Nos. 13-56706, 13-56755

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEJANDRO RODRIGUEZ, et al.,
Petitioners-Appellees/Cross Appellants,

v.

TIMOTHY ROBBINS, et al.,
Respondents-Appellants/Cross Appellees.

On Appeal from the United States District Court, Central District of California
No. CV 07-3239-TJH (RNB)

PETITIONERS-APPELLEES SUPPLEMENTAL BRIEF

AHILAN T. ARULANANTHAM
aarulanantham@aclu-sc.org
MICHAEL KAUFMAN
mkaufman@aclu-sc.org
ACLU Foundation
of Southern California
1313 West Eighth Street
Los Angeles, CA 90017
Telephone: (213) 977-5211
Facsimile: (213) 977-5297

JUDY RABINOVITZ
jrabinovitz@aclu.org
MICHAEL TAN
mtan@aclu.org
ACLU Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 549-2618

JAYASHRI SRIKANTIAH
jsrikantiah@law.stanford.edu
Stanford Law School
Immigrants' Rights Clinic
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
Telephone: (650) 724-2442
Facsimile: (650) 723-4426

SEAN COMMONS
scommons@sidley.com
Sidley Austin LLP
555 West Fifth Street, Suite 4000
Los Angeles, CA 90013
Telephone: (213) 896-6000
Facsimile: (213) 896-6600

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION AND SUMMARY OF RESPONSES

The Due Process Clause forbids prolonged arbitrary imprisonment. Time and again, to vindicate that protection, the Supreme Court and this Court have required the Government to provide a hearing before a neutral decisionmaker when it confines people for lengthy periods. But the Government has imprisoned thousands of Class members for at least six months, and often for years, without that most basic due process protection. Nowhere else does our legal system permit imprisonment for comparable lengths under such deficient procedures.

Petitioners filed this case to vindicate their rights against prolonged arbitrary imprisonment on either of two grounds, one statutory and the other constitutional. After this Court largely affirmed summary judgment in Petitioners' favor on statutory grounds, the Supreme Court reversed. *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) ("*Rodriguez IV*"). The Supreme Court remanded for this Court to consider two sets of questions. The first concern procedural issues about whether the case should proceed as a class. The second concern Petitioners' constitutional claims. *Id*. at 851. The answers to both sets require this Court to affirm the district court's injunction on constitutional grounds, though with certain additional protections. Though not required by statute, the injunction's protections are required by the Constitution.

As to the procedural questions:

Q1: Section 1252(f)(1) does not bar federal courts from protecting a class of prisoners against unconstitutional incarceration. Congress can only withdraw this Court's power to grant equitable relief by clear legislative command. It has not done so here. Section 1252(f)(1) does not apply to cases seeking relief for individuals who are in removal proceedings. And whereas neighboring provisions explicitly bar class actions and habeas relief, Section 1252(f)(1) contains no comparable language doing either one.

Q2: The Subclasses remain appropriately certified under Rule 23(b)(2). This case presents a paradigmatic example of a Rule 23(b)(2) civil rights action as contemplated by the drafters of Rule 23 and endorsed by this and other courts pre- and post-*Wal-Mart*. Moreover, all individuals within the Section 1225(b) Subclass share common constitutional due process concerns. All have been subject to prolonged imprisonment on U.S. soil, referred for full removal proceedings, and denied the right to a bond hearing to prevent prolonged arbitrary imprisonment.

Q3: The due process issues in this case, like those in many other settings, present common questions about the legal framework that governs all Class members. Decades of due process class action cases at every level of the federal courts confirm that such claims merit class treatment. Resolving the parties' disputes about the legal framework governing prolonged imprisonment will benefit

all Class members, who seek to apply that law regardless of their individual circumstances.

As to the constitutional questions:

Traditional due process principles governing freedom from imprisonment control here. In most civil and criminal contexts involving incarceration, due process requires bond hearings within a matter of days. Outside of the national security context, no court has permitted imprisonment of the lengths at issue here under procedures so limited. The injunction's protections provide the bare minimum needed to vindicate Petitioners' liberty interests against prolonged arbitrary imprisonment.

Q1: As "persons" protected by the Fifth Amendment, all Section 1225(b) ("Arriving") Subclass members have a constitutional right to the bond hearings provided by the injunction. Unlike most noncitizens detained upon arrival, all have been "screened in" for full removal proceedings, and the Government has no legal authority to deport them while those proceedings remain pending. Such individuals have the right to be free from prolonged arbitrary imprisonment.

Q2: All Section 1226(c) ("Mandatory") Subclass members also have a constitutional right to the bond hearings provided by the injunction. Under this Court's precedent, the Government must afford them with heightened procedural

protections when it subjects them to prolonged arbitrary confinement while their removal cases remain pending.

Q3: The right to be free from prolonged arbitrary detention necessarily includes certain minimum procedural protections, including that the Government prove the need for imprisonment to a neutral decision-maker by clear and convincing evidence, and provide periodic review when imprisonment stretches beyond six months.

STATEMENT OF FACTS

When this Court last affirmed the injunction on statutory grounds, Petitioners supplied a rich factual record to establish a constitutional "basis—apart from binding Ninth Circuit precedent—to affirm the District Court's conclusion." ECF 25-2 at 12. A brief review of those facts is warranted.[1]

Most Class members are either long-time residents with extensive ties to this country, including U.S. citizen spouses and children, SER 169-172b ¶¶ 15-17, 28-29; SER 80-86, or asylum seekers with no criminal history. SER 151:20-24; SER 86-94. The Government incarcerates them under conditions indistinguishable from prisons. *See* ER 738 ¶¶ 6-7. Prior to the injunction, incarcerations averaged more than one year, and frequently exceeded two. ER 682-83.

[1] A detailed description appears at ECF 25-2 at 12-22.

The vast majority of Class members raise substantial defenses to removal—i.e., defenses that would allow them to retain or obtain lawful status in the U.S. Class members are incarcerated for prolonged periods because—due to backlogs in the immigration courts and the structure of removal proceedings—litigating meritorious cases takes time. Inlender Dec., ER 741-42 ¶¶ 17-23; Castillo Dec., ER 658-59 ¶¶ 3-8. *See also* Long Rep. ER 687 (reporting longer detention lengths for studied class members who sought relief). Approximately a third win their cases outright, even when litigating from prisons, including nearly 40% of those incarcerated under Section 1226(c) and 65% of those under Section 1225(b) (primarily asylum seekers). ER 721 Tbl.34; ER 730 Tbl.38. In contrast, amongst a comparable group of *all* immigration detainees (most of whom are held for far shorter periods) only 7% won their cases. ER 692 Tbl.17.

Class members' success rates reflect their long-standing ties to the U.S. and relatively minor criminal histories. Even excluding arriving asylum seekers, "99.9%" of whom have no criminal history, SER 151, many other Class members also have no criminal history. SER 127-28 ¶¶ 7-8. Of those who do, a majority received no sentence over six months (and often no incarceration at all). *Id*. In other words, the Government imprisoned a majority of Class members for far longer under civil immigration statutes than it did under criminal statutes.

At bond hearings conducted under the preliminary injunction, 70% of Class members were ordered released because they presented no danger or flight risk. ECF 24-4, Patler Dec., Ex B. at 1. Many were released under intensive supervision programs that produce extraordinarily high appearance rates, saving the government millions of dollars each year. SER 181:2-24 (government witness stating compliance is "at, if not close to, 100 percent" in one region covered by the injunction, and 90% in broader Los Angeles region); ER 693 Tbl.18 (during 18 month period, government paid for over 364,000 detention days beyond six months for Class members).

ARGUMENT

I. No Statute or Procedural Rule Requires Decertification of the Class or Reversal of the Injunction.

Q1. The Court Has Jurisdiction Over Petitioners' Constitutional Claims Notwithstanding Section 1252(f)(1) and, at a Minimum, Can Issue Classwide Declaratory Relief.

Section 1252(f)(1) does not strip this Court's jurisdiction to hear Petitioners' constitutional claims or bar it from providing meaningful relief, for four reasons. *First*, by its terms, Section 1252(f)(1) only limits courts' authority to grant injunctive relief for individuals who are *not yet in removal proceedings*, whereas all Class members are detained only after removal proceedings have begun. *Second*, it does not apply to habeas cases. *Third*, it prohibits injunctions that halt the "operation" of the specified immigration statutes, not injunctions that end

unconstitutional applications of those statutes. Petitioners' as-applied challenge leaves the immigration detention statutes in operation in the vast majority of cases to which they apply, because they involve brief detentions. *Finally*, even if Section 1252(f)(1) barred the classwide injunction here, it would not foreclose certifying a class for declaratory relief.

1. Section 1252(f)(1) Does Not Prohibit Class Actions on Behalf of Individuals "Against Whom [Removal] Proceedings Have Been Initiated."

Section 1252(f)(1) does not bar classwide injunctive relief on behalf of individuals in removal proceedings. Section 1252(f)(1) provides:

> [N]o court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter . . . other than with respect to the application of such provisions to *an individual alien against whom proceedings under such part have been initiated*.

8 U.S.C. 1252(f)(1) (emphases added).

The last clause strips authority over claims by noncitizens not yet in removal proceedings, but not others. *American Immigration Lawyers Ass'n (AILA) v. Reno*, 199 F.3d 1352, 1359-60 (D.C. Cir. 2000) ("Congress meant to allow litigation challenging the new system by, and only by, *aliens against whom the new procedures had been applied*.") (emphasis added). Congress adopted Section 1252(f)(1) after a period in which organizations and classes of individuals who were *not in removal proceedings* repeatedly brought preemptive challenges to the

enforcement of certain immigration statutes. *E.g.*, *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43 (1993) (class action brought by, *inter alia*, immigrant rights' organizations and class of individuals, many of whom were not in removal proceedings); *McNary v. Haitian Refugee Center*, 498 U.S. 479, 487-88 (1991) (same by, *inter alia*, refugee services organizations and class of individuals, only some of whom were in proceedings); *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1029 (5th Cir. Unit B 1982) (class of, *inter alia*, individuals who applied for asylum but were not in proceedings).

Section 1252(f)(1) now serves as a standing limitation: only natural persons *already* targeted for removal can seek injunctive relief. All of the Petitioners here, unlike in *CSS*, *McNary*, and *Haitian Refugee Center*, satisfy that requirement because all are "individual alien[s] against whom [removal] proceedings . . . have been initiated." 8 U.S.C. 1252(f)(1).

But Respondents want to inject a further limitation into 1252(f)(1). Respondents view the reference to "an individual alien" as barring *all forms* of classwide injunctive relief. However, "traditional equitable powers can be curtailed only by an unmistakable legislative command." *Rodriguez I*, 591 F.3d at 1120. For three reasons, it is not a "necessary and inescapable inference from the language of Section 1252(f)" that it bars this class from pursuing injunctive relief. *Id.* (internal quotation marks and citation omitted).

First, courts decline to construe references in the singular to "any individual" or "any plaintiff" as eliminating judicial authority under Rule 23. *E.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979) ("The fact that the statute speaks in terms of an action brought by 'any individual' . . . does not indicate that the usual Rule providing for class actions is not controlling. . . . Indeed, a wide variety of federal jurisdictional provisions speak in terms of individual plaintiffs, but class relief has never been thought to be unavailable under them."). For example, the Supreme Court upheld classwide injunctive relief under the Prison Litigation Reform Act, despite a provision stating "[p]rospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." *Brown v. Plata*, 563 U.S. 493, 531 (2011) (citing 18 U.S.C. 3626(a)(1)(A)); *Shook v. El Paso Cty.*, 386 F.3d 963, 970 (10th Cir. 2004) (finding Section 3626(a)(1)(A) does not limit classwide relief where "[t]he text of the PLRA says nothing about the certification of class actions.").

Second, when Congress wants to prohibit class relief in immigration cases, it does so unequivocally. A neighboring subsection adopted by the same Congress in the same enactment as Section 1252(f)(1) proves the point. With respect to the expedited removal provisions, Section 1252(e)(1)(B) bars courts from "certify[ing] a class under Rule 23 . . . in any action for which judicial review is authorized

under a subsequent paragraph of this subsection." Under basic canons of statutory construction, Section 1252(f)(1) cannot be read to effect a *sub silentio* ban on class actions for injunctive relief when the *same* Congress in the *same* enactment explicitly imposed such a ban in a different section (governing expedited removal). *See Rodriguez I*, 591 F.3d at 1119 (construing Section 1252(f)(1) narrowly in light of Section 1252(e)'s breadth); *AILA*, 199 F.3d at 1359 (contrasting "the statute's ban on class actions" in 1252(e) with the more limited restriction at 1252(f)(1)).

Third, Respondents' reading leads to anomalous results. Under Respondents' view, rather than certify a class, the district court would have had to consolidate and oversee (at least) hundreds of materially indistinguishable habeas petitions to remedy the constitutional violations identified in this case. Rule 23 exists to prevent such inefficiencies, and readings that lead to such "absurd results are to be avoided" absent unambiguous direction from Congress. *U.S. v. Wilson*, 503 U.S. 329, 334 (1992).

In sum, Section 1252(f)(1) does bar injunctive relief in actions brought by persons *not* yet in removal proceedings. Because all Class members are in removal proceedings, Section 1252(f)(1) does not prevent them from seeking classwide injunctive relief.

2. Section 1252(f)(1) Does Not Apply to Habeas Actions.

Section 1252(f)(1) also cannot prohibit injunctive relief here because

Petitioners invoke the Court's habeas corpus authority under 28 U.S.C. 2241. ER 882. Under *INS v. St. Cyr*, federal courts will not read a statute to restrict their power to grant habeas relief unless Congress explicitly revokes authority under the general federal habeas statute—28 U.S.C. 2241—by name. 533 U.S. 289, 314 (2001) (holding statute lacked sufficiently clear statement to eliminate habeas review); *Demore v. Kim*, 538 U.S. 510, 517 (2003) (same as to statute concerning habeas review of detention decisions); *cf. Rodriguez IV*, 138 S. Ct. at 841 (Section 1226(e) "does not preclude challenges [to] the statutory framework" permitting detention without bail (quoting *Demore*, 538 U.S. at 517)).

Section 1252(f)(1) does not expressly revoke authority to grant injunctive relief in habeas corpus cases; it is silent on the subject. The silence is telling because Congress was aware of the possibility of class habeas actions when it enacted Section 1252(f)(1). Courts had repeatedly permitted habeas class actions before 1996. *E.g.*, *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 393, 404 (1980) (holding class representative could appeal denial of nationwide certification of class habeas); *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1202 (9th Cir. 1975) ("we see no reason here why the complaint may not be treated as a joint or class application for a writ of habeas corpus").

The inference from congressional silence gains strength from other provisions of Section 1252 that, unlike Section 1252(f)(1), were amended after *St.*

Cyr to explicitly limit jurisdiction in habeas cases. *E.g.*, 8 U.S.C. 1252(a)(2)(B); 1252(b)(9); *Ramadan v. Gonzales*, 479 F.3d 646, 650-54 (9th Cir. 2007) (explaining enactment history of REAL ID Act, which amended several provisions of Section 1252 to explicitly repeal and replace habeas jurisdiction). In contrast, the REAL ID Act did not add references to habeas in Section 1252(f)(1). By failing to mention habeas corpus in Section 1252(f)(1), while expressly and repeatedly addressing habeas in neighboring subsections, Congress made clear its intention *not* to apply Section 1252(f)(1)'s limitations to habeas actions. *See Nken v. Holder*, 556 U.S. 418, 430-31 (2009) (rejecting broad reading of Section 1252(f) because of text in neighboring provision).

Finally, restricting federal courts' power to resolve habeas cases "as law and justice require" would raise serious constitutional problems. Congress gave federal courts authority to entertain habeas cases, including the power to order the release of federal prisoners, in 1789. *See St. Cyr*, 533 U.S. at 305. Under the Suspension Clause, "the habeas court must have the power to order the conditional release of an individual unlawfully detained." *Boumediene v. Bush*, 128 S. Ct. 2229, 2266 (2008). For this reason as well, Section 1252(f) cannot be construed as depriving federal courts of equitable authority in cases founded upon habeas jurisdiction.

3. Petitioners Do Not Seek to Enjoin the "Operation" of the Immigration Detention Statutes, Only Their Unlawful Application in Specific Circumstances.

Section 1252(f)(1) also does not apply because Petitioners do not challenge the "operation" of the immigration statutes at issue. Rather, this lawsuit is an as-applied challenge to their unlawful application in cases of prolonged detention.

"Operation" is "the quality or state of being functional or operative."[2] Where an injunction leaves the vast majority of a statute's applications intact, it does not enjoin the statute's "operation." Jill E. Family, *Another Limit on Federal Court Jurisdiction? Immigrant Access to Class-Wide Injunctive Relief*, 53 Clev. St. L. Rev. 11, 29 (2005) ("to enjoin the 'operation of' a statute is to foreclose completely its application in any instance"). As this Court has recognized previously, Section 1252(f)(1) does not bar courts from granting classwide injunctions to stop "constitutional violations" in the "administration" of the INA, because such injunctions are not directed against the statute's "operation." *See Ali v. Ashcroft*, 346 F.3d 873, 886-87 (9th Cir. 2003), *opinion withdrawn on denial of reh'g sub nom. Ali v. Gonzales*, 421 F.3d 795 (9th Cir. 2005), *as amended on reh'g* (Oct. 20, 2005); *Rodriguez*, 591 F.3d at 1121 (citing "sound reasoning" of *Ali*).

No one disputes that, under the injunction, Section 1226(c), Section 1225(b),

[2] "*Operation*," Merriam-Webster, https://www.merriam-webster.com/dictionary/operation (last visited May 15, 2018)).

and Section 1226(a) remain in operation in the vast majority of detentions to which they apply. Most immigration detentions last less than six months.[3] The injunction limits the statutes' application only in the minority of cases where imprisonment exceeds six months.

Respondents will likely argue that *any* limitation on how the Government can implement its power under the detention statutes interferes with their "operation," in violation of Section 1252(f)(1). But "implementation" and "operation" are not interchangable. Section 1252(a)(2)(A)(i) distinguishes "implementation" from "operation," and the distinction must be respected in Section 1252(f)(1) as well. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) ("identical words used in different parts of the same act are intended to have the same meaning.") (internal quotation and citation omitted).

4. Even if Section 1252(f)(1) Bars Classwide Injunctive Relief, Declaratory Relief Remains Available.

The Court also asked whether, if Section 1252(f)(1) bars classwide injunctive relief, the class can pursue declaratory relief. The answer is "yes." Rule 23(b)(2) authorizes certification for "injunctive relief or *corresponding* declaratory

[3] The parties agree on this point. *See* Letter from Ian Heath Gershengorn, Acting Solicitor General, to the Hon. Scott S. Harris, U.S. Sup. Ct. Clerk (Aug. 26, 2016) at 2 (34 days average, and 15 days median, to complete removal proceedings for the 85% of 1226(c) detainees who do not appeal). *See also* ER 840, 842, 844 (average case completion times for all detained cases in Central District of California substantially less than six months).

relief." Under settled precedent and canons of statutory construction, a class can obtain "corresponding" declaratory relief even when it cannot pursue injunctive relief. Declaratory relief "correspond[s]" for purposes of the Rule so long as a classwide declaration could serve as a basis for later individual injunctive relief.

First, the overwhelming weight of authority confirms that "a class action seeking solely declaratory relief may be certified under [Rule 23](b)(2)" so long as a favorable ruling could later support individualized injunctive relief. 7AA Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 1775 (3d ed.).[4] "Congress plainly intended declaratory relief to act as an *alternative* to the strong medicine of the injunction," and Rule 23(b)(2) reflects that intent. *Steffel v. Thompson*, 415 U.S. 452, 466 (1974) (emphasis added). *See also Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1194 (9th Cir. 2000) ("declaratory relief is sometimes proper even when injunctive relief is not"). "Class certification under Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory *or* injunctive." *Zinser v. Accufix Res. Inst., Inc.*, 253 F.3d 1180, 1195 (9th Cir. 2001) (emphasis added); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) ("The

[4] *E.g.*, *Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615 (6th Cir. 2007) (certifying Rule 23(b)(2) class for declaratory relief); *Whatley v. Clark*, 482 F.2d 1230 (5th Cir. 1973) (affirming Rule 23(b)(2) class seeking only declaratory relief); *Nieves v. Oswald*, 477 F.2d 1109 (2d Cir. 1973) (permitting plaintiff class to amend complaint on remand to seek only declaratory relief (and waive request for injunctive relief) to cure jurisdictional defect).

key to the (b)(2) class is 'the indivisible nature of the injunctive *or* declaratory remedy warranted—the notion that the conduct is such that it can be *enjoined or declared* unlawful. . . .") (emphases added).

Second, Rule 23's text and drafting history confirm that a court may certify a class under Rule 23(b)(2) for declaratory relief alone. As the drafters explained, the term "corresponding" was intended to make clear that courts should not certify Rule 23(b)(2) class actions for "a declaration related exclusively or predominantly to liability for money damages." *See* Fed. R. Civ. P. 23(b)(2) advisory committee's note to 1966 amendment. The drafters did not want plaintiffs circumventing the limits on Rule 23(b)(3) classes by disguising claims for monetary relief as ones for injunctive or declaratory relief under Rule 23(b)(2). They therefore inserted the "correspondence" requirement under Rule 23(b)(2), and specified that "[d]eclaratory relief 'corresponds' to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief." *Id*. *See also* Andrew Bradt, *"Much to Gain and Nothing to Lose" Implications of the History of the Declaratory Judgment for the (b)(2) Class Action*, 58 Ark. L. Rev. 767, 797-802 (2005).

This case seeks no damages, and no one contends otherwise. If classwide injunctive relief were unavailable due to Section 1252(f)(1), class-wide declaratory relief would still serve as a basis for later individual injunctive relief—i.e., once

the law is declared, each class member could pursue an individual action to enforce the law. Hence, the declaratory relief Petitioners seek "corresponds" to injunctive relief.

Finally, Section 1252(f)(1)'s text presumes district courts can entertain class actions for declaratory relief alone. Section 1252(f)(1)'s prohibition on injunctive relief applies to all courts "other than the Supreme Court." But the Supreme Court has only limited original jurisdiction. U.S. Const., art. III, Sec. 2. If section 1252(f)(1) bars district courts from certifying class actions even for declaratory relief, it is unclear how the Supreme Court would ever have an opportunity to grant injunctive relief in a case covered by Section 1252(f)(1). *See* Gerald L. Neuman, *Federal Courts Issues in Immigration Law*, 78 Tex. L. Rev. 1661, 1686 (2000) ("Assuming that section 1252(f)(1) is interpreted as barring the district court from affording either declaratory or injunctive relief on behalf of the class prior to the Supreme Court's authorization, it is difficult to see how the district court could acquire jurisdiction over the class action in the first place."). If district courts cannot even issue classwide declaratory relief, then the statute's exception for the Supreme Court would become meaningless. "Our practice, however, is to 'give effect, if possible, to every clause and word of a statute.'" *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017) (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000)).

For all these reasons, even if Section 1252(f)(1) foreclosed classwide injunctive relief, the class could still pursue declaratory relief under Rule 23(b)(2).

Q2. A Rule 23(b)(2) Class Remains Proper Under *Wal-Mart.*

The Court also asked whether class treatment is appropriate for the constitutional claims challenging incarceration, particularly for the Section 1225(b) "Arriving" Subclass, in light of *Wal-Mart*. 138 S. Ct. at 852. The answer is "yes."

The Arriving Subclass includes two groups of individuals subjected to prolonged imprisonment after apprehension upon arrival: (1) asylum seekers who have passed a credible fear interview and (2) returning lawful permanent residents ("LPRs") who present facially valid entry documents, but are not clearly entitled to admission.

Despite some differences between these two groups, they share common interests for purposes of asserting constitutional claims for bond hearings. All members of the Arriving Subclass are individuals imprisoned for a prolonged period without a hearing before a neutral decisionmaker. Moreover, all share a critical common feature that distinguishes them from other arriving individuals initially detained under Section 1225(b): all have been referred for full removal proceedings before an Immigration Judge ("IJ"), such that the Government has no authority to summarily remove them. *See* 8 U.S.C. 1225(b)(1)(B)(ii); (b)(2)(A). Finally, the same deficient release procedure is available to both of them—the

parole process run by DHS enforcement officers. These three features—that they are persons imprisoned on U.S. soil for a prolonged period, that the immigration laws entitle them to remain in the U.S. while they pursue their immigration cases, and that the only release procedure is through parole—give rise to their common claims for relief. As explained below, all such individuals have the same bedrock due process right to be free of prolonged arbitrary imprisonment, and the parole process does not protect that right. *See infra* Section II.Q1.

Because all members of the Arriving Subclass share in common the characteristics that give rise to their constitutional claims, this Court need not modify the Arriving Subclass. *See Hanlon v. Chryler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998) ("All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class."). *See also Wal-Mart Stores, Inc.*, 564 U.S. at 350 ("what matters to class certification . . . [is] the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.").

Class treatment would remain appropriate even if the Court concluded that the small number of returning LPRs in this Subclass have additional claims against prolonged arbitrary imprisonment. *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) (permitting class action even where some plaintiffs had

additional unique claims because "refusing to certify a class because the plaintiff decides not to make the sort of person-specific arguments that render class treatment infeasible would throw away the benefits of consolidated treatment"); *Hiser v. Franklin*, 94 F.3d 1287, 1291 (9th Cir. 1996) (class action proper even where some members have separate claims for damages that could be brought in subsequent individual litigation).

However, if the Court concludes that these two groups should not be part of the same subclass, the Court should carve out the small number of returning lawful permanent residents and limit the Section 1225(b) Subclass to arriving asylum seekers who have passed credible fear screening—the group that comprises the vast majority of the Arriving Subclass. *See supra* Statement of Facts. It should then remand in part for the district court to permit Petitioners to identify a named representative and pursue certification of a new subclass of returning lawful permanent residents, while proceeding to address the claims of the arriving asylum seekers on their merits. A partial remand would ensure due process for the largest number of Subclass members, while also efficiently utilizing judicial resources.

This Circuit and others have long recognized their authority to affirm certification and class relief in part, while remanding as to other classes, claims, or issues for further consideration by the district court. *E.g.*, *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1027 (9th Cir. 2011) (affirming denial of certification of two

claims, and remanding due to viability of a third for certification); *Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592, 618 (6th Cir. 2007) (modifying an overbroad class definition to conform to plaintiff's claims); *Chiang v. Veneman*, 385 F.3d 256, 268 (3d Cir. 2004) ("[R]ather than decertify the class . . . we prefer to take a less drastic course and simply modify the class definition to remove the ambiguity."). *See also* 28 U.S.C. 2106 (entitling this Court to "affirm, modify, vacate, set aside or reverse any judgment, decree, or order"); *Rodriguez v. Robbins (Rodriguez III)*, 804 F.3d 1060, 1090 (9th Cir. 2015) (reversing district court as to only the Section 1231(a) subclass), *rev'd on other grounds*, *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018).

Thus, if this Court concludes that returning lawful permanent residents should be treated differently from arriving asylum seekers for purposes of their rights against prolonged arbitrary detention, it should carve them out of the Arriving Subclass and remand in part for the district court to consider them separately.

Q3. A Rule 23(b)(2) Class Action Based on Common Facts Remains Proper to Resolve Due Process Claims.

The Court also asked whether Rule 23(b)(2) is an appropriate vehicle for resolving Petitioners' due process claims. *Rodriguez IV*, 138 S. Ct. at 852 (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). The answer is "yes." As this Court explained after *Wal-Mart*, "the primary role of [Rule 23(b)(2)] has always

been the certification of civil rights class actions." *Parsons v. Ryan*, 754 F.3d 657, 686 (9th Cir. 2014). The Supreme Court and the Federal Rules Advisory Committee have long recognized that civil rights cases embody "prime examples" of Rule 23(b)(2) actions; Rule 23 "builds on experience, mainly, but not exclusively, in the civil rights field." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Many of those cases raised due process claims.

Due process challenges lend themselves to class certification because they raise legal questions of general application. "[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases . . . ." *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). Many seminal due process cases, including cases asserting the right to a hearing, have been Rule 23(b)(2) actions. *E.g.*, *Carey v. Piphus*, 435 U.S. 247, 266 (1978) (recognizing denial of procedural due process "does not depend on the merits of the claimant's substantive assertions," but instead on whether the government created a sufficient process); *Califano*, 442 U.S. at 702 (establishing right to hearing in cases involving recovery of excess benefits); *Haitian Refugee Ctr., Inc. v. Nelson*, 694 F. Supp. 864, 876-78 (S.D. Fla. 1988), *aff'd*, 872 F.2d 1555 (11th Cir. 1989), *aff'd sub nom. McNary.*, 498 U.S. at 488 (finding federal jurisdiction in class action challenging notice and related procedures in amnesty program); *Lopez v. Williams*, 372 F. Supp. 1279, 1292 (S.D. Ohio 1973), *aff'd sub nom. Goss v.*

Lopez, 419 U.S. 565, 584 (1975) (right to hearing for school discipline).[5]

Wal-Mart reaffirmed the validity of class actions in civil rights contexts, stating that "'[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what (b)(2) is meant to capture," *id*. at 361 (quoting *Amchem*, 521 U.S. at 614) (alterations in original). This Court's post-*Wal-Mart* decision in *Parsons* is instructive. *Parsons* addressed the constitutional claims of inmates who received improper medical care. Recognizing that "each of the . . . policies and practices may not affect every member of the proposed class and subclass in exactly the same way," it nonetheless found 23(b)(2) certification warranted "because every inmate in the proposed class is allegedly suffering the same (or at least a similar) injury and that injury can be alleviated for every class member by uniform changes in . . . policy and practice." 754 F.3d at 689.

Numerous other post-*Wal-Mart* decisions, including from this Circuit, uphold Rule 23(b)(2) due process class actions. *E.g.*, *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1203 (N.D. Cal. 2017); *K.W. ex rel. D.W. v. Armstrong*, 298 F.R.D.

[5] *Morrissey* itself, which *Rodriguez IV* cited, addressed "the question whether the requirements of due process *in general* apply to parole revocations." 408 U.S. at 481 (emphasis added). Although not a class action, *Morrissey* analyzed the due process question as to parolees generally, not on the particular facts of the case before it. "[T]he determination of what process is due is performed on a 'wholesale' basis for general categories of disputes, rather than on a 'retail' basis taking into account the particular characteristics of each case." Stephen G. Breyer et al., *Administrative Law and Regulatory Policy* 698 (7th ed. 2011).

479, 486 (D. Idaho 2014), *aff'd* 789 F.3d 962 (9th Cir. 2015); *Viet. Veterans of Am. v. C.I.A.*, 288 F.R.D. 192, 209 (N.D. Cal. 2012). Courts rely on Rule 23(b)(2) in a variety of analogous settings, including challenges to conditions of confinement, segregation, and police practices. *E.g.*, *Yates v. Collier*, 868 F.3d 354, 367–68 (5th Cir. 2017) (conditions of confinement); *Cole v. City of Memphis*, 839 F.3d 530 (6th Cir. 2016) (unlawful removal from neighborhood street), *cert. denied sub nom. City of Memphis, Tenn. v. Cole*, 137 S. Ct. 2220 (2017); *Shelton v. Bledsoe*, 775 F.3d 554 (3d Cir. 2015) (cell assignments for inmates); *In re D.C.*, 792 F.3d 96 (D.C. Cir. 2015) (segregation).

As in other civil rights class actions, every class member here has suffered the same injury due to a uniform policy and practice—denying bond hearings. That injury can be alleviated by the same remedy—a right to a hearing at six months. This is just the sort of class-wide constitutional claim Rule 23(b)(2) was created to address.

II. The Constitution Requires the Injunction Because All Class Members Are Entitled to Be Free From Prolonged Arbitrary Imprisonment.

This Court also asked three questions about Petitioners' constitutional claims—namely, whether the Constitution requires the relief the injunction provides. It does.

Petitioners start with certain background principles bearing on all three

answers, before addressing issues unique to each one. *Cf. Rodriguez III*, 804 F.3d at 1174-76 (describing principles governing civil detention).

"Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that the [Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). "In the context of immigration detention, it is well-settled that due process requires adequate procedural protections to ensure that the government's asserted justification for physical confinement outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Hernandez v. Sessions*, 872 F.3d 976, 990 (9th Cir. 2017) (internal citations and quotations omitted); *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 950 (9th Cir. 2008) (same, in challenge to prolonged detention pending removal proceedings).

The Supreme Court has recognized only two valid purposes for civil immigration detention—to mitigate the risks of danger to the community and to prevent flight. *Zadvydas*, 533 U.S. at 690; *Demore*, 538 U.S. at 528.
If the Government can protect these interests without imprisonment, then it serves no valid purpose and violates the Due Process Clause. *See Zadvydas*, 533 U.S. at 690. *See also Rodriguez IV*, 138 S. Ct. at 862 (Breyer, J., dissenting on other grounds).

An individualized hearing before "a neutral administrative official" that tests

the Government's justification for incarceration forms the bedrock procedural protection against prolonged arbitrary imprisonment, including in the immigration context. *Zadvydas*, 533 U.S. at 723 (Kennedy, J., dissenting); *Salerno*, 481 U.S. at 750 (upholding civil pretrial detention of individuals charged with crimes only upon individualized findings of dangerousness or flight risk at custody hearings); *Foucha v. Louisiana*, 504 U.S. 71, 81-83 (1992) (requiring individualized finding of mental illness and dangerousness for civil commitment); *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997) (upholding civil commitment of sex offenders after jury trial on lack of volitional control and dangerousness).

Outside the national security context, the Supreme Court has never authorized prolonged civil confinement without the bedrock protection of an individualized hearing as to the need for incarceration. *See Toyosaburo Korematsu v. United States*, 323 U.S. 214 (1944); *Ludecke v. Watkins*, 335 U.S. 160 (1948); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

Where confinement becomes prolonged, due process requires enhanced protections to ensure detention remains reasonable in relation to its purpose. *Zadvydas*, 533 U.S. at 701 ("for detention to remain reasonable," greater justification needed "as the period of . . . confinement grows"); *McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 249 (1972) ("If the commitment is properly regarded as a short-term confinement with a limited purpose . . . then lesser safeguards may

be appropriate, but . . . the duration of the confinement must be strictly limited"); *Diouf II*, 634 F.3d at 1085 ("greater procedural safeguards" required when detention prolonged).

This Court's caselaw, consistent with our legal traditions, treats detention as prolonged in this context when it exceeds six months. *Diouf II*, 634 F.3d at 1085 (requiring individualized bond hearings before Immigration Judge at six months for noncitizens held under Section 1231(a)(6) because "[w]hen the period of detention becomes prolonged, 'the private interest that will be affected by the official action' is more substantial; greater procedural safeguards are therefore required.") (quoting *Mathews*, 424 U.S. at 335); *Duncan v. State of La.*, 391 U.S. 145, 161 & n.34 (1968) (six month sentence defines historical limit between petty and serious offenses).

For more than a decade, this Court has repeatedly applied these constitutional guideposts to immigration detention cases. Each time, this Court has found prolonged imprisonment without a hearing before a neutral decisionmaker constitutionally "doubtful." *See Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005) (Section 1226(c)) (citing *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996)); *Casas*, 535 F.3d at 950 (same, based on due process principles in *Zadvydas*); *Diouf II*, 634 F.3d at 1087 (same, for detention under Section 1231(a)(6), because "[r]egardless of the stage of the proceedings, the same important interest is at

stake—freedom from prolonged detention."); *Singh v. Holder*, 638 F.3d 1196, 1204 (9th Cir. 2011) (due process requires government to prove danger and flight risk by clear and convincing evidence) (citing, *inter alia*, *Addington v. Texas*, 441 U.S. 418(1979), *Foucha*, *Cooper*, and *Santosky v. Kramer*, 455 U.S. 745 (1982)).

Every circuit to address the issue likewise has found prolonged mandatory detention under Section 1226(c) presents serious due process concerns. Like this Court, four of them construed immigration detention statutes to avoid serious constitutional problems. *Sopo v. U.S. Attorney Gen*., 825 F.3d 1199, 1214 (11th Cir. 2016); *Reid v. Donelan*, 819 F.3d 486, 499 (1st Cir. 2016); *Lora v. Shanahan*, 804 F.3d 601, 614 (2d Cir. 2015); *Ly v. Hansen*, 351 F.3d 263, 267 (6th Cir. 2003) (requiring release when mandatory detention exceeds a reasonable period of time). The Third Circuit held prolonged immigration incarceration without a bond hearing violates the Due Process Clause. *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 233 (3d Cir. 2011) (lengthy detention without hearing "a violation of the Due Process Clause").

These settled principles provide a clear roadmap for answering the constitutional questions now before this Court.

Q1. The Constitution Requires That All Section 1225(b) Subclass Members Be Afforded Bond Hearings When Detention Exceeds Six Months.

All members of the Section 1225(b) "Arriving" Subclass are entitled to the

injunction's protections. The vast majority are asylum seekers referred for full removal proceedings because they established a "credible fear of persecution" and, thereby, a "significant possibility" of ultimately winning asylum during an interview with a DHS official. *See* 8 U.S.C. 1225(b)(1)(B)(v); SER 89-90 (Subclass member fled Ethiopia after government soldiers kidnapped and tortured him with electric shocks over the course of six months, and killed his father and brother); SER 88 (Subclass member abducted, burned, and deprived of food for days). *See generally* ER 894-97, SER 86-94 (describing named representatives and other individuals in this Subclass).

Once "screened in" for removal proceedings before an IJ, the Government has no authority to deport them while their cases remain pending. Instead, when Congress created the credible fear screening process in 1996, it afforded those who pass the interview the right to remain until their cases are fully adjudicated.

> The credible fear standard is designed to weed out non-meritorious cases so that only applicants with a likelihood of success will proceed to the regular asylum process. If the alien meets this threshold, *the alien is permitted to remain in the U.S.* to receive a full adjudication of the asylum claim—*the same as any other alien in the U.S.*

H.R. Rep. No. 104-469, pt. 1, at 158 (1996) (emphasis added).

A substantial majority of asylum seekers in the Arriving Subclass win their cases, ER 703 Tbl.28; ER 730 Tbl.38 (65%), but (absent the injunction) they would have been imprisoned for, on average, nearly a year while litigating them.

ER 703 Tbl.27 (346 days).

Prior to the injunction, the Government considered Arriving Subclass members for release only through the "parole" review process, by which DHS officers (i.e., the jailing authorities) could impose months or years of additional incarceration by checking a box on a form that requires no explanation and reflects no deliberation. There is no hearing, no record, and no appeal. SER 86-88; SER 157-159. Extensive discovery confirmed this regime results in arbitrary detentions because it lacks minimal safeguards to catch even manifest errors. *See, e.g.*, SER 90 (*Ethiopian* asylum seeker ordered detained based officer's statement that "[t]here is an apparent correlation with all the *Somalian* Detainee's [sic] that present [sic] a paradigm of deceit and paralleled ambiguity of events and identity") (emphases added). *See also* SER 87-93.

As explained below, these Subclass members have a right to be free from prolonged arbitrary imprisonment, and therefore are entitled to the bond hearings provided by the injunction. While this Court previously suggested that most Subclass members lacked such rights, it relied on cases involving people who had conclusively *lost* the right to live here, whereas all Arriving Subclass members *do* have a right to live here. Moreover, the cases the Court previously mentioned pre-date *Zadvydas*, which held that even individuals who have lost the right to live here nonetheless retain a liberty interest in freedom from prolonged arbitrary detention.

1. All Arriving Subclass Members are Entitled to Freedom from Prolonged Arbitrary Imprisonment.

All the Arriving Subclass members are "person[s]" who cannot "be deprived of . . . liberty . . . without due process of law." U.S. Const. amend. 5. Like all noncitizens, they are "surely . . . 'person[s]' in any ordinary sense of that term." *Plyler v. Doe*, 457 U.S. 202, 210 (1982). The Due Process Clause protects "every one of" the noncitizens "within the jurisdiction of the United States" "from deprivation of life, liberty, or property without due process of law." *Mathews v. Diaz*, 426 U.S. 67, 77, 87 (1976) (holding that "[e]ven one whose presence in this country is unlawful, involuntary, or transitory is entitled to" protection under the Due Process Clause).[6] So long as they remain physically located within our borders, the Due Process Clause applies. *Rodriguez IV*, 138 S.Ct. at 862 (Breyer, J., dissenting on other grounds) ("No one can claim, nor since the time of slavery has anyone to my knowledge successfully claimed, that persons held within the United States are totally without constitutional protection."). *Cf. Boumediene v. Bush*, 553 U.S. 723, 766 (2008) (holding Suspension Clause protects non-citizen enemy combatants imprisoned abroad under U.S. control).

The bedrock legal principle that all persons in the United States must receive

[6] *Diaz* involved, *inter alia*, individuals who were "excludable," i.e., detained at the border upon arrival. They were then paroled into the U.S., but like the Arriving Subclass members here they had not effected a legal entry, and therefore were treated for statutory purposes as though still at the border.

due process does not disappear merely because someone is "excludable"—meaning they were stopped at the border prior to entry and treated as if still there for statutory purposes. *See Kaplan v. Tod*, 267 U.S. 228, 230 (1925) (noncitizen paroled into U.S. "was still in theory of law at the boundary line" and "never has been dwelling in the United States *within the meaning of the Act*") (emphasis added). Our law does not permit "any number of abuses to be deemed constitutionally permissible merely by labeling certain 'persons' as non-persons." *Kwai Fun Wong v. United States*, 373 F.3d 952, 973 (9th Cir. 2004) (holding that "non-admitted aliens" are "not categorically exclude[d] from all constitutional coverage"). For example, "sure[ly]" even noncitizens who have conclusively lost the right to live here "cannot be tortured." *Zadvydas*, 533 U.S. at 704 (Scalia, J., dissenting).

Petitioners recognize that prior decisions in this case have assumed, albeit without deciding, that some "prolonged detentions under § 1225(b) are constitutionally permissible." *Rodriguez III*, 804 F.3d at 1070, 1082 (describing reasoning of *Rodriguez II* as holding that, "even if" prolonged detention without hearings is constitutional for some excludables, statute must be construed to avoid constitutional problems as to returning LPRs) (citing *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir. 1995) (en banc), *superseded by statute as stated in Xi v. I.N.S.*, 298 F.3d 832, 837-38 (9th Cir. 2002)) and *Shaughnessy v. United States ex*

rel. Mezei, 345 U.S. 206 (1953)).

But *Rodriguez II* and *III* also recognized that *Mezei* and *Barrera* did not necessarily apply to the Arriving Subclass. *Rodriguez v. Robbins*, 715 F.3d 1127, 1140 (9th Cir. 2013) (*Rodriguez II*) ("it is not clear that the class of aliens to whom *Mezei* and *Barrera-Echavarria* applied is coextensive with the 1225(b) subclass in this case."); *Rodriguez III*, 804 F.3d at 1070 (describing *Rodriguez II* as holding that "[t]he cases relied upon by the government . . . namely [*Mezei* and *Barrera*] were decided under pre-IIRIRA law and, as such, were inapposite").

Now that the Court is squarely presented with the question, it should hold that those cases do not authorize the prolonged arbitrary imprisonment of Arriving Subclass members.

Mezei and *Barrera* upheld the prolonged detention of excludable noncitizens, but the petitioners in those cases already had conclusively lost all right to remain in the U.S. *Mezei*, 345 U.S. at 215; *Barrera*, 44 F.3d at 1443-44. In contrast, Arriving Subclass members have not conclusively lost the right to live here; most never will. ER 703 Tbl.28; ER 730 Tbl.38 (65% win their asylum cases). The Subclass consists only of persons referred for full removal proceedings—after being "screened in," usually through the credible fear interview process. Individuals screened in through that process cannot be summarily deported; they are "permitted to remain in the U.S. . . . the same as any other alien

in the U.S." unless and until they lose their cases, H.R. Rep. No. 104-469, pt. 1, at 158 (1996)—which, again, most will not.

There is no clear pre-IIRIRA analogue to individuals who have passed credible fear screening and remain incarcerated pending a final decision in their cases. Whatever *Mezei* and *Barrera* may say about the power to summarily exclude arriving noncitizens, neither purports to authorize prolonged confinement of persons *not* already subject to removal.[7]

Furthermore, even if *Mezei* and *Barrera* were applicable here, much of their constitutional reasoning has been undermined by *Zadvydas*. The *Zadvydas* petitioners had also lost all legal right to reside in the U.S. For that reason, the Government argued that they had no right to be released into the country. *Zadvydas* rejected that view. It acknowledged the Government's heightened power to exclude noncitizens, but made clear that the power to *exclude* and the power to *imprison* are distinct for due process purposes. In light of that distinction, seven of the nine justices in *Zadvydas* agreed that even persons with no right to live here

[7] District courts have agreed that *Mezei* and *Barrera* do not apply to individuals who pass credible fear screenings. *Ahad v. Lowe*, 235 F. Supp. 3d 676, 680, 687-88 (M.D. Pa. 2017) (excludable noncitizen with pending case entitled to prolonged detention bond hearing because "rising sea of case law" "has consistently determined that detained aliens" "are entitled to some essential measure of due process"); *Maldonado v. Macias*, 150 F. Supp. 3d 788, 791, 800 (W.D. Tex. 2015) (ordering bond hearing for excludable non-citizen incarcerated for over two years who passed credible fear interview because "even inadmissible aliens—are entitled to . . . some amount of due process.").

have an interest in "[f]reedom from . . . physical restraint," 533 U.S. at 690, which protects against arbitrary imprisonment "for any purpose." *Addington*, 441 U.S. at 425; 533 U.S. at 692 (majority describing constitutional problem as "serious" and "obvious"). Justice Kennedy, joined by Chief Justice Rehnquist, did not agree that the petitioners were entitled to release, but would have required procedures to justify the detentions because "both removable *and inadmissible* aliens are entitled to be free from detention that is arbitrary or capricious." 533 U.S. at 721 (Kennedy, J., dissenting) (emphasis added).

Respondents' expansive reading of *Mezei* and *Barrera* cannot be squared with the reasoning of *Zadvydas*. Whereas *Zadvydas* distinguished between the right to be free from incarceration with the right to reside in the U.S., both *Mezei* and *Barrera* equated the two. *See Mezei*, 345 U.S. at 207 (suggesting "continued exclusion" permissible in part because petitioner had no right to enter); *Barrera*, 44 F.3d at 1448 ("we find that Barrera has no constitutional right to immigration parole and, therefore, no right to be free from detention pending his deportation"). And whereas *Barrera* described the Court's post-*Mezei* civil detention precedents as "irrelevant," *id*. at 1448, *Zadvydas* applied those precedents to conclude individuals who have lost the right to "live at large" in this country nonetheless retain an interest in "[f]reedom from . . . physical restraint." 533 U.S. at 690, 695-96 (citing cases). Thus, even if Arriving Subclass members had lost the right to

reside in the United States—which they have not—they would still have a right to be free from prolonged arbitrary imprisonment.

This Court's other immigration cases confirm that principle. Some cases have held noncitizens stopped at the border cannot assert due process claims challenging procedures for *admission*. *E.g.*, *Angov v. Lynch*, 788 F.3d 893, 898 (9th Cir. 2013).[8] But this case is about detention, not admission. This Court has recognized that the procedures for *detention* must satisfy the Due Process Clause because it "applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent,' and *to immigration detention as well as criminal detention*." *Hernandez v. Sessions*, 872 F.3d 976, 990 (9th Cir. 2017) (citing *Zadvydas*) (emphasis added). Just like criminal defendants or other civil detainees, immigration detainees cannot be arbitrarily imprisoned.

In addition, neither *Mezei* nor *Barrera* considered the constitutional question at issue here, namely which *procedures* should govern release under generally-applicable detention statutes. *Mezei* authorized prolonged confinement without a

[8] Even *Angov* did not purport to remove all constraints on admission procedures. *Id*. at 898 n.3 (Ninth Circuit has not decided whether arriving asylum seekers have certain "minimum due process rights") (citing, *inter alia*, *Marincas v. Lewis*, 92 F.3d 195 (3d Cir. 1996) (holding such rights exist)). *Compare Judulang v. Holder*, 132 S. Ct. 476, 485 (2011) (rejecting suggestion Government can flip coins to decide purely discretionary relief applications).

hearing, but relied on the fact that Mr. Mezei had been excluded *as a threat to national security*. 345 U.S. at 216 ("to admit an alien barred from entry *on security grounds* nullifies the very purpose" of the exclusion order) (emphasis added). *Mezei* says nothing about what procedures constitute the constitutional minimum outside of the national security context. Here, individuals detained as national security threats are exempted from the class. ER 905. Releasing Subclass members found to pose no danger or flight risk under orders of supervision does not "nullify" the purpose of removal proceedings, which is to determine whether they may live here permanently.

Similarly, *Barrera* did not authorize prolonged detention regardless of the procedures employed. *Barrera* rejected a request for *outright release*, 44 F.3d at 1448, in a setting where the Government provided periodic detention reviews the adequacy of which petitioner did not challenge. *Id*. at 1450. In contrast, Subclass members have demonstrated with record evidence the inadequacy of existing procedures. They also do not seek unconditional release—just the right to a hearing to ensure their prolonged imprisonment actually serves its purpose.

Finally, since *Zadvydas*, the two circuits to address the question have recognized that "excludable" noncitizens—including ones who, unlike Class members, have *lost* all right to remain in the country—retain the due process right to freedom from arbitrary prolonged detention. *See Rosales-Garcia v. Holland*, 322

F.3d 386, 408, 412 (6th Cir. 2003) (en banc) (holding that indefinite detention of excludable noncitizens "raises [equally] serious constitutional concerns" as in *Zadvydas*); *Chi Thon Ngo v. I.N.S.*, 192 F.3d 390, 392, 396-98 (3d Cir. 1999), *amended* (Dec. 30, 1999) (excludable noncitizens remain "persons" under the Fifth Amendment "entitled to substantive due process" and therefore requiring "rigorous review" as to flight risk and dangerousness to ensure that incarceration does not outlast "the original justifications for custody"). Those cases further support Petitioners' view that *Mezei* and *Barrera* do not authorize their prolonged arbitrary imprisonment.[9]

2. Core Constitutional Values Protect Arriving Subclass Members from Prolonged Arbitrary Imprisonment.

The Due Process Clause also must protect Arriving Subclass Members because our legal tradition does not tolerate prolonged arbitrary imprisonment. At its irreducible minimum, the Fifth Amendment protects freedoms historically understood to be essential to liberty. *See Moore v. City of East Cleveland*, Ohio, 431 U.S. 494, 503 (1977) ("substantive due process" derived "from careful 'respect for the teachings of history (and) solid recognition of the basic values that underlie our society.'") (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501

[9] Even before *Zadvydas*, "no circuit ha[d] concluded that the Due Process Clauses of the Fifth and Fourteenth Amendments do not apply to excludable aliens." *Rosales-Garcia*, 322 F.3d at 410 n.29.

(1965)).

No tradition condones arbitrarily imprisoning people for years on U.S. soil without a hearing to determine if their confinement is actually needed. On the contrary, "[f]reedom from arbitrary detention is as ancient and important a right as any found within the Constitution's boundaries." *Jennings*, 138 S. Ct. at 863 (Breyer, J., dissenting on other grounds). Due process "limits the Government's ability to deprive a person of his physical liberty where doing so is not needed to protect the public, or to assure his appearance at, say, a trial or the equivalent." *Id*. (internal citations omitted).

Due process limits on arbitrary detention also serve an important separation of powers function, providing a critical check on state power irrespective of the immigration status of the prisoners. *Hernandez*, 872 F.3d at 990 n.17 ("the Due Process Clause stands as a significant constraint on the manner in which the political branches may exercise their plenary authority"). The Government cannot imprison excludable noncitizens without trial under color of criminal process. Nor can it confine them without hearings pursuant to the laws governing civil commitment. Equally so, it cannot imprison them for no reason under the immigration laws—i.e., absent a hearing where it shows a need to detain based on danger or flight risk.

Excluding Arriving Subclass members from a core protection of the Due

Process Clause would represent a significant departure from this Court's precedents. This Court has recognized that excludable noncitizens are "persons" entitled to other rights protected by the Fifth Amendment. For example, *Wong* held an excludable noncitizen can assert Fifth Amendment equal-protection claims, explaining that "rounding up all immigration parolees of a particular race solely because of . . . skin color" clearly violates their Fifth Amendment rights. 373 F.3d at 973-74.[10] *See also Alvarez-Garcia v. Ashcroft*, 378 F.3d 1094, 1098 (9th Cir. 2004) ("the entry doctrine does not categorically exclude non-admitted aliens from all constitutional coverage," and "the government cannot, consistent with the constitution, mistreat non-admitted aliens with impunity") (citing *Wong*); *Papa v. United States*, 281 F.3d 1004, 1010-11, 1010 n.22 (9th Cir. 2002) (holding an excludable non-citizen had a right not to be "knowingly plac[ed] . . . in harm's way" by governmental officials) (citing *Lynch v. Cannatella*, 810 F.2d 1363, 1374-75 (5th Cir. 1987)); *Wang v. Reno*, 81 F.3d 808, 817-18 (9th Cir. 1996) (same). If such decisions have any vitality, then surely noncitizens cannot be deprived of the core due process right against arbitrary physical restraint.[11]

[10] This Court dismissed Ms. Wong's due process challenge to ICE's decision to revoke parole before deciding her adjustment of status application. But it did so because it found no liberty interest in temporary parole, not because she was not a "person." *Wong*, 373 F.3d at 968.

[11] Courts have even recognized certain noncitizens *outside* the United States have Fifth Amendment rights arising from substantial voluntary connections or property interests. *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 997 (9th Cir. 2012)

For all these reasons, the Constitution protects Arriving Subclass members from prolonged arbitrary imprisonment.

3. Immigration Detention Without a Bond Hearing is Unconstitutional After Six Months.

Under this Court's case law, immigration confinement without a hearing becomes unconstitutional when it exceeds six months. Because Arriving Subclass members are entitled to the same basic protection against prolonged arbitrary imprisonment that applies to all persons, they too are entitled to bond hearings when imprisonment exceeds six months.

This Court already has held that due process balance shifts once incarceration reaches six months. In *Diouf II*, this Court considered whether regulations providing for custody reviews—but not bond hearings—for noncitizens detained under Section 1231(a)(6) adequately alleviate the "profound" due process concerns created by prolonged detention. 634 F.3d at 1091. The regulations provided for custody reviews by DHS officers, without a hearing, after 90 days, 180 days and 18 months of confinement. This Court found those procedures

---

(right to challenge placement on No Fly List); *In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1308 n.6 (9th Cir. 1982) (property right to cause of action); *Russian Volunteer Fleet v. U.S.*, 282 U.S. 481, 491-92 (1931) (takings). Surely Arriving Subclass members—who have suffered six months of incarceration even though the Government has given them a right to remain here to litigate substantial asylum claims—have voluntary connections comparable to those recognized for the people residing abroad in *Ibrahim*, *Bali*, and *Russian Volunteer Fleet*.

insufficient: "[w]hen detention crosses the six-month threshold and release or removal is not imminent, the private interests at stake are profound. Furthermore, the risk of an erroneous deprivation of liberty in the absence of a hearing before a neutral decisionmaker is substantial. The burden imposed on the government by requiring hearings before an immigration judge at this stage of the proceedings is therefore a reasonable one." *Id*. at 1091-92.

While *Diouf II* ultimately construed Section 1231(a)(6) to require a bond hearing after six months, its reasoning was unambiguously constitutional. *Id*. Nor was *Diouf II*'s analysis limited to the particular facts of that detainee's case. The petitioner's status as a non-lawful permanent resident who had a final removal order no longer subject to direct review did not matter. Regardless of a person's status, the Court held, "the same important interest is at stake—freedom from prolonged detention." *Id*. at 1087. *Cf. Singh*, 638 F.3d at 1204–05 (rejecting similar arguments for why burden of proof could shift against detainee based on immigration status, citing *Diouf II*); *Rodriguez II*, 715 F.3d at 1139 ("*Diouf II* strongly suggested that immigration detention becomes prolonged at the six-month mark regardless of the authorizing statute.").

Diouf II's recognition that due process requires heightened procedures after six months comports with long-standing precedent. "It is not difficult to grasp the proposition that six months in jail is a serious matter for any individual . . . ."

Muniz v. Hoffman, 422 U.S. 454, 477 (1975). Our nation's legal tradition has long recognized six months as a substantial period of physical confinement, such that significant process is required to continue incarceration beyond that time. With few exceptions, "in the late 18th century in America crimes triable without a jury were for the most part punishable by no more than a six-month prison term . . . ." *Duncan v. State of La.*, 391 U.S. 145, 161 & n.34 (1968). Consistent with this tradition, the Supreme Court has set six months as the outer limit of confinement for criminal offenses that federal courts can impose without a jury trial. *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966) (plurality opinion); *Baldwin v. New York*, 399 U.S. 66 (1970) (extending *Duncan* to the states).

To be clear: no state or federal authority can imprison a person under the criminal law to more than six months' confinement without *a jury trial*. Yet Respondents contend they can imprison under the immigration laws for that period, and far longer, without even a bond hearing.

Six months also has been considered an outer limit for confinement without individualized inquiry in civil contexts. *See McNeil*, 407 U.S. at 250-52 ("six months" commitment without a hearing "a useful benchmark" for the outer constitutional limit). *Zadvydas* itself drew that line because "Congress previously doubted the constitutionality of detention for more than six months," 533 U.S. at 701, even as to individuals already ordered removed. Both Congress and DHS

have adopted six months as an outer limit in immigration detention contexts, even for national security risks and specially dangerous individuals. 8 U.S.C. 1537(b)(2)(C) (mandating detention review every six months for national security detainees who cannot be repatriated); 8 C.F.R. 241.14(k)(1)-(3) (requiring IJ review every six months of specially dangerous individuals not substantially likely to be removed).

Rather than leave Government officials at sea, courts adopted six-month rules in each of these instances as administrable rules necessary to vindicate constitutional guarantees. *Cf. Rodriguez I*, 591 F.3d at 1123 (favoring class treatment to "facilitate development of a uniform framework" for "[a]nswering comprehensively in a class setting the constitutional question that is at the center of the proposed class's claims").

The Supreme Court repeatedly has endorsed such administrable rules to proscribe constitutional limits in various analogous contexts. *See Maryland v. Shatzer*, 559 U.S. 98, 110 (2010) (adopting 14-day limit in interrogation context because "case-by-case adjudication" would be "impractical"); *McLaughlin*, 500 U.S. at 55-56 (adopting 48-hour limit on detention prior to probable cause hearing as "reasonable" and necessary to "provide some degree of certainty" States acted "within constitutional bounds"). *Cf. Zadvydas*, 533 U.S. at 700-01 (citing *McLaughlin* and *Cheff* and adopting six-month rule "for the sake of uniform

administration" and to avoid need for lower courts to make "difficult judgments"). As the Supreme Court has recognized, in some circumstances "it is necessary to draw a line." *Duncan*, 391 U.S. at 160-61.

Accordingly, due process requires the injunction's provision ordering bond hearings after six months of incarceration for all Class members, including those in the Section 1225(b) Subclass.

Q2. The Constitution Requires That Class Members Subject to Mandatory Detention Under Section 1226(c) Receive Bond Hearings Once Detention Exceeds Six Months.

The Court also asked whether the Constitution requires bond hearings for individuals subject to mandatory detention under Section 1226(c). It does. Existing circuit law compels that conclusion.

This Court and every circuit to address the issue consistently has found prolonged mandatory incarceration under Section 1226(c) presents, at a minimum, serious due process concerns. *See supra* pp. 27-28 (citing *Tijani*, *Casas*, *Rodriguez II*, and *Singh* in Ninth Circuit); *supra* p. 28 (citing *Reid*, *Lora*, *Diop*, *Ly*, and *Sopo* in other circuits). These courts repeatedly rejected the claim that *Demore* authorizes *prolonged* mandatory detention. *Demore* upheld detention without a bond hearing under Section 1226(c) based on two critical limitations: (1) the petitioner's concession of deportability; and (2) the Supreme Court's understanding that proceedings under Section 1226(c) are typically "brief." *See*

Rodriguez II, 715 F.3d at 1137 ("we have consistently held that *Demore*'s holding is limited to detentions of brief duration"); *Casas*, 535 F.3d at 950 ("References to the brevity of mandatory detention under § 1226(c) run throughout *Demore*."); *Tijani*, 430 F.3d at 1242 (petitioner in *Demore* "conceded deportability"); *Demore*, 538 U.S. at 522 n.6 (case "decide[d] . . . on [the] basis" of the petitioner's concession of deportability); *id*. at 518 (rule applies to a "limited class of deportable aliens").

Should the Court be inclined to revisit its view of *Demore*, *Demore*'s reliance on *Carlson v. Landon*, 342 U.S. 524, 546 (1952) and *Reno v. Flores*, 507 U.S. 292, 309 (1993) further supports this Court's prior reading. *Carlson* upheld the detention of certain dangerous noncitizens, but stressed the "problem" of "unusual delay in deportation hearings is not involved in this case." 342 U.S. at 546. Subsequent cases recognize *Carlson* as so limited. *See Zadvydas*, 533 U.S. at 691; *Mezei*, 345 U.S. at 216 n.13. Likewise, *Flores* upheld brief custodial detentions of children pending removal, but nonetheless emphasized the brevity of those detentions. 507 U.S. at 314 (average of 30 days). The children also had access to bond hearings. *Id.* In responding to concerns about the risk of prolonged detention (even with such hearings), *Flores* stressed those proceedings were required to "be concluded with 'reasonable dispatch,'" and that it had "no evidence" of detention "for undue periods" or that "habeas corpus is insufficient to

remedy particular abuses." *Id.* Here, Petitioners supplied ample evidence of both.[12]

Thus, under this Court's existing law, where a noncitizen has been incarcerated for a prolonged period or has a substantial defense to removal, due process requires an individualized determination that such a profound deprivation of liberty is warranted. *Casas*, 535 F.3d at 950; *Tijani*, 430 F.3d at 1242. *Cf. Demore*, 538 U.S. at 532 (Kennedy, J., concurring) ("individualized determination as to his risk of flight and dangerousness" may be warranted "if the continued detention became unreasonable or unjustified").

Because Mandatory Subclass members are incarcerated for prolonged periods and overwhelmingly have substantial defenses to removal, *Demore* does not foreclose their constitutional claims. In *Demore*, the Supreme Court believed that, for 85% of cases, the average detention time was 47 days and that, in outlier cases, detention would "last[] . . . about five months in the minority of cases in which the alien cho[se] to appeal." 538 U.S. at 529-30.[13] Here, by contrast, detention exceeds six months in *every* case under the class definition, and the average detention for Mandatory Subclass members is nearly ten times the average

[12] The record documents that many Class members cannot request bond hearings, much less file habeas petitions, due to language barriers and inability to access the courts. *See* Merida Dec. ER 446-48 ¶¶ 12-18; Inlender Dec., ER 739-40 ¶¶ 10-14.
[13] As the Solicitor General admitted years later, the Court's assumptions about detention length rested on incorrect data provided by the Government. *See supra n.* 4.

assumed in *Demore*. ER 699, Tbl.20 (427 days). Even for appeals, the average is three times what *Demore* envisioned. ER 685, Tbl.6 (448 days)

In addition, unlike in *Demore*, the vast majority of Mandatory Subclass members have substantial defenses to removal, providing strong incentives to appear for hearings. At least three quarters pursue substantial defenses that, if successful, prevent entry of a removal order. ER 701 Tbl.23; ER 730 Tbl.38; ER 702 Tbls.25-26. Thirty-eight percent of them win their cases even while imprisoned. ER 730. ER 446-49, ER 664-65 (incarceration makes litigation far more difficult). For example, forty-nine percent are eligible for LPR cancellation of removal, and thirty-nine percent of those win it. 8 U.S.C. 1229b; ER 700 Tbls.22-23 (referencing Form "EOIR-42A" applications). By definition, such individuals had no aggravated felony conviction and at least seven years of lawful residence, including five as LPRs. *Id*.

Individuals who have substantial defenses, and therefore an opportunity to maintain the right to reside here through removal proceedings, do not present the presumptive flight risk or dangerousness concerns that underlie *Demore*. *Demore* repeatedly limited its holding to "deportable criminal aliens," 538 U.S. at 521, for whom entry of a removal order was virtually inevitable. *See, e.g.*, *id*. at 518 (Section 1226(c) enacted because "INS could not even identify most deportable aliens, much less locate them and remove them from the country.") (emphasis

omitted); *id*. (relying on study regarding time needed to "remove every criminal alien already subject to deportation"); *id*. (referring to "INS' near-total inability to remove deportable criminal aliens").

By contrast, Subclass members with substantial defenses have obvious incentives to appear for proceedings, and also generally have stronger ties to this country and less serious criminal histories than others held under Section 1226(c). *See* SER 172b-172c ¶ 31 (82% of Section 1226(c) Subclass members resided in United States 5+ years prior to detention; 62% for 10+ years; 35% for 20+ years); SER 169-171 ¶¶ 15-20 (nearly 60% for whom data was available had U.S. citizen children); Jacobs Dec., SER 127-128 ¶ 7 (among Class members with a criminal history, over half of their records did not disclose convictions serious enough to warrant sentences over six months).

These characteristics make Mandatory Subclass members more likely to win their cases, thereby diminishing the risk they will flee, as well as the Government's interest in imprisoning them for lengthy periods. *See*, *e.g*., SER 80-81 (long-time LPR with firearms offense, for which he served 8 days, detained 15 months while the Government processed his successful application to maintain his status, during which time he missed the birth of his daughter); SER 76-77 (LPR—who provided critical support to his ill mother and was a "standout" employee—detained for ten months based on drug possession conviction for which he received diversion,

before winning his case); SER 133 (Class members detained based on simple possession offenses with sentences of 30 to 90 days held for 600 and 750 days before winning their cases).[14]

Q3. The Constitution Requires That, in Prolonged Detention Bond Hearings, the Government Bear the Burden of Proof by Clear and Convincing Evidence, Consider the Length of Detention, and Afford Periodic Hearings Every Six Months.

1. The Government Must Bear the Burden of Proof to Justify Prolonged Detention By Clear and Convincing Evidence.

This Court already has held that the Constitution requires the Government bear the burden of proof by clear and convincing evidence at prolonged detention bond hearings. *Singh*, 638 F.3d at 1200. *Singh* found that "*due process* places a heightened burden of proof on the State in civil proceedings in which the 'individual interests at stake ... are both particularly important and more substantial than mere loss of money.'" *Id*. at 1204 (emphasis added) (citing *Addington v. Texas*, 441 U.S. 418 (1979); *Cooper v. Oklahoma*, 517 U.S. 348 (1996); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Woodby v. INS*, 385 U.S. 276 (1966)). *See also id.* (observing that the Supreme Court "'repeatedly has recognized that civil commitment for *any* purpose constitutes a

[14] In the Supreme Court, the Government did not defend prolonged mandatory imprisonment based on the availability of hearings under *Matter of Joseph*, 22 I&N Dec. 799, 801 (BIA 1999). Should the Government resurrect that argument here, Petitioners will again address that argument. *See* ECF 25-2 at 32-36 (describing *Joseph*'s deficiencies).

significant deprivation of liberty'") (quoting *Addington*, 441 U.S. at 425) (emphasis in original); ECF 25-2 at 63-67.

Rodriguez IV does not affect the continued validity of *Singh*'s constitutional holding. In *Rodriguez IV*, the Supreme Court found the text of Section 1226(a) could not be construed to require the Government to bear the burden of proof by clear and convincing evidence at a bond hearing. *Rodriguez IV*, 138 S. Ct. at 847–48 ("Nothing in § 1226(a)'s text" authorizes injunction's bond hearing requirements). The Supreme Court made clear it did not resolve any constitutional issues, *id*. at 851 ("we do not reach" "respondents' constitutional arguments on their merits"), leaving *Singh*'s due process holding undisturbed.

2. Adequate Notice and Automatic Bond Hearings

The District Court properly required two protections to ensure adequate review of prolonged detentions: an automatic bond hearing and timely notice seven days prior to the hearing, ER 81-82.

The Government waived any challenge to the injunction's notice requirement by not contesting it in its prior appeal in this Court or at the Supreme Court. *Compare* ECF 25-2 at 75 n.28 (noting the Government waived challenge to requirement in opening brief) *with* ECF 58 (not contesting waiver). As Petitioners previously explained, the notice requirement follows from due process precedent and undisputed record evidence establishing the deficiencies of the prior notice

system. That system failed to give adequate notice of bond hearings, leaving many detainees unable to access critical case information in advance of hearings. *See* ECF 75 at 71-75.

Due process also requires automatic bond hearings based on this record. *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976) establishes a three-part framework for procedural due process claims, balancing the private interests at stake, the risk of erroneous deprivation absent additional safeguards, and the costs to the Government. 424 U.S. at 335. The due process balance here tilts overwhelmingly in favor of automatic hearings to ensure Class members' ongoing prolonged confinement remains justified.

First, this Court has recognized that "[t]he private interest here—freedom from prolonged detention—is unquestionably substantial." *Singh v. Holder*, 638 F.3d 1196, 1208 (9th Cir. 2011). Prolonged confinement imposes not only lengthy physical restraint, but also loss of income and attendant injury to detainees and their families. That separation causes significant medical and psychological harm. *See* SER 81-82 ¶¶ 47- 52, SER 80 ¶ 44, SER 86 ¶ 71 (describing Class members who, *inter alia*, could not care for sick relatives, financially support children attending college, and attend parents' funerals); Tan Dec., SER 169-171 ¶¶ 15-20 (60% of Class members had U.S. citizen children). *See also Hernandez*, 872 F.3d at 995 (noting "evidence of subpar medical and psychiatric care in ICE detention

facilities, the economic burdens imposed on detainees and their families as a result of detention, and the collateral harms to children of detainees").

Second, the record evidence establishes that erroneous deprivations of liberty occur without automatic hearings and adequate notice. Before the preliminary injunction, the Government refused to schedule automatic hearings to implement *Casas*. Instead, it provided a short notice regarding the availability of *Casas* hearings. Detainees were expected to read the notice, navigate the complex and confusing Immigration Court Practice Manual, and then affirmatively request hearings. *See* ER 649 (exemplar *Casas* notice). But many Class members lack English proficiency or literacy in any language. Even those who could understand the notice have limited access to law libraries and likely cannot understand the Manual, which in any event did not state that detainees could request a bond hearing in cases of prolonged detention. In fact it suggests that detainees with certain convictions cannot make such requests. ER 445-449, 556-568. *Compare Walters v. Reno*, 145 F.3d 1032, 1043 (9th Cir. 1998) (striking down INS procedures in part because "the alien never learns *how* to take advantage of the . . . procedures because the combined effect of all the [immigration] forms together is confusion") (emphasis in original).

Unsurprisingly given these deficiencies, many Class members did not know how to request a hearing and, as a result, remained unnecessarily incarcerated for

months or years. *See* ER 743 ¶¶ 24; ER 449 ¶¶ 20-21; SER 100-103 ¶¶ 117-128 (studied class member who obtained release in a *Casas* hearing more than a year after he became eligible for the hearing, after suffering 796 total days of detention). Based on this record evidence, the District Court found the government's failure to provide automatic hearings was "fraught with peril"—a finding entitled to deference under the clear error standard. ER 81. *See also Doe v. Gallinot*, 657 F.2d 1017, 1023 (9th Cir. 1981) (lack of automatic hearings rendered process "illusory" because many detainees "cannot realistically be expected to set the proceedings into motion in the first place").

Finally, the Government faces minimal burdens in sending adequate notices and automatically scheduling bond hearings. *See Martinez-de Bojorquez*, 365 F.3d at 805 (cost of adding written notice is "minimal"); *Walters*, 145 F.3d at 1044 ("constitutionally adequate notice requires only minor changes in the content of [INS] forms"). In fact, the Government has stipulated "the cost of providing a bond hearing should [not] be considered in this case as a factor weighing in [their] favor." SER 191. Respondents already conduct numerous bond hearings; they are typically brief (ten to fifteen minutes) and often occur via video. *See* ER 664. And because detention costs dwarf supervision and hearing costs, the injunction has saved millions of dollars by avoiding costly unnecessarily prolonged detentions. Long Rep., ER 693 Tbl.18.

3. Consideration of Alternatives to Detention

The District Court properly held that IJs should consider non-monetary alternatives to detention when determining whether Class members' continued detention is necessary to prevent danger or flight risk. ER 80-81. Class members are particularly strong candidates for release on alternatives given their strong ties to this country, substantial defenses to removal, and minor (if any) convictions. *See supra* Statement of Facts.

This Court has held that due process requires immigration officials to consider non-monetary alternatives to detention, such as home visits or electronic monitoring, at bond hearings. *See Hernandez v. Sessions*, 872 F.3d 976, 990–91 (9th Cir. 2017) (holding "consideration of . . . possible alternative release conditions" is "necessary to ensure that the conditions of their release will be reasonably related to the governmental interest in ensuring their appearance at future hearings"). As this Court and the Supreme Court have explained, restrictions on liberty in the civil detention context are unconstitutional when the government's objectives could be "accomplished in . . . alternative and less harsh methods." *See Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004) (citations and quotations omitted); *Bell v. Wolfish*, 441 U.S. 520, 538, 539 n.20 (1979). *See also* ECF 25-2 at 76-79.

Requiring IJs to consider alternatives is particularly justified in light of the

record evidence establishing the remarkable success of ISAP II, ICE's alternatives to detention program. Eric Saldana, Respondents' designated 30(b)(6) witness on alternatives to detention, testified compliance with ISAP II "[is] at, if not close to, 100 percent . . . for people going to their immigration court hearing pre-order" in the San Bernardino area, and estimated compliance for the Los Angeles area as a whole is "in the 90th percentile." SER 181:2-24. *See also* ER 533, Ex. F (ICE headquarters directive commenting on "continued success" of ICE ATD program and encouraging use of ATDs for "aliens who pose a significant risk of flight"). The company ICE uses for ISAP II has reported attendance rates at hearings for ISAP II participants exceeds 99%. *See* ER 520, Ex. E (ISAP II 2011 annual report) (In 2011, ISAP II's "full service" option produced 99.4% attendance rate at IJ hearings and 96.0% attendance rate at final court decisions).

4. Length of Detention and Periodic Review

Due process also requires periodic review where detention becomes exceedingly prolonged. Many Class members endure lengthy periods of incarceration beyond six months, often for years. More than half detained past six months remained imprisoned at 12 months; 23% were still imprisoned at 18 months; and 10% at 24 months. ER 684-85 Tbl.4; ER 683 Tbl.2 (Class member imprisoned more than 1,585 days); *Nadarajah v. Gonzalez*, 443 F.3d 1069, 1081 (9th Cir. 2006) (nearly five years); *Casas*, 535 F.3d at 944 (seven years). On this

record, due process requires two further critical protections that the district court did not adopt—that IJs consider the length of detention and provide periodic bond hearings. These requirements ensure confinement remains justified should detentions stretch a year or more.

Mr. Rodriguez's illustrates the need for this basic protection. He was imprisoned for more than three years and three months, and would have been held for seven years if not for this case. *See* ER 938-47; SER 111-12. Yet on the Government's view, it could continue his imprisonment with the same showing after six months of detention as after six *years*.

This Court has recognized that "the due process analysis changes as 'the period of . . . confinement grows,'" and that longer detention requires "greater procedural safeguards." *Diouf II*, 634 F.3d at 1086 (quoting *Zadvydas*, 533 U.S. at 701). Both *Demore* and *Zadvydas* focused on length of detention when considering the sufficiency of custody review procedures. *See Zadvydas*, 533 U.S. at 701; *Demore*, 538 U.S. at 529. Indeed, at the Supreme Court, the Government conceded that "because longer detention imposes a greater imposition on an individual, as the passage of time increases a court may scrutinize the fit between the means and the ends more closely." Brief for Petitioners at 47, *Jennings v. Rodriguez*, No. 15-1204 (U.S. Aug. 26, 2016).

Two requirements follow from this principle. *First*, IJs must consider the

length of time Class members have been incarcerated when determining whether additional confinement is justified. Courts, including this one, have required consideration of additional factors "such as the length of the detention" in evaluating whether pre-trial detention violates due process. *United States v. Hare*, 873 F.2d 796, 801 (5th Cir. 1989); *United States v. Ojeda Rios*, 846 F.2d 167, 169 (2d Cir. 1988).

Second, due process requires the Government provide *periodic* bond hearings, every six months, to assess whether continued incarceration remains reasonable in relation to its purpose. *See Mathews*, 424 U.S. at 335 (greater procedural protections required when the private interests at stake are weightier). The Supreme Court has recognized "[a] confinement that is in fact indeterminate cannot rest on procedures designed to authorize a brief period of observation." *McNeil*, 407 U.S. at 249. In *Jackson v. Indiana*, the Court found lengthy pre-trial detention of incompetent criminal defendants unconstitutional where "[t]here is no statutory provision for periodic review of the defendant's condition." 406 U.S. 715, 720 (1972).

Application of the *Mathews* due process test demonstrates the need for periodic hearings during prolonged imprisonment. The deprivation of liberty for Class members confined longer than six months is "profound." *Diouf II*, 634 F.3d at 1091. Absent periodic review, the risk of erroneous deprivation is high because

many Class members face lengthy additional detentions that may not be justified by an initial showing at six months. Under 8 C.F.R. 1003.19(e), a detainee may request an additional custody hearing based on changed circumstances. But because the agency does not count additional time in prison as a "changed circumstance," a detainee cannot obtain a new custody hearing based on passage of time. SER 138. Absent periodic review, many Class members remained imprisoned for additional months and years without any determination that the additional incarceration was justified.

Finally, as discussed *supra*, conducting periodic hearings poses minimal burdens and generates significant savings for the Government.[15]

CONCLUSION

The Court should affirm the District Court's permanent injunction on constitutional grounds, but reverse the District Court insofar as it refused to order IJs to consider the length of past and likely future detention, and to require periodic hearings for detainees who fail to win release after their first hearing.[16]

---

[15] Despite this Court's contrary findings, Petitioners re-assert due process requires consideration of length of future detention and likelihood of removal. *See* ECF 25-2 at 84-92.

[16] Although not within the Court's questions, Petitioners note an issue relevant to this remand: *Rodriguez III* concluded that "the § 1231(a) subclass does not exist" because it believed that detainees with pending cases are not detained under Section 1231(a). 804 F.3d at 1086. However, subsequent Ninth Circuit precedent clarified that Section 1231(a) applies to certain individuals with pending cases. *See Padilla-Ramirez v. Bible*, 882 F.3d 826, 830, 832 (9th Cir. 2017) (holding Section

Respectfully submitted,

ACLU OF SOUTHERN CALIFORNIA

Dated: May 29, 2018

s/ Ahilan T. Arulanantham
AHILAN T. ARULANANTHAM
Counsel for Petitioners-Appellees

1231(a) applies to individuals with reinstated removal orders in withholding-only proceedings). *See also Diouf I*, 542 F.3d at 1228-32 (Section 1231(a) applies to individuals with pending motions to reopen and a stay of removal); ER 901-04 (named representative for Section 1231(a) Subclass with pending case). Accordingly, Petitioners respectfully submit this Court erred in concluding there are no Section 1231(a) Subclass members. Because *Padilla-Ramirez* has now acknowledged that *Diouf II* requires a bond hearing for individuals detained for more than six months under Section 1231(a), 882 F.3d at 830, the Court should affirm the injunction as to the Section 1231(a) Subclass. Put another way, every Section 1231(a) Subclass member is already entitled to a prolonged detention bond hearing under *Diouf II*. The Court should clarify that it has not held otherwise.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a)(7)(C), Ninth Circuit Rule 32-1, and this Court's Order (Dkt. 150) the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,931 words.

s/ Ahilan T. Arulanantham
AHILAN T. ARULANANTHAM
Counsel for Petitioners-Appellees

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 29, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Ahilan T. Arulanantham
AHILAN T. ARULANANTHAM
Counsel for Petitioners-Appellees