, they nonetheless granted OOS to Supervision Class representatives Norma Pena de Herrera and Isidro Herrera on November 8, 2007. (Doc. 256, Exs. 3-5). Respondents also offer undisputed evidence that remaining class representative Maria Francisca Arce Cedeno was removed from the United States to Mexico on April 9, 2007. (Doc. 256, Ex. 3). Respondents therefore argue that Petitioners' claims are moot. (Doc. 256).

"The 'case or controversy' requirement of Article III of the U.S. Constitution prohibits federal courts from considering questions 'that cannot affect the rights of litigants in the case before them.'" *C&H Nationwide, Inc. v. Norwest Bank Tex. NA*, 208 F.3d 490, 493 (5th Cir.

2000)(quoting *N.C. v. Rice*, 404 U.S. 244, 246 (1971)). A matter becomes moot, and thus does not present a case or controversy, "'if the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004)(quoting *Sierra Club v. Glickman*, 156 F.3d 606, 619 (5th Cir. 1998)). In light of the newly provided evidence that Ms. Arce Cedeno was removed prior to the certification of the Supervision Class on April 25, 2007, the Court finds that her claims are moot and that she may not serve as a class representative. However, Mr. and Mrs. Herrera's receipt of OOS subsequent to certification does not, even if it moots their individual claims, preclude this Court from considering the claims of the Supervision Class. *See Sosna v. Iowa*, 419 U.S. 393, 399-402 (1975)(mootness of named plaintiff's individual claim after certification of class does not render action moot); *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 753-54 (1976)(emphasizing that Court's holding in *Sosna* did not depend on existence of claim "capable of repetition, yet evading review"); *see also Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1045 (5th Cir. 1981)("[A] suit brought as a class action must as a general rule be dismissed for mootness when the personal claims of the named plaintiffs are satisfied *and* no class has properly been certified.")(emphasis added).

In any event, Mr. and Mrs. Herrera's individual claims are not moot. The Supreme Court has held that a defendant's "voluntary cessation" of the challenged conduct "does not moot a case or controversy unless 'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (U.S. 2007)(quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). This "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with

the party asserting mootness." *Friends of the Earth*, 528 U.S. at 170 (quoting *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 303 (1968))(internal quotations omitted). Respondents have not met their burden to show that it is "absolutely clear" that they will no longer deny OOS to Mr. and Mrs. Herrera. It is undisputed that these two Petitioners, a married couple, are under administratively final orders of removal but have been allowed by Respondents to remain in the United States to care for their U.S. citizen child who suffers from a blood disorder requiring regular medical treatment. (Docs. 55, 102, 256; Doc. 256, Ex. 1 at ¶ 94). Although Respondents initially granted OOS to Mr. and Mrs. Herrera, those orders were cancelled pursuant to the instructions of Michael A. Watkins, Assistant Field Office Director for the Harlingen Resident Office of DHS/ICE,[7] in an "Interoffice Memorandum" dated February 27, 2006. (Doc. 55). In response to a letter from Petitioners' counsel addressing the "Watkins Memo," Watkins indicated that his office had no need to comply, in future cases, with this Court's determination in *Zamora-Garcia v. Trominski*, *supra* that OOS are required for non-detained aliens whose 90-day removal periods have expired and who have not "conspired or acted to prevent removal." (Docs. 59, 64; Cause No. M-02-144 at Doc. 124). Watkins explained that the requirement to issue OOS upon the expiration of the 90-day removal period applied only to aliens detained and then released. (Doc. 64). Respondents continue to take this position. (Docs. 256, 261). Nonetheless, Respondents again issued OOS to Mr. and Mrs. Herrera after the Court certified the Supervision Class. The OOS are not indefinite; they must be renewed. (Doc. 256, Ex. 6 at pp. 48-49). In light of the above, the Court finds that Respondents have not made it "absolutely clear" that they will continue to allow Mr. and Mrs. Herrera to remain under OOS. Therefore, these Petitioners' individual claims are not moot.

[7] "DHS" refers to the U.S. Department of Homeland Security. "ICE" refers to U.S. Immigration and Customs Enforcement, an agency within DHS.

3. Merits

Again, the Supervision Class consists of those aliens, like Mr. and Mrs. Herrera, who are allowed, for humanitarian reasons, to remain in the United States past the 90-day removal period (*i.e.*, 90 days after their removal orders become administratively final, because they have not pursued *judicial* stays of removal), and who have not otherwise "conspired or acted to prevent removal." (Doc. 138); *see also* Cause No. M-02-144 at Docs. 124, 131. The Court concluded, in the course of the two predecessor actions, that OOS are statutorily mandated for persons who fall within this class, for the reasons stated in its prior orders and now incorporated herein. *Id.* Although Respondents granted OOS to Mr. and Mrs. Herrera following the Court's certification of the class, Respondents continue to challenge the Court's finding that they are *required* to do so. (Docs. 256, 261). In light of the additional briefing provided by the parties, the Court will revisit its determination of the merits of Petitioners' claims. In doing so, the Court cannot help but note that the denial of OOS to Petitioners appears to have the effect of depriving Respondents of the ability to supervise aliens under final removal orders and in fact circumvents the purpose for which Respondents have allowed aliens like Mr. and Mrs. Herrera to remain in the United States—that is, to care and provide for family members with special medical needs. In any event, the apparent lack of any policy argument to support the denial of OOS is of no consequence here, where the Court need only look to the language of the statute to determine whether it applies to Petitioners. The relevant statutory provisions are as follows:

> **§ 1231. Detention and removal of aliens ordered removed**
>
> (a) Detention, release, and removal of aliens ordered removed
>
> (1) Removal period
>
> (A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(2) During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien—

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

> (D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien….

8 U.S.C. § 1231(a)(1)-(3). The terms of supervision set forth in § 1231(a)(3) are the terms of the OOS. *See* 8 C.F.R. § 241.5. In the past, the Court interpreted § 1231(a) to require Respondents to provide OOS to all non-detained aliens whose removal periods have expired. Cause No. M-02-144 at Doc. 124; (Doc. 138). However, Respondents argue that § 1231(a) does not apply to those aliens, like Petitioners, who are not detained *during* the removal period. (Docs. 256, 261). The Court previously rejected this argument, relying on the statute's requirement that "[i]f the alien *does not leave or is not removed* within the removal period, the alien, pending removal, *shall* be subject to [an OOS]." *See* § 1231(a)(3)(emphasis added); Cause No. M-02-144 at Doc. 124; (Doc. 138). This language indicates that § 1231(a) applies to those aliens who do not voluntarily leave during the removal period, and thus are not detained. However, as Respondents note, this language cannot be read in isolation. *Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987)("Specific words within a statute…may not be read in isolation of the remainder of that section or the entire statutory scheme."). Section 1231(a) also provides that the Attorney General "shall" detain the alien during the removal period, and that "[u]nder no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title." 8 U.S.C. § 1231(a)(2).[8] Further, the statute gives authority to Respondents to *continue* to detain the alien past the initial 90-day removal

[8] This requirement is reflected in the title of the statutory section at issue, "Detention and removal of aliens ordered removed," and the title of the subsection at issue, "Detention, release, and removal of aliens ordered removed." These titles provide further indication that § 1231(a) applies only to aliens detained during the removal period. *See Bhd. of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 528-29 (1947)(although statutory headings and titles "are not meant to take the place of the detailed provisions of the text," they are of use for "interpretative purposes…[to] shed light on some ambiguous word or phrase" or as "tools available for the resolution of a doubt").

period if certain criteria are met, or to release him. *Id.* § 1231(a)(1)(C). It is upon this release that the provision of OOS becomes mandatory. *Id.* § 1231(a)(3). Here, Respondents decided not to detain Petitioners during the 90-day removal period or otherwise, for humanitarian reasons. By making the discretionary decision not to detain aliens who otherwise "shall" be detained, Respondents removed Petitioners from the confines of § 1231(a), and therefore from the requirement that they be provided OOS upon release. In fact, they were never "released," and thus § 1231(a)(3) does not apply to them. For these reasons, the Court finds that OOS are not statutorily required for aliens not detained during the removal period. Therefore, Respondents' motion for summary judgment must be granted and Petitioners' motion denied.

B. Cash Bond Classes

As with the Supervision Class, the Court addressed the claims asserted by the Cash Bond Classes in both predecessor actions to this cause. In the first predecessor action, Defendants did not dispute the Court's jurisdiction over these claims aside from arguing that § 1252(g) precludes such jurisdiction. Cause No. M-02-144 at Doc. 61. The Court rejected this argument, and Defendants no longer maintain this position. *Id.* For the first time in their motion for summary judgment, Defendants claim that they are entitled to sovereign immunity from suit on the claims of the Cash Bond Classes (collectively, "Plaintiffs"). (Doc. 256). They also move for summary judgment on the merits of Plaintiffs' claims, relying principally on the argument that they have no constitutional obligation to do more than send notice of a bond demand to the obligor's address listed in bond contract, which is all that the contract requires. *Id.* Plaintiffs assert that due process requires more when this notice is returned undelivered, and request summary judgment in their favor. (Doc. 251).[9]

[9] Plaintiffs' summary judgment briefing also makes the argument that principles of contract law require more than the notice provided. (Docs. 251, 260). However, this case has always proceeded under the

1. Sovereign Immunity

The pleaded bases for this Court's jurisdiction over the claims of the Cash Bond Classes are 28 U.S.C. §§ 1331 and 1346(a)(2). (Doc. 114 at ¶ 31).[10] Defendants correctly point out that the "Little Tucker Act," § 1346(a)(2), does not confer jurisdiction over these claims, as it "has long been construed as authorizing only actions for money judgments and not suits for equitable relief against the United States." *Richardson v. Morris,* 409 U.S. 464, 465 (1973).[11] The Cash Bond Classes, certified pursuant to Federal Rule of Civil Procedure 23(b)(2), indisputably seek only injunctive and declaratory relief. *See* FED. R. CIV. P. 23(b)(2); (Docs. 114, 138). Defendants do not contest that the claims of the Cash Bond Classes present a federal question sufficient to invoke § 1331, the remaining basis for the Court's jurisdiction. (Doc. 256).[12] However, they argue that § 1331 "merely provides district courts with original jurisdiction over federal questions; it does not provide the waiver of sovereign immunity necessary for a suit against the federal government." (Doc. 256). Although a correct statement of the law, *see Shanbaum v. United States*, 32 F.3d 180, 182 (5th Cir. 1994), Defendants overlook that the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, serves as the waiver of sovereign immunity that allows "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action," to sue the United States for equitable relief if

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theory that the notice practices at issue violate due process, and the Cash Bond Classes were defined accordingly. In any event, the Court need only consider Plaintiffs' due process arguments to resolve whether they are entitled to the injunctive and declaratory relief they seek.

[10] As Defendants note, Plaintiffs Jorge Echavarria and Juan Larin-Ulloa are not mentioned in the "Jurisdiction and Venue" section of Plaintiffs' live complaint. (Doc. 114 at ¶¶ 28-32). However, the complaint makes sufficiently clear that these Plaintiffs invoke the same bases for jurisdiction as the other Cash Bond Class Plaintiff, Adrianna Echavarria.

[11] The Act gives the district courts original jurisdiction over "[a]ny…civil action or claim against the United States [not otherwise set forth in subsection (a)(1) and] not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort…." 28 U.S.C. § 1346(a)(2).

[12] Section 1331, entitled "Federal question," gives the district courts original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

jurisdiction under § 1331 otherwise exists. 5 U.S.C. § 702 ("An action in a court of the United States seeking relief other than money damages…shall not be dismissed…on the ground that it is against the United States."); *Stockman v. Federal Election Comm'n*, 138 F.3d. 144, 151-52 (5th Cir. 1998). Defendants point to no authority indicating that Plaintiffs must affirmatively plead this waiver, and the Court has located none. Therefore, the Court finds that it has jurisdiction to consider the Cash Bond Class claims.

2. Merits

a. Summary Judgment Evidence

1. Overview of Cash Bond Class Claims

The claims of Plaintiffs Adrianna Echavarria, Jorge Echavarria, and Juan Larin-Ulloa and the Cash Bond Classes they represent all involve constitutional due process challenges to the adequacy of notice provided by Defendants of "call-ins" or "demands" on cash delivery bonds. Plaintiffs' claims cover periods of time before, and after, the Immigration and Naturalization Service ("INS") was abolished on March 1, 2003 and its functions transferred to agencies within the Department of Homeland Security ("DHS"), but Defendants admit that "[t]his change has no effect on the present case." (Doc. 256). For the sake of clarity, the Court will mostly use the present tense, and refer to DHS, when describing the notice practices of DHS and its predecessor.

It is undisputed that an alien detained by DHS during removal proceedings may, if DHS deems it to be appropriate, secure his or her release from detention by obtaining a cash delivery bond posted by an obligor for the alien's benefit. (Docs. 251, 256; Doc. 256, Ex. 8). The obligor posts the bond with DHS by depositing the bond amount and signing the "Immigration Bond" form contract, or "Form I-352," which is drafted by DHS and filled out by its staff. (Doc. 256,

Ex. 8; Doc. 235 at pp. 29-33). The Form I-352 requires the obligor to provide his or her name, address, telephone number, and taxpayer identification number,[13] and obligates DHS to notify the obligor by mail, directed to the obligor at the address provided by the obligor on the form, of any demand to deliver the alien to DHS. (Doc. 256, Ex. 8). A demand on the bond, or "Form I-340," can be for the alien's surrender for the purpose of removal, or for a hearing or interview. (Doc. 235 at pp. 33-34; Doc. 256, Ex. 10). DHS does not send the Form I-340 to the alien. (Doc. 235 at pp. 36-37; Doc. 256, Ex. 10). If the alien has not appeared by the date specified in the Form I-340, the bond is declared breached and DHS sends notice of the breach, or "Form I-323," to the obligor at the same address. (Doc. 256, Ex. 8; Doc. 235 at p. 44). The date of the breach is the surrender or appearance date specified in the demand. (Doc. 256, Ex. 8). Absent the filing of an administrative appeal or motion for reconsideration within 30 days of notification of the breach, the breach becomes administratively final. *Id.* It is the practice of DHS to send the "Form I-166," a demand sent directly to the alien requesting his or her appearance, *after* the surrender date specified in the Form I-340 has passed and the alien has not appeared—in other words, after the bond has already been breached. (Doc. 244 at pp. 62-63; Doc. 256, Ex. 10).

Glenn Stewart, DHS Supervisory Detention and Deportation Officer, offered this undisputed testimony in his November 17, 2003 deposition:

> Q. In the case of cash bonds, what happens if the I-340 [demand on the bond] is returned undeliverable?
> A. If it's returned undeliverable and the post office says it's undeliverable, then we'll declare that bond breached.
> …
> Q. Before you send the I-340, where would you get the address for the obligor?
> A. Off the contract.[14]
> Q. …[I]s there any duty by the obligor to provide…a change of address?

[13] A previous version of this form, and the one signed by Obligor Class representative Adrianna Echavarria on November 5, 1993, required the obligor to provide only his or her name and address. (Doc. 236).

[14] There is no dispute that "the contract" is the Form I-352.

> A. Yes. I would think so. Because how are we going to know how to locate them?
> Q. And if there is some sort of document in the A file[15] that reflects a change of address—what I'm trying to get at is, I mean, are there any documents or do deportation officers do anything else to confirm that that's the right address, that the obligor's address is correct?
> A. I would have to say no. The obligor gave us their address and they said, "When you're ready, you contact us at this address."
> Q. And let's say you do get this and—the envelope of the I-340 saying they couldn't deliver it and it says their forwarding address has expired. What is the practice of your deportation officers?
> A. We declare the bond breached.
> Q. And you have received now an envelope that says, you know, "Forwarding address expired." What is the practice of determining whether there has been a change in address?
> A. If we send a demand, occasionally the post office will send—it's certified. It's certified mail. We sent it out certified mail. If it comes back and the post office says that, "This is undeliverable, we went to the address, the address doesn't exist, there is nobody there by that name, nobody wouldn't take it," for whatever reason, they tried to deliver it, then we're going to breach that bond. We don't go any further trying to track this person down. They're the ones that signed the contract that said, "You can find me right here," and it's up to them to keep us apprised of wherever their new address is if they're going to move.

(Doc. 235 at pp. 43-46). In sum, Mr. Stewart testified that the obligor has the responsibility to inform DHS of a change in address, but that DHS officers do not consult any documents or information other than the Form I-352 in determining where to send a demand on the bond. Plaintiffs' expert, attorney Jodi Goodwin, also testified that she believed that obligors are required to "keep [DHS] aware not only of their address, but also the alien's address," although she qualified that she "would have to look at the bond contract to tell you all of the obligations." (Doc. 256, Ex. 11 at p. 195). That contract, the Form I-352, does not advise the obligor to notify DHS of any change in address. (Doc. 256, Ex. 8). Moreover, no change of address form exists for the Form I-352.[16]

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[15] The "A file" refers to the alien's file.

[16] In contrast, an alien in removal proceedings must receive written notice of the requirement to provide the Attorney General with a written record of any change of the alien's address, 8 U.S.C. § 1229(a)(1)(F)(ii), and forms exist for aliens to make changes of address with DHS ("Form AR-11"), the

The effect of a bond breach is that the full amount of the bond posted by the obligor becomes due and payable to DHS. (Doc. 256, Ex. 8).[17] In addition, an alien's failure to appear on the date specified in the Form I-340 subjects the alien to a possible return to custody[18] and the loss of otherwise available legal rights. (Doc. 256, Ex. 10).[19]

2. Evidence Pertaining to Class Representatives

Plaintiffs' evidence, undisputed by Defendants, establishes that the representative of the Obligor Cash Bond Class, Adrianna Echavarria ("Mrs. Echavarria"), posted a $1,500.00 cash delivery bond on November 5, 1993 to secure the release from INS detention of her husband, Immigrant Cash Bond Class A representative Jorge Echavarria ("Mr. Echavarria"). (Doc. 236 at pp. 2-5). Mrs. Echavarria signed the Form I-352 and provided her name and address, which are contained in the bond agreement in typewritten form. *Id.*[20]

On May 4, 1995, Mr. Echavarria was ordered deported when the Board of Immigration Appeals ("BIA" or "Board") dismissed his appeal of the Immigration Court's denial of his

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Immigration Courts ("Form EOIR-33/IC"), and the Board of Immigration Appeals ("Form EOIR-33/BIA"). (Doc. 246).

[17] The current Form I-340 provides that the obligor may receive "mitigation" of this amount if he or she delivers the alien within the 30-day period following the date of the bond breach. (Doc. 256, Ex. 8).

[18] Plaintiffs' expert, Ms. Goodwin, explained that that if an alien fails to appear on the surrender date, "another very practical concern is the risk of detention or re-detention." (Doc. 256, Ex. 10). More specifically, "[e]ven if the immigrant were able to request authority to post a new immigration bond, he or she would be treated as a 'flight risk' because [he or she] had previously not appeared when requested…." *Id.* Defendants, who in fact attached Ms. Goodwin's expert report to their summary judgment motion, provide no argument or evidence to dispute that these consequences exist.

[19] Ms. Goodwin explained that notice of a surrender date allows an alien with an appeal pending with the Board of Immigration Appeals or with a Circuit Court of Appeals to request a stay of removal or expedited treatment of the appeal, or to seek relief in the form of a petition for habeas corpus. (Doc. 256, Ex. 10). Without notice, an alien faces the possibility of apprehension by DHS and immediate removal without the opportunity to pursue these legal remedies. *Id.* Also, an alien whose surrender date passes is designated a "fugitive," which prevents the alien from obtaining information about his or her case through the Freedom of Information Act, and which may bar the availability of judicial review of the legal basis of an alien's challenge to removal. *Id.*; *see Giri v. Keisler*, 507 F.3d 833 (5th Cir. 2007). Again, Defendants offer no argument or evidence to dispute that these legal consequences exist.

[20] As indicated *supra*, the Form I-352 has been revised since this date to require the obligor to also provide his or her telephone number and taxpayer identification number. (Doc. 256, Ex. 8).

application for discretionary relief under former § 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). (Doc. 239 at p. 17; Doc. 251). INS did not send any notice to the obligor, Mrs. Echavarria, of a demand for her husband's appearance for deportation. (Doc. 251). Rather, it notified Mr. Echavarria of the requirement that he appear for deportation on June 29, 1995 by sending the Form I-166 directly to him. (Doc. 239 at p. 20). Mr. Echavarria received the Form I-166 and responded by locating counsel and filing a petition for review with the Fifth Circuit Court of Appeals, a motion to reopen and reconsider with the BIA, and an application for stay of deportation with INS. (Doc. 239 at pp. 11, 13-19). INS granted the stay and allowed Mr. Echavarria to remain at liberty pending the Board's determination of his motion. (Doc. 239 at p. 11).

Mr. Echavarria was again ordered deported and, on April 10, 2001, INS sent the Form I-340 by certified mail, return receipt requested, to Mrs. Echavarria at the address provided in the Form I-352, notifying her of the demand for her husband's appearance for deportation on May 9, 2001. (Doc. 239 at pp. 8-9). The U.S. Postal Service returned the Form I-340 undelivered, with a notation that the forwarding time had expired. *Id.* On May 17, 2001, INS sent the Form I-323 to Mrs. Echavarria at the same address, notifying her that the bond had been breached on May 9, 2001. (Doc. 239 at pp. 4-7). Again, the notice was returned undelivered, with the same notation. *Id.* On June 27, 2001, a notation was made on the notice of breach that no appeal had been received, and that the bond breach was final. (Doc. 239 at p. 4). *After* this date, on July 6, 2001, INS sent the Form I-166 to Mr. Echavarria at the Echavarrias' *new* address, notifying him of the demand for his appearance for deportation on August 3, 2001. (Doc. 239 at p. 23). Mr. Echavarria received the Form I-166 and filed a petition for habeas corpus challenging the deportation order on July 23, 2001. (Doc. 239 at pp. 24-25). In accordance with the policy then

in effect, INS cancelled the Form I-166 upon receiving notice of the filing of the petition. (Doc. 239 at p. 23). This local policy no longer exists. (Docs. 55 at pp. 3-4; Doc. 240 at p. 4). Plaintiffs' complaint alleges, and it appears to be undisputed, that Mr. Echavarria was granted relief from deportation on June 10, 2003, and the government waived appeal. (Doc. 114 at ¶ 90).

No party points to evidence pertaining to Immigrant Cash Bond Class B representative Juan Larin-Ulloa, but it appears to be undisputed that an obligor posted a cash delivery bond on his behalf on September 1, 2006, that he has appeared at every appearance requested by Defendants, and that he remains released pursuant to the bond. (Doc. 114 at ¶ 103-04; Docs. 251, 256).

b. Immigrant Cash Bond Class A

As an initial matter, the Court finds that the evidence submitted through the parties' motions for summary judgment requires it to reexamine whether Mr. Echavarria is a proper class representative of the Immigration Cash Bond Class A. *See* FED. R. CIV. P. 23(c)(1)(C)("An order that grants…class certification may be altered or amended before final judgment."). All three Cash Bond Classes make essentially the same claim—that is, that Defendants' failure to provide notice consistent with *Jones v. Flowers*, *supra*, constitutes a deprivation of their constitutional right to due process. The only material difference between the claims of the Obligor Cash Bond Class and the Immigrant Cash Bond Classes lies in the nature of the interest deprived. The Obligors claim that the notice procedures complained of deprive them of a property interest, *i.e.*, the bond amount, whereas the Immigrants assert the deprivation of a liberty interest, *i.e.*, possible return to custody and lack of access to the courts.

This Court has previously recognized that Defendants' notice practices implicate the bonded alien's liberty interests. Cause No. M-02-144 at Doc. 135. The Court reiterates, and

Defendants do not dispute, that each of the members of the Immigrant Cash Bond Classes has a liberty interest, protected by the due process clause of the Fifth Amendment to the U.S. Constitution, in "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Further, the right of access to the courts is a liberty interest protected by the due process clause. *Arnaud v. Odom*, 870 F.2d 304, 311 (5th Cir. 1989); *see also Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983)("[t]he right of access to the courts is basic to our system of government, and it is well established…that it is one of the fundamental rights protected by the Constitution."). However, the Court cannot ignore that with respect to Mr. Echavarria, the record makes clear that Defendants' failure to make additional efforts to notify his wife of the demand for his appearance for deportation on May 9, 2001 did not result in any deprivation of these interests, *i.e.*, detention or any other loss of freedom, or lack of access to any legal remedy. In fact, over the course of a decade, Mr. Echavarria pursued an appeal and motion to reopen or reconsider at the BIA, an appeal to the Fifth Circuit, and a petition for habeas corpus. INS sent notice to him of the original surrender date, June 29, 1995, in sufficient time to enable him to locate counsel and seek relief. After the May 9, 2001 demand was sent to Mrs. Echavarria and returned undelivered, and the bond breached, INS directly notified Mr. Echavarria at his updated address of a new surrender date. He responded by filing the petition for habeas corpus, and eventually secured relief from deportation. Under this set of undisputed facts, Mr. Echavarria cannot show any deprivation of a liberty interest that occurred as a result of Defendants' failure to take additional steps to notify Mrs. Echavarria of the demand on Mr. Echavarria's bond. Therefore, he is not a proper class representative, and the Immigrant Cash Bond Class A must be decertified.[21] For the

[21] With respect to Mr. Larin-Ulloa, the record reflects that DHS will make no additional attempts to notify the obligor on his bond of any bond call-in that is returned undelivered, and that the bond will

same reasons, the Court must grant Defendants' motion, and deny Plaintiffs' motion, with respect to Mr. Echavarria's individual due process claim.

c. Obligor Cash Bond Class

The Court turns to the claims of Mrs. Echavarria and the Obligor Cash Bond Class she represents (hereinafter "Obligor Plaintiffs") by first noting what is undisputed: at all times relevant to Obligor Plaintiffs' claims, INS/DHS has consulted no information other than the obligor's address as supplied in the bond agreement (Form I-352) when determining where to mail (1) notice of a demand on a bond (Form I-340); and, if the alien fails to appear on the date requested, (2) notice of the bond breach (Form I-323), which breach becomes administratively final if the obligor fails to challenge it within the requisite period of time. If these notices sent by certified mail, return receipt requested, are returned undelivered for *any* reason, the agency takes no additional steps to provide notice. Accordingly, absent notice to the obligor by some other means, notice sent by the agency that is returned undelivered results in the breach of the bond and the forfeiture of the bond amount.[22] Defendants do not contest that these are the past and current consequences of notice returned undelivered, nor do they dispute the Court's previous finding that an obligor has a property interest in the bond amount that is protected by the due process guarantees of the Fifth Amendment to the U.S. Constitution. Cause No. M-02-144 at Doc. 61. Rather, Defendants argue that they have no constitutional obligation to do more than

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therefore be breached, resulting in his possible return to custody and the loss of otherwise available legal rights. Therefore, Mr. Larin-Ulloa remains a proper class representative of the Immigrant Cash Bond Class B.

[22] The record contains no evidence that notice by another means occurs at all, much less with any frequency. If, somehow, an obligor received notice from the government by another means, these facts would exclude her from the Obligor Cash Bond Class, but notice from a third party would not affect her class membership. *See Taylor v. Westly*, 488 F.3d 1197, 1201 (9th Cir. 2007)(citing *Jones v. Flowers*, *supra*)("[B]ecause the *Jones* decision clearly holds that the *State* must give notice," State of California's argument that it did not have to give notice because third parties would do so "is not only novel, it is apparently foreclosed by Supreme Court precedent.")(emphasis in original).

send notice to the obligor's address listed in the Form I-352, which is all that the contract requires. (Docs. 256, 261).

"Procedural due process imposes constraints on governmental decisions that deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319 (1976). The fundamental requisite of due process is the right to be heard, but "[t]his right has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Accordingly, the government must provide both "notice and opportunity for hearing appropriate to the nature of the case" before it may deprive a person of a constitutionally protected interest. *Id.* Actual notice is not required, *Dusenbery v. United States*, 534 U.S. 161, 170 (2002), but "process which is a mere gesture is not due process," *Mullane*, 339 U.S. at 315. To comport with the Constitution, notice must be "*reasonably calculated, under all the circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," and "must be such as one *desirous of actually informing*" the recipient might reasonably use. *Id.* at 314-15 (emphasis added). The adequacy of a particular form of notice is assessed by balancing the State's interest against the individual interest sought to be protected. *Id.* at 314.

Jones v. Flowers, 547 U.S. 220 (2006), the case on which Obligor Plaintiffs principally rely, reaffirmed the *Mullane* notice standard and considered for the first time what due process requires when the government knows that its initial attempt at notice, however reasonable when sent, has failed. *Id.* at 226-27. In compliance with the applicable statute, the State of Arkansas attempted to notify the petitioner, Jones, that the home he owned would be sold for tax

delinquency by sending two letters by certified mail, return receipt requested, to Jones at the property's address. *Id.* at 223-24. At the time the State sent the notices, Jones had not lived at the home for many years and had not fulfilled the obligation imposed upon him by statute to keep his address updated with the State. *See id.* at 223-24, 226. Both letters were returned "unclaimed," the State sold the property, and Jones eventually received notice of the sale through a third party. *Id.* at 223-24.

The Supreme Court did not question the reasonableness of the initial attempt at notice but could not accept that "a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed." *Id.* at 226-27, 229. In other words, "[n]o one 'desirous of actually informing' the owners would simply shrug his shoulders...and say 'I tried.'" *Id.* Instead, he would resend the letter or take other reasonable steps, if available, to give notice, especially where the letter concerned "such an important and irreversible prospect as the loss of a house." *Id.* at 230. The Court further reasoned that Jones's failure to keep his address updated as the statute obligated him to do gave strength to the State's position that its notices were reasonable when sent, but not to its argument that it had no need to do anything more when the notices were returned unclaimed. *Id.* at 232. The Court held that the State should have taken "additional reasonable steps" to notify Jones of the tax sale, if practicable to do so, and that such steps were in fact available. *Id.* at 233-39.

Defendants dispute the applicability of *Jones* to the case at hand, arguing that the decision applies only in the context of the government's deprivation of an individual's protected property interest in his home. This argument is easily disposed of—*Jones* contains no express language so limiting its holding, other courts of appeals have applied *Jones* outside this

context,[23] and the *Mullane* notice standard that informs the decision in *Jones* has never been limited to home foreclosures, *see Jones*, 547 U.S. at 229 (citing cases). Rather, that Jones stood to lose his home was a factor considered by the Court in balancing the State's interest against Jones's. Nonetheless, Defendants further assert that the Court should ignore the holding in *Jones* because "far more relevant" precedent applies when determining the notice required under a bond agreement. (Docs. 256, 261).

That precedent, according to Defendants, includes "a line of cases that concern due process requirements for notice procedures in the immigration context." *Id.* (citing *Rodriguez-Cuate v. Gonzalez*, 444 F.3d 1015 (8th Cir. 2006); *Fuentes-Argueta v. INS*, 101 F.3d 867 (2d Cir. 1996); *United States v. Estrada-Trochez*, 66 F.3d 733 (5th Cir. 1995)). More specifically, these cases concern the notice required of the government when informing an alien of a deportation hearing to take place in Immigration Court. In each case, the alien received actual notice of the charging document for deportation proceedings, the Order to Show Cause ("OSC"), which directed the alien to provide the government with a current address to which further notices could be sent. *See Rodriguez-Cuate*, 444 F.3d at 1016; *Fuentes-Argueta*, 101 F.3d at 871 n.1; *Estrada-Trochez*, 66 F.3d at 734; *see also Adeyemo v. Ashcroft*, 383 F.3d 558, 559 (7th Cir. 2004). When immigration officials sent the subsequent notice of hearing to the alien's last known address by certified mail, return receipt requested, the notice was returned undelivered

[23] *See Crum v. Vincent*, 493 F.3d 988, 992-93 (8th Cir. 2007)(applying *Jones* to claim by physician that State had deprived him of property interest in medical license without due process); *Taylor*, 488 F.3d at 1201 (under *Jones*, likelihood was "high" that plaintiffs would succeed on merits of due process challenge to notice provided by government before seizing stock subject to escheat); *Yi Tu v. Nat'l Transp. Safety Bd.*, 470 F.3d 941, 945-46 (9th Cir. 2006)(Federal Aviation Administration violated due process when it failed to take additional reasonable steps to notify pilot of suspension of license after suspension orders sent by certified mail were returned unclaimed); *United States v. One Starr Class Sloop Sailboat*, 458 F.3d 16, 25-26 (1st Cir. 2006)(remanding to district court for determination of whether additional reasonable steps were available to identify part owner of sailboat subject to forfeiture, and to notify him of forfeiture proceeding).

and the government made no additional attempts to notify the alien of the hearing. *See Rodriguez-Cuate*, 444 F.3d at 1017 (notice returned and marked "attempted-not known"); *Fuentes-Argueta*, 101 F.3d at 869 (notice "unclaimed"); *Estrada-Trochez*, 66 F.3d at 735 (notice "undeliverable").[24] Each alien failed to appear at the deportation hearing and was ordered deported *in absentia*. *See Rodriguez-Cuate*, 444 F.3d at 1017; *Fuentes-Argueta*, 101 F.3d at 869; *Estrada-Trochez*, 66 F.3d at 735. In Estrada-Trochez's collateral challenge to his deportation order, and in Fuentes-Argueta's and Rodriguez-Cuate's appeals of the denial of their motions to reopen deportation proceedings, each alien sought relief from the *in absentia* order on grounds of lack of notice. *See generally id.* The Fifth Circuit's determination that no due process violation had occurred rested on its observation that Estrada-Trochez had a statutory duty to inform the government of his change in address but did not. *Estrada-Trochez*, 66 F.3d at 736 (citing 8 U.S.C. § 1305). The Fifth Circuit reasoned that the *in absentia* order was therefore permissible under the applicable statute because the government gave Estrada-Trochez "a reasonable opportunity to be present at the [deportation] proceeding" by sending notice of the hearing to his last known address, and "without reasonable cause" he failed to attend. *Id.* (citing former 8 U.S.C. § 1252(b)). In *Fuentes-Argueta*, the Second Circuit reviewed the alien's claims under an abuse of discretion standard, and was required to afford "substantial deference" to the BIA's interpretation of the now-repealed statutory provisions governing the reopening of deportation proceedings for lack of notice. *Fuentes-Argueta*, 101 F.3d at 870 (citing *Osorio v. INS*, 18 F.3d 1017, 1022 (2d Cir. 1994)); *see* former 8 U.S.C. § 1252b(a)(2), (c)(1), (c)(3)(B). The court deferred to the BIA's determination that "[s]o long as there is proof of attempted delivery, there

[24] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub.L.No. 104-208, 110 Stat. 3009-543 (Sept. 30, 1996), effective April 1, 1997, consolidated the OSC and notice of hearing into a single "Notice to Appear" ("NTA"). *E.g.*, *Adeyemo*, 383 F.3d at 560 n.1 (citing 8 U.S.C. § 1229(a)(1)).

is a presumption of adequate notice, rebuttable only upon 'present[ation of] substantial and probative evidence…demonstrating that there was improper delivery or that nondelivery was not due to the [alien]'s failure to provide an address where he could receive mail.'" *Id.* at 871 (quoting *Matter of Grijalva*, 21 I&N Dec. 27, 37 (BIA 1995)). It also found no abuse of discretion in the BIA's determination that Fuentes-Argueta had failed to rebut the presumption of effective service and therefore concluded that the BIA appropriately upheld the Immigration Judge's denial of her motion to reopen. *Id.* at 872. Turning to whether the BIA's reading of the statute at issue violated due process, the court took into consideration that the use of certified mail to convey notices of deportation proceedings generally comports with due process, and further, that *Mullane* has not been interpreted to require actual notice. *Id.* The court stated that "[i]t is thus within the bounds of due process to establish a presumption of adequate notice—which the petitioner would be free to rebut—where, as here, there is evidence that attempts were made to deliver the petitioner's notice by certified mail." *Id.* Finally, in *Rodriguez-Cuate*, which concerned the same statutory notice provisions at issue in *Fuentes-Argueta*, the Eighth Circuit also deferred to the BIA's interpretation of the statute and found that Rodriguez-Cuate had failed to rebut the presumption of effective service. *See Rodriguez-Cuate*, 444 F.3d at 1017-18. Therefore, the court found no abuse of discretion in the denial of his motion to reopen. *Id.* at 1018-19. *Rodriguez-Cuate* contains no discussion of due process.

Upon careful review of this precedent, the Court finds that it is distinguishable in multiple ways from the case at hand. Most apparently, the cases were decided under different standards of review and involved notice to aliens of deportation hearings in Immigration Court, and therefore statutory provisions not in play here. In *Rodriguez-Cuate*, the court never moved beyond statutory construction and application—that is, it did not further consider the

constitutional sufficiency of the notice procedures used. Again, the Fifth Circuit in *Estrada-Trochez* rested its determination that the notice given did not violate due process on the fact that the alien had a statutory obligation to keep the government apprised of his current address. The obligor has no such duty, statutory or otherwise, and the record reflects that any obligation she may take upon herself to update her address does not affect the notice procedures used. She also has no opportunity, as under the statutory provisions at issue in *Fuentes-Argueta* and *Rodriguez-Cuate*, to rebut a presumption of effective service. Finally, each of these cases pre-dates *Jones*. The Second Circuit relied on the *Mullane* notice standard in resolving Fuentes-Argueta's due process claims. Had it been given occasion to consider *Jones*, the court almost certainly would have done so. For all of these reasons, this Court concludes that the three cases discussed above do not preclude consideration of *Jones* in determining Obligor Plaintiffs' due process claims.

Defendants' "more relevant" precedent also includes two cases that, according to Defendants, demonstrate that due process requires no more than compliance with the notice terms in the bond contract. (Docs. 256, 261). As Defendants note, the Fifth Circuit in *L&A Contracting Co. v. S. Concrete Servs., Inc.*, 17 F.3d 106 (5th Cir. 1994), stated that "'[t]he liability of a surety should not be extended by implication beyond the terms of the contract.'" *Id.* at 112 n.22 (quoting *Am. Home Assur. Co. v. Larkin Gen. Hosp., Ltd.*, 593 So.2d 195, 198 (Fla. 2002)). However, it did so in a footnote, and was citing to Florida law. *See id.* More importantly, Defendants' reliance on this case is misplaced because the court had no need to concern itself with the requirements of due process in determining liability under a performance bond involving only private parties, and no state action. *See generally id.*

Defendants characterize the Eighth Circuit's decision in *United States v. Minnesota Trust Co.*, 59 F.3d 87 (8th Cir. 1995), as a determination that notice provided to an obligor pursuant to

the terms of a bond agreement satisfies due process, but the decision contains no discussion of due process at all. (Docs. 256, 261). Further, the precise issue before the court in *Minnesota Trust* was whether INS was required to provide notice to a surety of a bond call-in, and/or of the ensuing bond breach when the alien failed to appear as requested, where the agreement itself contemplated notice to the agent only. *See id.* at 89-91. The surety in *Minnesota Trust* knew that its agent had gone out business (this was the reason the agent had failed to receive the notices, giving rise to the government's suit to hold the surety liable for the bond breach), but "never notified the INS that notices should be sent to [the surety instead of the agent], nor did [the surety] take any other steps to protect itself." *Id.* at 90. Citing to authority indicating that a surety bears the burden to monitor its principal and protect its own interests, the court held the surety to the notice terms of the agreement and found it liable for the bond amount. *Id.* at 91. Even if the obligor in this case somehow bears the same burden to protect her interests, again, the record contains no evidence that any efforts by the obligor to do so would alter the notice procedures used. Also, *Minnesota Trust* does not reflect that the surety claimed a property interest in the bond amount or challenged the notice provided as constitutionally deficient.[25] Failure to consider an argument not raised, and rejecting it as inapplicable, are two different things—*Minnesota Trust* does not somehow stand for the proposition that a federal contract substitutes for due process. A party may *waive* its due process rights by entering into a contract, *see, e.g.*, *Fuentes v. Shevin*, 407 U.S. 67, 94-96 (1972), but that is a question apart from the

[25] The court discussed the sufficiency of notice to the agent only briefly, in a footnote, finding that INS had complied with the applicable regulations. *See Minnesota Trust*, 59 F.3d at 90 n.3. Those regulations do not apply in this case. The court further relied on the Board's decision in *Matter of Grijalva, supra*, in stating that "[t]he fact that the notices were returned unclaimed is not controlling." *Id.* As indicated *supra, Grijalva* involves the BIA's interpretation of statutory provisions not in play here.

process due.[26] Generally speaking, to be enforceable, a waiver of constitutional rights must be "voluntary, knowing, and intelligently made," or "an intentional relinquishment or abandonment of a known right or privilege." *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972)(internal quotations and citations omitted). Where a contract is "one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the [waiver] provision," an enforceable waiver may not exist. *See id.* at 188. Arguably, the pre-printed, "take-it-or-leave it" bond contract is one of adhesion, but there is a more apparent reason why its notice provisions do not constitute an enforceable waiver. "[A] waiver of constitutional rights in any context must, at the very least, be clear." *Fuentes*, 407 U.S. at 95. In other words, "[w]e need not concern ourselves with the involuntariness or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver." *Id.* Here, the Form I-352 provides that notice will be sent to the obligor's address listed on the bond contract, but this is hardly a clear waiver of notice of a bond demand should the first attempt to send it, no matter how far in the future, be returned undelivered for any reason. In light of the requirement that this Court "'indulge every reasonable presumption against waiver,'" *Id.* at 95 n.31 (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)), the Court finds that the bond contract does not contain a waiver of the notice due to the obligor under *Jones*, explained *infra*, and is therefore unenforceable as such.

In sum, Defendants have pointed to no more relevant precedent than *Jones* in determining Obligor Plaintiffs' due process claims. Even setting aside the precise holding in *Jones* for a moment, the Court notes that the circumstances of this case make questionable whether the

[26] In fact, Defendants concede the applicability of the waiver analysis by citing to *Colorado v. Spring*, 479 U.S. 564 (1987)(delineating what constitutes valid waiver of Fifth Amendment privilege against self-incrimination), as support for their contention that the obligor consents to Defendants using her address as provided on the bond contract for notice purposes. (Docs. 256, 261).

notice given was reasonable when sent, as required under *Mullane*. It is well-known that removal proceedings can extend for many years, and again, the obligor has *no* means to update her address for the purpose of receiving the Form I-340 and Form I-323. Arguably, notice by certified mail to the obligor at the address provided in the bond contract, and no more, is not notice reasonably calculated, under all the circumstances, to inform the obligor of the date of the requested appearance and bond breach. In any event, assuming notice was reasonable when first attempted, *Jones* compels this Court to find that Defendants must have taken additional reasonable steps to provide notice to Obligor Plaintiffs that was returned undelivered. First, the Court is concerned only with those cases in which the bonded alien previously made all requested appearances of which he or she received adequate notice. In such cases, Defendants could not reasonably assume that notice had been returned undelivered because the obligor was evading service on the alien's behalf; rather, it was at least reasonable to deduce that the obligor was not there to claim the notice, or no longer resided at that address. The Court cannot conceive of any legitimate, government interest served by then failing to take further steps to provide notice to the obligor. No doubt, Defendants have a legitimate interest in securing the bonded alien's appearance, often for the purpose of effecting removal, but the fact that bond has been issued at all reflects a determination by the government that the alien is not a flight risk and will appear when notified. In fact, Defendants notify the alien of a new appearance date if he fails to appear on the date in the notice provided to the obligor. The burden in sending notice to the alien is not somehow lesser, and a more reasonable step, than resending notice to the obligor. The only interest served by doing no more when notice to the obligor is returned undelivered is a financial one, *i.e.*, forfeiture of the bond amount. This is no good reason for the notice procedures employed, and in fact militates against a finding of compliance with the "good faith"

requirement implicit in the *Mullane* notice standard. In light of the constitutional interests at play and the consequences of their deprivation—forfeiture of the bond amount as well as the bonded alien's possible return to custody and loss of otherwise available legal rights—the Court finds that Defendants must have taken additional reasonable steps, if available, to inform the obligor of the demand on the bond before declaring it breached, and before making that breach administratively final.

The relief requested by Obligor Plaintiffs does not require the Court to pronounce the steps Defendants should have taken. It is enough to find that additional reasonable steps were in fact available, and were not used, and in this case Defendants have provided no evidence to suggest that these steps did not exist. The Supreme Court in *Jones* recognized that "[a]n open-ended search for a new address—especially when the State obligates the taxpayer to keep his address updated with the tax collector—imposes burdens on the State significantly greater" than the other "relatively easy" options available. *Jones*, 547 U.S. at 236 (internal citation omitted). Here, however, INS/DHS had at its disposal the bond contract with additional information about the obligor and/or the "A file" of the bonded immigrant who had appeared at all hearings of which he or she received adequate notice. The Court finds that consulting the contract and/or A file for alternate contact information would have been reasonable, especially where the government itself bore some responsibility for the fact that the obligor had no means to keep her address current.

For all of these reasons, the Court finds that Defendants deprived the members of the Obligor Cash Bond Class of due process, and that Obligor Plaintiffs are entitled to the reinstatement of the breached bonds they posted (if proceedings are ongoing) or the reinstatement and cancellation of the breached bonds (if proceedings have been completed).

(Docs. 114, 138). The Court will grant Plaintiffs' motion, and deny Defendants' motion, with respect to Obligor Plaintiffs' claims.

d. Immigrant Cash Bond Class B

Finally, the Court turns to the claims of Mr. Larin-Ulloa and the class he represents, the Immigrant Cash Bond Class B (hereinafter "Immigrant Plaintiffs"). Whereas the other Cash Bond Classes seek relief from Defendants' past notice practices, this final class seeks prospective relief that would require Defendants to comply with *Jones* in the future. Again, Defendants do not contest that each of the Immigrant Plaintiffs has a liberty interest in freedom from detention, and in access to the courts, that the government cannot deprive him of without due process. Further, under Defendants' current notice practices, a request to the obligor for the Immigrant Plaintiff's appearance that is returned undelivered results in a bond breach and the Plaintiff's possible return to custody and loss of otherwise available legal remedies. Defendants have provided no evidence that additional reasonable steps are not available to provide further notice to the obligor when the initial attempt has failed, and for the reasons explained *supra*, the Court finds that such steps do in fact exist. Perhaps most notably, the current Form I-352, and the one in place at the time Mr. Larin-Ulloa obtained his bond, requires the obligor to provide his or her name, address, telephone number, and taxpayer identification number. (Doc. 256, Ex. 8). Therefore, additional information that could be used to locate the obligor is readily available to DHS. Accordingly, and for the reasons detailed in the Court's discussion of Obligor Plaintiffs' claims, the Court finds that Defendants' current notice practices fail to afford the process due under *Jones*, and that Immigrant Plaintiffs are entitled to prospective relief requiring DHS to take additional reasonable steps to provide notice to the obligor of a bond demand that is returned

undelivered. The Court will grant Plaintiffs' motion, and deny Defendants' motion, with respect to the claims of this class.

IV. Conclusion

For the foregoing reasons, the Court hereby **ORDERS** that Petitioners'/Plaintiffs' Motion for Summary Judgment is hereby **GRANTED** in part and **DENIED** in part (Doc. 251), and Federal Respondents'/Defendants' Cross-Motion for Summary Judgment is hereby **GRANTED** in part and **DENIED** in part (Doc. 256), as follows:

Respondents' Motion is hereby **GRANTED** and Petitioners' Motion is hereby **DENIED** with respect to the claims of the Supervision Class;

Plaintiffs' Motion is hereby **GRANTED** and Defendants' Motion is hereby **DENIED** with respect to the claims of the Obligor Cash Bond Class;

The Immigrant Cash Bond Class A is hereby decertified, and Defendants' Motion is hereby **GRANTED** and Plaintiffs' Motion is hereby **DENIED** with respect to the individual claim of Plaintiff Jorge Echavarria; and

Plaintiffs' Motion is hereby **GRANTED** and Defendants' Motion is hereby **DENIED** with respect to the claims of the Immigrant Cash Bond Class B.

SO ORDERED this 23rd day of August, 2010, at McAllen, Texas.

Randy Crane
United States District Judge