No. 20-234

IN THE

Supreme Court of the United States

IMMIGRATION AND CUSTOMS ENFORCEMENT, *et al.*,

Petitioners,

—v.—

YOLANY PADILLA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

Trina Realmuto
NATIONAL IMMIGRATION LITIGATION ALLIANCE
10 Griggs Terrace
Brookline, MA 02446

Kristin Macleod-Ball
AMERICAN IMMIGRATION COUNCIL
1331 G Street NW, Suite 200
Washington, DC 20005

David Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street NW
Washington, DC 20005

Cecillia D. Wang
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111

Matt Adams
Counsel of Record
Aaron Korthuis
NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Avenue, Suite 400
Seattle, WA 98104
(206) 957-8611
matt@nwirp.org

Michael K.T. Tan
Judy Rabinovitz
Anand Balakrishnan
Omar C. Jadwat
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004

Counsel for Respondents

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does the Due Process Clause of the Fifth Amendment require custody hearings before a neutral decisionmaker to detain asylum seekers who are apprehended inside the United States; found by the Department of Homeland Security to have a credible fear of persecution or torture; and permitted to remain in the United States for as long as the subsequent proceedings take, often a matter of years?

2. Does 8 U.S.C. § 1252(f)(1) permit a classwide injunction requiring custody hearings for "individual alien[s] against whom [removal proceedings] have been initiated"? *Id.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Regulations

Rules

Other Authorities

INTRODUCTION

Petitioners ask this Court to review a preliminary injunction maintaining a status quo that has been in place for more than 15 years. Since 2005, Petitioners have afforded asylum seekers apprehended inside the United States and found to have a "credible fear" of persecution or torture a custody hearing to determine if their detention is necessary during lengthy proceedings on their claims to protection. Because of the preliminary posture of this case and multiple intervening developments, this Court's review would be premature at this time. The Court should deny certiorari and allow the lower court to reach a final determination based upon a complete factual record.

Respondents entered the country to seek protection from persecution or torture. All were screened by a Department of Homeland Security ("DHS") officer, found to have a *bona fide* asylum claim, and referred for full proceedings before an immigration judge ("IJ"). They are entitled to remain in the United States for the time required to adjudicate their claims, which can often take years. The preliminary injunction temporarily preserves the government's well-established practice of providing custody hearings to such individuals to assess whether they need to be detained pending their administrative proceedings and any judicial review. The injunction follows from this Court's longstanding recognition that the Due Process Clause protects noncitizens inside the United States against arbitrary detention and requires adequate procedures to ensure that detention serves a valid government purpose, so that only those who pose a flight risk or danger are detained. *See Zadvydas v. Davis*, 533 U.S. 678, 690–91, 693 (2001).

Since the district court entered the preliminary injunction, dramatic changes to the immigration system have fundamentally altered the injunction's scope. At the time the district court entered its order, the class consisted of thousands of asylum seekers apprehended near the border who had recently entered the country. However, in the interim, the number of these class members has fallen precipitously because of new, sweeping restrictions on entry at the southern border and eligibility for asylum. At the same, the government has expanded the application of "expedited removal" to noncitizens apprehended anywhere in the country who have lived here less than two years since their last entry. Therefore, while the class initially consisted almost entirely of individuals seeking asylum very shortly after crossing the border, it now primarily consists of individuals who have lived in the United States for considerable periods of time.

In addition, this Court decided *DHS v. Thuraissigiam*, 140 S. Ct. 1959 (2020), after the court of appeals' decision, and Petitioners maintain that it affects the validity of the preliminary injunction. While Respondents disagree, this is not the proper forum to resolve that dispute in the first instance. Nothing stops Petitioners from seeking a modification or lifting of the injunction from the district court on the basis of *Thuraissigiam*. Since Petitioners are free to pursue that remedy, the Court should deny review and remit them to the lower courts. This is a court of review, not of first instance.

Petitioners contend that review is necessary because the decision below holds the detention statute at issue, 8 U.S.C. § 1225(b)(1)(B)(ii), unconstitutional. Pet. 25. But the court of appeals did not invalidate the statute; it held only that due process requires a hearing before

a neutral decisionmaker to determine if an individual's detention is necessary. App. 9a-12a. The statute does not preclude such a hearing, but instead gives the Attorney General broad parole authority without specifying the procedures to be applied. *See* 8 U.S.C. § 1182(d)(5)(A). Thus, the court's holding that a hearing is required does not invalidate any federal statute.

Finally, review is also not warranted on Petitioners' contention that Section 1252(f)(1) bars classwide relief. First, there is only the shallowest of circuit splits on this issue, and this case is an inappropriate vehicle to address the question. Second, Section 1252(f)(1) provides that no court other than the Supreme Court can "enjoin or restrain the operation of the provisions of [8 U.S.C. §§ 1221–1232], other than with respect to the application of such provisions to an individual alien against whom [removal] proceedings . . . have been initiated." Because the preliminary injunction does not actually "enjoin or restrain the operation" of any immigration statute, but merely specifies procedures to be provided where the statute is silent, the decision below can be upheld without addressing Petitioners' question as to whether the reference to an "individual alien" bars classwide relief. And in any event, the court below correctly determined that the statute permits relief to a class so long as they are all, as here, "individual alien[s] against whom [removal] proceedings . . . have been initiated." App. 24a–28a.

I. STATEMENT

A. Legal Framework

From 1952 until 1996, the Immigration and Nationality Act ("INA") provided for two types of removal proceedings: "deportation" proceedings for individuals who had entered the United States—

including those who had entered without inspection—and "exclusion" proceedings for individuals stopped at the border before effectuating an entry. *Judulang v. Holder*, 565 U.S. 42, 45–46 (2011); 5 Charles Gordon, et al., *Immigration Law and Procedur*e § 63.01 (2019). The statute governing deportation proceedings provided for discretionary release on bond, and the regulations authorized an IJ to review agency decisions to detain. *See* 8 U.S.C. § 1252(a)(1) (1994); 8 C.F.R. §§ 242.2(d), 3.19 (1994).[1] In contrast, individuals stopped at the border and placed in exclusion proceedings were not entitled to bond hearings; their only option for release was a discretionary "parole" review by an immigration officer. *See* 8 U.S.C. §§ 1182(d)(5), 1225(b) (1994); 8 C.F.R. §§ 212.5(a), 235.3(b) (1994).

In 1996, Congress replaced "exclusion" and "deportation" proceedings with a single "removal" proceeding. *See* 8 U.S.C. § 1229a. However, the detention scheme remained essentially the same. As before, noncitizens who had entered the United States were generally entitled to bond hearings, while noncitizens stopped at the border before entering were limited to seeking release on parole. *See* 8 C.F.R. §§ 1003.19(a), 1003.19(h)(2)(i)(B), 1236.1(c)(11), 1236.1(d)(1); *see also id*. § 1235.3(c).

In 1996, Congress also created the expedited removal process, and authorized the Attorney General to designate for expedited removal certain persons who are apprehended inside the country and cannot demonstrate that they have been present for a two-

[1] The government first provided bond hearings before special inquiry officers in 1969, *see* 34 Fed. Reg. 8,037 (May 22, 1969), and replaced those officers with IJs in 1973. See 38 Fed. Reg. 8,590 (Apr. 4, 1973); *see also* 48 Fed. Reg. 8,038 (Feb. 25, 1983) (establishing Executive Office of Immigration Review).

year period. 8 U.S.C. § 1225(b)(1)(A)(iii).[2] In doing so, Congress preserved the right to a fair adjudication of *bona fide* asylum claims. Individuals in expedited removal who express a fear of persecution or torture are interviewed by an asylum officer for a credible fear screening. If they pass the screening, they are transferred for full-scale removal proceedings before an IJ to consider their claims for asylum and other relief. *See id*. §§ 1225(b)(1)(A)(ii), (b)(1)(B)(ii); 8 C.F.R. §§ 208.30(f), 1235.6(a)(ii)–(iii). "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." H.R. Rep. No. 104–469, pt.1, at 158 (1996). Individuals found to have a credible fear have *bona fide* asylum claims meriting full adjudication by an IJ. "If the alien meets this threshold, the alien is permitted to remain in the United States to receive a full adjudication of the asylum claim," which may include an administrative appeal and judicial review. *Id.*

In 2004, DHS authorized expedited removal for individuals apprehended within 100 miles of the border and who had been present in the country for less than 14 days. 69 Fed. Reg. 48,877 (Aug. 11, 2004). Controlling regulations continued to provide that persons apprehended after entering the country without inspection, and subsequently transferred for full removal proceedings after passing a credible fear screening were entitled to bond hearings. *See Matter of X-K-*, 23 I. & N. Dec. 731, 732, 734–35 (BIA 2005)

---

[2] The Homeland Security Act of 2002 transferred the desigation power from the Attorney General to the Secretary of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002); 6 U.S.C. § 557.

(construing 8 C.F.R. §§ 1003.19(h)(2), 1236.1(c)(11), (d)). That practice continued unbroken for 15 years.

In April 2019, however, the Attorney General eliminated custody hearings for such asylum seekers. *Matter of M-S-*, 27 I. & N. Dec. 509 (A.G. 2019).[3] *Matter of M-S-* reversed *Matter of X-K-*, which had held that that those who have demonstrated *bona fide* asylum claims are entitled to custody hearings. *Id*. at 509–10. Under the Attorney General's new interpretation, asylum seekers with *bona fide* claims now face detention for months or even years without a custody hearing, even if there is *no evidence* that they pose a flight risk or danger, and therefore their detention serves no valid purpose.

In July 2019, DHS sought to expand expedited removal to the full scope authorized by statute, namely to all those who have lived in the United States for up to two years and who are taken into custody anywhere in the country—including far from the border. 84 Fed. Reg. 35,409 (July 23, 2019). DHS is now fully implementing expedited removal in the interior.[4] As a result, thousands of individuals who have lived for long periods in the United States are now subject to expedited removal.

---

[3] Citing *Jennings v. Rodriguez*, 138 S. Ct. 830, 839, 844—45 (2018), the Attorney General reasoned that the INA does not provide bond hearings to such asylum seekers, but instead limits them to seeking release through a request for "parole" from DHS. *Matter of M-S-*, 27 I. & N. Dec. at 516–18.

[4] *See* Press Release, U.S. Immigr. & Customs Enf't, ICE Implements July 23, 2019 Expedited Removal Designation (Oct. 21, 2020), https://www.ice.gov/news/releases/ice-implements-july-23-2019-expedited-removal-designation.

B. Procedural History

Respondents are asylum seekers who were apprehended after entering the United States and determined by DHS asylum officers to have a credible fear of persecution or torture. Some, like Blanca Orantes, fled with young children to seek protection in the United States. Ms. Orantes suffered serious mistreatment while detained by Petitioners, including being forcibly separated from her 8-year old son. Third Am. Cmplt. ¶¶ 77-89, *Padilla v. U.S. Immigr. & Customs Enf't*, No. 2:18-cv-00928-MJP (W.D. Wash. May 20, 2019) (ECF No. 130).

Respondents filed this class action to enforce, among other things, their right to constitutionally-adequate procedures at their bond hearings. Second Am. Cmplt. ¶ 148, *Padilla v. U.S. Immigr. & Customs Enf't*, No. 2:18-cv-00928-MJP (W.D. Wash. Aug. 22, 2018) (ECF No. 26). From the time Respondents filed their second amended complaint until October 2020, when Petitioners implemented their expansion of expedited removal, the class consisted of asylum seekers who had been in the United States for less than 14 days and apprehended within 100 miles of the border, pursuant to the government's then-existing expedited removal procedures. At the time, both the implementing regulations and *Matter of X-K-* entitled them to bond hearings.

In March 2019, the district court certified a nationwide class of "[a]ll detained asylum seekers who entered the United States without inspection, were initially subject to expedited removal proceedings under 8 U.S.C. § 1225(b), were determined to have a credible fear of persecution, but are not provided a bond hearing with a verbatim transcript or recording

of the hearing within seven days of requesting a bond hearing." App. 100a.[5]

The district court subsequently granted a preliminary injunction requiring the government to (1) provide bond hearings within seven days of a request; (2) bear the burden of justifying continued detention; (3) record bond hearings and produce either the recording or transcript on appeal; and (4) provide written IJ decisions with particularized determinations. App. 97a–98a.

However, eleven days after the injunction issued, the Attorney General issued *Matter of M-S-*, denying Respondents a bond hearing under the Attorney General's reading of the statute. Respondents subsequently amended their complaint and moved to modify the injunction to challenge *Matter of M-S-*'s prohibition on custody hearings as violating the Due Process Clause. App. 55a–56a.

The district court modified the preliminary injunction and divided the injunction into two parts to facilitate appellate review. App. 74a–75a. The court found Respondents likely to succeed on their claim that due process entitles them to custody hearings (Part B), App. 65a–73a, and reaffirmed its initial order requiring that those hearings be provided promptly and with specific procedural protections (Part A), App. 74a. The court reasoned that 8 U.S.C. § 1252(f)(1), which limits relief to an "individual alien against whom [removal proceedings] have been initiated," did not bar injunctive relief because all class members were currently in removal proceedings. App. 59a–62a.

---

[5] The district court later approved a stipulation by the parties including individuals who establish a credible fear of torture in the class. App. 5a.

Petitioners appealed and moved to stay the preliminary injunction. App. 48a–51a. The court of appeals denied the request to stay Part B (requiring custody hearings) and granted the request to stay Part A (requiring specific hearing procedures). *Id*. The government did not ask this Court to stay Part B. Accordingly, Respondents continue to have custody hearings.

On March 27, 2020, the court of appeals vacated and remanded Part A of the injunction and affirmed Part B. App. 30a–31a. With respect to the procedural protections in Part A, the court found the record insufficient to support preliminary relief and remanded for further development as to the "seven-day timeline," and any "burden [on] the immigration courts." App. 22a–23a. As to Part B, the court agreed that Respondents were "likely to prevail on their due process claim regarding the availability of bond hearings" and "would suffer irreparable harm" absent injunctive relief. App. 19a–20a. Applying the procedural due process test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the court recognized that class members' liberty interests were "substantial" and required detention to be "strictly limited," and thus "accompanied by a prompt individualized hearing before a neutral decisionmaker to ensure that [it] serves . . . legitimate goals." App. 9a–12a.

The court also concluded that relief was not barred by Section 1252(f)(1), holding that the plain language of the statute permits classwide injunctive relief where class members are all "individual aliens" in removal proceedings. App. 24a.

Judge Bade dissented, concluding that Section 1252(f)(1) precluded the classwide injunction, and that the injunction was overbroad. App. 32a–47a.

The government did not petition for rehearing en banc. Nor has the government sought to modify the preliminary injunction before the district court in light of intervening developments.[6]

REASONS TO DENY THE PETITION

I. THIS COURT'S REVIEW OF THE PRELIMINARY INJUNCTION IS PREMATURE IN LIGHT OF INTERVENING DEVELOPMENTS.

The Court should deny the petition for certiorari as premature. First, the case is only at the preliminary injunction stage, and several intervening developments in the immigration system have dramatically changed the composition of the Respondent class and require appropriate factual development by the district court. Second, Petitioners' arguments that *DHS v. Thuraissigiam*, 140 S. Ct. 1959 (2020)—which was issued after the court of appeals' decision—undermines the preliminary injunction are premature, as the lower courts have not had the opportunity to address the applicability, if any, of *Thuraissigiam*. Petitioners may seek relief on that issue below, and they have offered no good reason for seeking this Court's premature intervention instead.

As the decision below provides only preliminary relief, the Court should deny certiorari, allow the parties to develop the factual record as this case proceeds, and permit the lower courts to address

---

[6] Discovery in the district court is stayed pending resolution of this petition, but can proceed as soon as this petition is resolved. *Padilla v. U.S. Immigr. & Customs Enf't*, No. 2:18-cv-00928-MJP (W.D. Wash. Sept. 11, 2020) (ECF No. 165).

Petitioners' invocation of *Thuraissigiam* in the first instance.

A. Intervening Factual Developments Have Dramatically Altered the Landscape.

Review is premature because intervening policy changes since the preliminary injunction issued have dramatically changed the Respondent class in ways that may affect both the scope of the injunction and the analysis of Respondents' constitutional claims, requiring further factual development by the district court. These changes have transformed the size and character of the class in significant ways that may be relevant to both the equitable and legal questions presented at the preliminary injunction stage. Most significantly, the class, initially made up entirely of asylum seekers who had recently crossed the border, will now include very few recent entrants, and many longer term U.S. residents instead.

The government has implemented five measures that have drastically reduced the number of asylum seekers who enter the United States, receive and pass a credible fear screening, and are referred for full removal proceedings.

First, in January 2019, DHS announced the Migrant Protection Protocols ("MPP"), which authorizes DHS to return certain non-Mexican asylum seekers to Mexico for the duration of their immigration proceedings.[7] DHS has expanded MPP to the entire

[7] DHS, Policy Guidance for Implementation of the Migrant Protection Protocols (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf. Although MPP was enjoined by the Ninth Circuit, this Court granted a stay allowing it to remain in effect, and then granted the government's petition for a writ of

southern border and has applied it primarily to individuals, like Respondents, who are apprehended after crossing into the United States and seek asylum. *Innovation Law Lab*, 951 F.3d at 1077–78. Through MPP, DHS has diverted thousands of individuals who otherwise might have passed credible fear interviews and been eligible for full removal proceedings in the United States.[8] The policy means that many individuals who would have been in the class protected by the preliminary injunction never even enter the credible fear screening process in the first place.

Second, in March 2020, citing the COVID-19 pandemic, the Centers for Disease Control and Prevention ("CDC") issued a series of orders that provide for the rapid expulsion of asylum seekers apprehended at or near the border. *See* 85 Fed. Reg. 16,559 (Mar. 24, 2020) (permitting CDC to bar the "introduction of persons," including people who have already entered the country without inspection, where the CDC Director determines there is "a risk of transmission of a communicable disease"); 85 Fed. Reg. 17,060, 17,067-68 (Mar. 26, 2020) (directing the forcible return of such persons). *See also P.J.E.S. by & through Escobar Francisco v. Wolf*, No. CV 20-2245 (EGS), 2020 WL 6770508, at *17 (D.D.C. Nov. 18, 2020) (describing a recent entrant subject to expulsion). The CDC issued a final rule codifying this ban in September 2020. 85 Fed. Reg. 56,424 (Sept. 11, 2020). This policy prohibits the entry and provides for

---

certiorari on October 19, 2020. *See Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020), *cert. granted* 2020 WL 6121563 (U.S. Oct. 19, 2020) (No. 19-1212).

[8] As of October 2020, at least 68,430 migrants had been subject to MPP. *See* TRAC Immigration, *Details on MPP (Remain in Mexico) Deportation Proceedings*, https://trac.syr.edu/phptools/immigration/mpp/ (last visited Dec. 6, 2020).

the expulsion of the very population that would otherwise benefit from the preliminary injunction.[9]

Third, in July 2019, the government signed Asylum Cooperative Agreements ("ACAs") with Guatemala, Honduras, and El Salvador, which bar certain asylum seekers from applying for asylum in the United States. Individuals who would otherwise seek credible fear interviews in the United States instead will be transferred to an ACA country to seek asylum there.[10] The government predicts that "hundreds of thousands" of asylum claims will be shared between the signatory countries. 84 Fed. Reg. at 63,997. Thus, the ACAs will divert many more people from the credible fear process that might permit them to benefit from the preliminary injunction.

Fourth, in July 2019, DHS and DOJ promulgated an interim rule making noncitizens arriving at the southern border ineligible for asylum if they did not seek protection from a third country through which they traveled on their way to the United States. 84 Fed. Reg. 33,829 (July 16, 2019) (codified at 8 C.F.R. §§ 208.13(c), 1208.13(c)). Individuals subject to this so-called "transit ban" are not screened for a credible fear of persecution or torture, but a more demanding "reasonable fear" to determine if they will be permitted

---

[9] From March through September 2020, CBP expelled over 197,371 people encountered at or near the border. CBP, FY 2020 Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions (last updated Nov. 20, 2020), https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy2020.

[10] *See, e.g.*, Agreement Between the United States of America and Guatemala, USA-Guat., July 26, 2019, 1945–2020 T.I.A.S. No. 19-1115, https://www.state.gov/wp-content/uploads/2020/01/19-1115-Migration-and-Refugees-Guatemala-ACA.pdf; 84 Fed. Reg. 63,994 (Nov. 19, 2019).

to apply for protection. Although the transit ban has been vacated,[11] it vastly reduced the number of class members who received custody hearings while it was in effect. Because individuals were assessed under a more stringent standard, fewer individuals were found to have *bona fide* claims that would entitle them to custody hearings under the preliminary injunction.

Fifth, new rulings making it more difficult for asylum seekers to establish a credible fear of persecution have also reduced the size of the class. In *Matter of L-E-A-*, 27 I. & N. Dec. 581 (A.G. 2019), the Attorney General severely narrowed the ability of individuals to seek asylum based on persecution due to their family membership. U.S. Citizenship and Immigraiton Services ("USCIS") subsequently issued a policy memorandum instructing asylum officers to apply *Matter of L-E-A-*.[12] Similarly, in *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018), the Attorney General imposed new limits on the ability of individuals to establish a credible fear based on domestic or gang violence. USCIS issued policy guidance to asylum officers for processing credible fear claims in

---

[11] *CAIR Coalition v. Trump*, Nos. 19-2117 (TJK) & 19-2530 (TJK), 2020 WL 3542481 (D.D.C. June 30, 2020) (vacating the transit ban for violating the rulemaking requirements of the APA). Another district court had previously enjoined the transit ban, but this Court stayed that injunction. *Barr v. East Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019).

[12] USCIS, Policy Memorandum, *Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with* Matter of L-E-A- (Sep. 30, 2019), https://www.uscis.gov/sites/default/files/document/memos/USCIS_Memorandum_LEA_FINAL.pdf.

accordance with *Matter of A-B-*.[13] These policies have significantly reduced the number of asylum seekers who are able to pass credible fear interviews and become eligible for a custody hearing under the preliminary injunction.

These five overlapping changes have contributed to a dramatic decline in both the number of asylum seekers apprehended at or near the border and placed into expedited removal proceedings,[14] as well as the number of credible fear interviews and positive credible fear determinations.[15] Only a small fraction of recent border crossers are currently able to receive

---

[13] USCIS, Policy Memorandum, *Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with* Matter of A-B-, (July 11, 2018), https://www.uscis.gov/sites/default/files/document/memos/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.PDF. Although the D.C. Circuit partially affirmed an injunction against the government's policies limiting credible fear claims relating to domestic or gang violence, *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020), unaffected portions of USCIS's policy memorandum implementing *Matter of A-B-* remain in effect and restrict the number of asylum seekers who are able to establish a credible fear of persecution.

[14] For example, between fiscal years 2019 and 2020, the number of apprehended family units fell by 89% (from 473,682 to 52,230). CBP, U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2020 (last modified Nov. 19, 2020), https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions-fy2020.

[15] For example, in the two weeks between September 1 and 15, 2019, USCIS made 4,022 credible fear determinations and found a fear in 2,428 of those cases. In the same two-week period in 2020, the agency decided only 238 cases, and found a credible fear in 114 of the cases. *See* USCIS, *Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions* (Nov. 5, 2020), https://www.uscis.gov/tools/reports-and-studies/semi-monthly-credible-fear-and-reasonable-fear-receipts-and-decisions.

protection under the preliminary injunction after establishing a credible fear.

At the same time, starting in October 2020, DHS began applying expedited removal to noncitizens encountered anywhere in the United States who cannot demonstrate that they have resided here for more than two years. *See supra* n.4.

As a result, going forward, the class will consist primarily not of recent entrants, but of noncitizens who have already been living in the United States for considerable periods of time. These facts could affect both legal questions about the applicability of due process and equitable questions about the respective burdens of injunctive relief. They could also affect questions relevant to certiorari, including the importance of the question presented.

Petitioners could seek to vacate or modify the injunction by pointing to these developents and making a record, but instead they have skipped that process and sought this Court's intervention, without any development of these facts. The Court should deny certiorari and allow the lower courts to develop a factual record that reflects the actual impact of the challenged rule and the injunctive relief.[16]

B. *Thuraissigiam* Also Supports Denial of Certiorari, to Permit the Lower Courts to Address the Case in the First Instance.

Petitioners rely heavily on this Court's decision *Thuraissigiam,* but the lower courts have not had an

[16] Indeed, the expansion of expedited removal already led the court of appeals to vacate the preliminary injunction in part, based on the need to develop the record in light of these developments. App. 23a.

opportunity to address their arguments in the first instance. Petitioners are entirely free to raise those claims in the courts below by moving to modify the injunction. Yet they have offered no explanation for their failure to do so. That is sufficient to deny certiorari and remit Petitioners to the processes available below.

This Court decided *Thuraissigiam* in June 2020, months after the ruling below. *Thuraissigiam* involved an asylum seeker who was stopped 25 yards from the southern border immediately after crossing into the United States. He challenged as unconstitutional the denial of habeas corpus review of the determination that he had no credible fear and should be summarily removed. *Thuraissigiam*, 140 S. Ct. at 1968. The Court held that Mr. Thuraissigiam had not "effected an entry" into the United States and therefore could be treated as having been stopped at the border for purposes of a due process challenge to the procedures for his removal. *Id*. at 1982–83. As such, he had no due process right to judicial review. *Id*. at 1983.

To date, no court of appeals has addressed the applicability of *Thuraissigiam* to challenges to unlawful detention. Although Petitioners argue this Court should extend *Thuraissigiam* to Respondents' claims here, Petitioners should not be permitted to skip over the lower courts in addressing this issue of first impression, especially where the parties have not yet had the opportunity to develop a record that would appropriately inform the legal and factual issues presented.

Petitioners argue that keeping the preliminary injunction in place would irreparably harm immigration enforcement and impose unreasonable burdens on the government. Pet. 29. But they can

make those arguments to the lower court in seeking modification or a lifting of the injunction. In any event, the claims are unfounded. The preliminary injunction maintains a status quo that had been in place for 15 years: conducting custody hearings for the limited pool of individuals who enter the United States and subsequently establish a *bona fide* asylum claim. The injunction does not require any class member's release from custody; it simply requires a *hearing* to determine if their detention is necessary to ensure appearance or protect public safety, something IJs have been doing for more than a decade. IJs are fully capable of denying release in cases where individuals pose a flight risk or danger to the community. Tellingly, Petitioners opted not to seek a stay from this Court after the court of appeals issued its decision more than seven months ago, and sought to extend the deadline for rehearing three times. These actions belie their assertions of harm.

II. THE DECISION BELOW DOES NOT DECLARE A FEDERAL STATUTE UNCONSTITUTIONAL, BUT MERELY REQUIRES THAT THE STATUTE BE IMPLEMENTED CONSISTENT WITH DUE PROCESS.

Petitioners cite no conflict among the circuits as to the due process question presented, but argue that the Court should nonetheless grant review because the court of appeals erroneously declared an act of Congress unconstitutional. Pet. 11. But the court of appeals held only that due process requires a hearing before a neutral decisionmaker to determine whether Respondents' detention is serving a valid government purpose. App. 9a-10a. Because such a hearing can be

provided consistent with the statute, the decision does not invalidate the statute.

Petitioners concede that the statute does not impose mandatory detention. Pet. 4. It expressly permits the Attorney General to release Respondents on parole "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). The government already has determined that parole serves the public interest where an asylum seeker who has been found to have a credible fear of persecution establishes that they pose no danger or flight risk requiring their detention.[17] Because the statute does not specify the procedures for making such parole determinations, nothing prohibits the Attorney General from providing a custody hearing before an IJ to determine if parole is appropriate and the person can be safely released to the community.

The Ninth Circuit found the elimination of custody hearings, substituted with only the government's interim parole guidance, violated due process. App. 16a–17a. That guidance provided only paper custody reviews by ICE—the jailing authority—and conditioned release on the number of available detention beds; it provided no hearing before a neutral decisionmaker to determine if detention serves a valid purpose. *Id.*

Thus, the court of appeals' decision does not invalidate any federal *statute*. The statute itself is silent regarding procedures. The decision below merely requires that Petitioners implement their

[17] ICE, Directive No. 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture, § 6.2, https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf.

detention authority through procedures that satisfy due process. While this Court often reviews decisions declaring federal statutes unconstitutional, it does not routinely review decisions requiring adequate procedures that do not invalidate any laws enacted by Congress.

III. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR CONSIDERING THE SECOND QUESTION PRESENTED AS TO THE AVAILABILITY OF RELIEF.

Petitioners also ask the Court to review whether Section 1252(f)(1) precludes classwide relief. But there is only the most shallow of circuit splits as to that question, and in any event this case provides an inappropriate vehicle for addressing it.

Section 1252(f)(1) provides that

> no court . . . shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of [8 U.S.C. §§ 1221–1232], 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) (emphasis added).

The court of appeals held that this provision does not bar the preliminary injunction because it applies only to individuals who have been placed in removal proceedings. Petitioners note that one other court of appeals has taken a contrary view of the statute, *see Hamama v. Adducci*, 912 F.3d 869, 877–79 (6th Cir. 2018), but such a shallow circuit split does not warrant this Court's review. Moreover, should the Court deny certiorari and return the case to the district court to

address the intervening developments identified above, the Court will still be able to address this split on review of a final judgment, which would allow further percolation of the issue in the meantime.

In any event, this case is an inappropriate vehicle to address the question Petitioners present: whether the statute's reference to an "individual alien" bars relief to a class of "individual aliens." That is because the injunction below can be upheld on an alternative ground as to which there is no conflict in the circuits. Section 1252(f)(1) places limits only on "enjoin[ing] or restrain[ing] the operation of the provisions of [8 U.S.C. §§ 1221–1232]"—that is, the statutory provisions themselves. But the injunction in this case does not require that the operation of any provision of the INA be enjoined, but merely specifies procedures to be provided where the statute is silent; at most, it declares administrative guidance invalid, and requires agency action consistent with due process.

Section 1252(f)(1) "places no restriction on the district court's authority to enjoin *agency action* found to be unlawful." *Grace v. Barr*, 965 F.3d 883, 907 (D.C. Cir. 2020); *accord Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010). As explained *supra* Point II, the decision here does not invalidate or enjoin the statute at all. Section 1182(d)(5)(A) provides that Respondents are eligible for release on parole, and is silent as to the procedures for parole determinations. The court's injunction requiring custody hearings does not "enjoin or restrain the operation of [the statute]," but only mandates that the agency provide certain procedures for making custody determinations. Because this is an alternative basis to uphold the grant of preliminary relief, this case is not a suitable vehicle to take up the question Petitioners present.

IV. THE COURT OF APPEALS' DECISION IS CORRECT.

Finally, the court of appeals' decision is correct. The Court has long recognized that all "persons" detained within the United States, have a constitutional right not to have their liberty taken without due process—including noncitizens. In these circumstances, where individuals have been determined to have *bona fide* asylum claims and a right to remain in the United States for the time it takes to adjudicate their claims, due process requires a custody hearing to determine whether there is in fact any need for their detention during that extended period. And the court of appeals also correctly determined that Section 1252(f)(1) does not bar relief here because the preliminary injunction extends only to individuals in removal proceedings, as the statute requires.

A. Respondents Have Due Process Rights.

Because Respondents were detained within the country, the Due Process Clause protects them against arbitrary detention. "[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas*, 533 U.S. at 693. *Thuraissigiam* amends this only with respect to rights vis-à-vis the process for *removal* itself, not *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." *Id.* at 690. Even if those apprehended shortly after crossing the border do not have a due process right to object to the procedures Congress establishes for their removal, they have a

right to object to being locked up arbitrarily for months or years. The decision below merely recognizes that detaining persons who do not need to be detained—because they pose neither a risk of flight nor a danger to the community—is arbitrary, and therefore the government can detain *bona fide* asylum seekers only where it has determined after a fair hearing that the individual in fact poses a threat justifying detention.

Petitioners claim that *Thuraissigiam* held that recent entrants lack due process rights against unlawful detention. Pet. 13. It did not. *Thuraissigiam* is fundamentally different than the case at hand for two reasons.

First, the power to exclude and the power to imprison are distinct for purposes of the Due Process Clause. While the government's authority to exclude is "plenary," its power to detain is not. The fact that the government can *remove* those it apprehends immediately after crossing the border without triggering due process does not mean that it can lock them up for lengthy periods without satisfying due process.

Zadvydas establishes that noncitizens who have no right to be in the United States nonetheless have a due process right not to be detained arbitrarily. In that case, the petitioners were subject to final orders of removal and had definitively lost any right to remain in this country. They sought release from detention because the government was unable to effectuate their removal. The government argued that because the petitioners had no right to be in the country, it followed that they had no due process right to be released. The Court rejected that view, and held that even persons with no right to "live at large" in the United States have a distinct liberty interest in "[f]reedom from . . .

physical restraint," 533 U.S. at 690, 698 (internal quotation marks and alteration omitted). Even two of the dissenters, Justice Kennedy and Chief Justice Rehnquist, acknowledged that "both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious." *Id*. at 721 (Kennedy, J., dissenting). *Thuraissigiam* addressed only the right to procedures as to *removal*, not *detention*, and therefore it did not *sub silentio* overturn the Court's longstanding recognition that all persons in the United States have a due process right not to be detained arbitrarily.

Second, unlike Mr. Thuraissigiam, who was found to lack a credible fear and was subject to an expedited removal order, DHS asylum officers have determined that all class members have *bona fide* asylum claims. As a result, they are legally entitled *to remain in the country* while they pursue their claims to protection through the administrative process, including any adminstrative and judicial review—a process that can last years. *Thuraissigiam* does not question that noncitizens who have a right to remain have a due process right not be detained arbitrarily during that period.

The other cases Petitioners cite are distinguishable for similar reasons. Pet. 12-13. First, all involve individuals apprehended *prior to* entering the United States. By contrast, Respondents were all apprehended *after* entering the country, and then deemed entitled to remain here while their *bona fide* asylum claims are adjudicated.

Second, the petitioners in those cases, like Mr. Thuraissigiam, challenged the procedures for *admission or removal*—not the procedures governing *detention*. Because noncitizens seeking initial

admission generally seek a privilege, they do not have a liberty interest that triggers due process. "[A]n alien who seeks admission to this country may not do so under any claim of right." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *see also Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (no "right to land"); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (no right to "initial admission"). But where the government physically detains an individual who has been granted a right to remain here while his claims are adjudicated, his liberty interests have been infringed in the most basic sense.

B. Due Process Requires a Custody Hearing Before a Neutral Decisionmaker.

The court of appeals also correctly held that due process requires a custody hearing to assess whether detention is necessary. Like all civil detention, immigration detention is justified only where "a special justification . . . outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Zadvydas*, 533 U.S. at 690 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)). The purpose of immigration detention is to protect against danger and flight risk while removal proceedings are pending. *Id.* at 690–91. Where there is no evidence that an individual would flee or pose any danger to the community, detention is arbitrary and violates due process.[18]

With only one inapposite exception—*Demore v. Kim*, 538 U.S. 510 (2003)—this Court has never upheld civil

[18] Petitioners erroneously claim that *Zadvydas*'s due process framework is limited to cases of indefinite detention. Pet. 16. In fact, *Zadvydas* affirms that immigration detention *in general* must satisfy due process. *See* 533 U.S. at 690–91.

detention without a hearing before a neutral decisionmaker to ensure that detention actually serves the government's goals. *See, e.g.*, *United States v. Salerno*, 481 U.S. 739, 750 (1987) (upholding pretrial detention where Congress provided "a full-blown adversary hearing" on dangerousness, where the government bears the burden of proof by clear and convincing evidence); *Hendricks*, 521 U.S. at 357–58 (upholding civil commitment when there are "proper procedures and evidentiary standards," including an individualized hearing on dangerousness); *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992) (noting individual's entitlement to "constitutionally adequate procedures to establish the grounds for his confinement"); *Schall v. Martin*, 467 U.S. 253, 277, 279–81 (1984) (upholding pretrial detention pending a juvenile delinquency hearing where the government proves dangerousness in a fair adversarial bond hearing with notice and counsel).

Indeed, this Court has required individualized hearings for far lesser interests, including for property deprivations, *see, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970) (failure to provide in-person hearing prior to termination of welfare benefits was "fatal to the constitutional adequacy of the procedures"); *Califano v. Yamasaki*, 442 U.S. 682, 696–97 (1979) (in-person hearing required for recovery of excess Social Security payments); *see also Zadvydas*, 533 U.S. at 692 (noting that "[t]he Constitution demands greater procedural protection even for property" than the INS provided to Zadvydas).

Demore is clearly distinguishable. First, the statute there imposed mandatory detention on a narrowly defined subset of noncitizens who were deportable for enumerated criminal offenses, based on Congress's determination that as a class they posed a categorical

bail risk. *See* 8 U.S.C. § 1226(c). *Demore* stressed the record before Congress showing that the "criminal aliens" targeted by the statute posed a heightened risk of flight and danger. *See* 538 U.S. at 518–21 (citing studies and congressional findings).

By contrast, Congress made no such group-based determination here. The statute applies to individuals with no criminal records who have been found by federal officials to have *bona fide* claims to protection, which they have a right to pursue in immigration court. Congress made no findings that this group poses a categorical flight risk or a danger to the community. Indeed, Petitioners concede that they can be released on parole, and for years interpreted the statute to authorize bond hearings. *See supra*, Statement.

Second, *Demore* emphasized what the Court understood to be the brief period of time that mandatory detention of "criminal aliens" typically lasts. *See* 538 U.S. at 529–30 (noting mandatory detention lasts about 47 days in 85% of cases and about four months for those 15% of cases where individuals appeal to BIA). In contrast, asylum seekers can expect to spend a median time of nearly six months for their protection claims to be adjudicated before the IJ, nearly a year in cases involving an appeal to the BIA, *see* App. 14a–15a, and still longer for judicial review.

Petitioners argue that because the petitioner in *Demore* was a longtime lawful permanent resident, Respondents' detention without a custody hearing is permissible *a fortiorari*. Pet. 14–15. But unlike the petitioner in *Demore*, who conceded he was removable for an enumerated crime, Respondents are pursuing asylum claims that the government has already deemed *bona fide*, and confirmation of those claims by

an IJ would allow them to seek permanent residence and, eventually, citizenship in the United States.

Petitioners' contention that prolonged detention without a hearing is the price for pursuing relief from deportation is wholly unfounded. *See* Pet. 16. The government cannot impose arbitrary detention as the "price" of a benefit. It may be imposed only where it is needed to prevent flight or danger to the community. *See Ly v. Hansen*, 351 F.3d 263, 272 (6th Cir. 2003) ("[A]lthough an alien may be responsible for seeking relief, he is not responsible for the amount of time that such determinations may take."), *abrogated on other grounds by Jennings*, 138 S. Ct. at 846–47 (2018); *Sopo v. U.S. Attorney Gen.*, 825 F.3d 1199, 1218 (11th Cir. 2016) ("[A]liens should [not] be punished for pursuing avenues of relief and appeals"), *vacated*, 890 F.3d 952 (11th Cir. 2018).

Finally, the court of appeals correctly found that the whole class is entitled to custody hearings. As individuals who have entered the country and been found to have *bona fide* asylum claims, all class members have a right not to be detained arbitrarily, and due process requires an individualized hearing. Thus, the preliminary injunction was precisely tailored to remedy the violation of class members' constitutional rights.

C. 8 U.S.C. § 1252(f)(1) Does Not Prohibit the Class-wide Preliminary Injunction.

The court of appeals also correctly determined that Section 1252(f)(1)'s limitation of relief to "an individual alien against whom [removal] proceedings . . . have been initiated" does not bar relief to a class of "individual alien[s] against whom [removal] proceedings . . . have been initiated." Petitioners argue that "any injunction against the enforcement of that statute would have to be limited to the individual aliens who [have] brought the suit and established a violation in the statute's application to them." Pet. 18–19. But that is precisely the case here: all Respondents in this case are individuals subject to removal proceedings.

The plain meaning of Section 1252(f)(1) is reinforced by the rule that the federal courts' equitable powers are available unless Congress indicates otherwise. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). Congress has not done so here. If anything, the statute confirms the propriety of the relief granted.

By its express terms, Section 1252(f)(1) prohibits relief only on behalf those who are *not* "individual alien[s]" in removal proceedings. "Congress meant to allow litigation challenging the new system by, and only by, *aliens against whom the new procedures had been applied*." *Am. Immigr. Lawyers Ass'n ("AILA") v. Reno*, 199 F.3d 1352, 1360 (D.C. Cir. 2000) (emphasis added). Congress sought to restrict preemptive challenges to the enforcement of certain immigration statutes by organizations and individuals *not* in removal proceedings. *See, e.g.*, *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 47–51 (1993); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 487–88 (1991); *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023,

1026 (5th Cir. Unit B 1982). By contrast, Respondents here are all in removal proceedings and thus may seek injunctive relief.

The statute's reference to an "individual alien" does not preclude relief to more than one individual. This Court has instructed courts not to construe references to "any individual" or "any plaintiff" as eliminating authority under Rule 23 to address claims by a class of individuals. *See 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 . . . ."). *Brown v. Plata*, 563 U.S. 493, 531 (2011) (reference in Prison Litigation Reform Act ("PLRA") to "particular plaintiff or plaintiffs" does not bar class-wide relief); *see also Shook v. El Paso Cnty.*, 386 F.3d 963, 970 (10th Cir. 2004) (finding 18 U.S.C. § 3626(a)(1)(A) does not limit class-wide relief where "[t]he text of the PLRA says nothing about the certification of class actions").

Congress speaks unequivocally when it wants to prohibit class relief, as a neighboring subsection of Section 1252, adopted by the same Congress, illustrates. 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." 8 U.S.C. § 1252(e)(1)(B). Section 1252(f)(1) cannot be read to create a *sub silentio* ban on class actions for injunctive relief when the same Congress explicitly imposed such a ban in another subsection of the very same statute. *See Nken v. Holder*, 556 U.S. 418, 430–31 (2009) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate

inclusion or exclusion." (internal quotation marks and citation omitted)); *see also Rodriguez*, 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 (noting that Section 1252(e) contains a "ban on class actions" while Section 1252(f)(1) contains a different limitation).

Petitioners claim that Section 1252(f)(1)'s reference to "an individual alien in removal proceedings" bars class injunctions altogether, relying on dicta in *Reno v. Am.-Arab Anti-Discrimination Comm.* ("*AADC*"), 525 U.S. 471, 481–82 (1999). Pet. 19. But *AADC* did not address Section 1252(f)(1)'s exception clause. *AADC* was not a class action, and its reference to Section 1252(f)(1) stated only that the statute was not an affirmative grant of subject matter jurisdiction. *AADC*, 525 U.S. at 481–82. This Court has previously rejected the government's reliance on dicta in *AADC*. *Compare AADC*, 525 U.S. at 487 (asserting habeas review unavailable post-1996 immigration laws) *with INS v. St. Cyr*, 533 U.S. 289, 313-14 (2001) (holding habeas remains available under those laws).

Nor did this Court in *Jennings* interpret Section 1252(f)(1) to bar class injunctions. *See* Pet. 20. Rather, *Jennings* "made clear that the question is unresolved, quoting *AADC*, but remanding to [the court of appeals] to consider in the first instance whether classwide injunctive relief is available under § 1252(f)(1)." App. 25a (citing *Jennings*, 138 S. Ct. at 851). In *Jennings*, as in *AADC*, this Court had no occasion to address the availability of relief where every class member is an individual alien in removal proceedings.

Petitioners argue that to allow class actions would "read the word ['individual'] out of the statute." Pet. 23. But as the court of appeals recognized, the

exceptions clause clarifies that only "individual alien[s]" who are in proceedings may seek injunctive relief, as opposed to organizations suing on behalf of clients or organizational members. App. 26a.[19] Petitioners argue that the term "alien" would suffice to exclude organizational plaintiffs and thus the ruling below fails to give independent content to the term "individual." Pet. 23. But the modifier "individual" often adds no independent content and can be deleted with no effect on a statute's meaning. *See, e.g.*, 8 U.S.C. § 1601(4) (statutory finding that public benefits rules were "incapable of assuring that individual aliens not burden the public benefits system"); *cf. id.* § 1446(a) (allowing Attorney General to "waive a personal investigation in an individual [naturalization] case or in such cases or classes of cases as may be designated by him").[20]

Petitioners also cite the phrase "[r]egardless of the . . . identity of the party or parties bringing the action" to argue that Section 1252(f)(1) bars class relief. Pet. 24–25. But that argument rips this phrase out of

---

[19] Indeed, similar litigation by organizational plaintiffs continues to challenge rules or procedures implemented against noncitizens outside of the challenges prohibited by Section 1252(f)(1). *See*, *e.g.*, *Wolf*, *et al. v. Innovation Law Lab, et al.*, No. 19-1212 (U.S).

[20] Moreover, Title 8 routinely uses the terms "individual" and "alien" interchangeably. *See, e.g.*, 8 U.S.C. § 1738 (providing that "immediately upon the arrival in the United States of an *individual* admitted [as a refugee], or immediately upon an *alien* being granted asylum . . . , *the alien* will be issued an employment authorization document (emphasis added)); 8 U.S.C. § 1252c(a) (authorizing State and local law enforcement officials to detain certain noncitizens "only for such period of time as may be required for the Service to take the *individual* into Federal custody for purposes of deporting or removing the *alien* from the United States" (emphasis added)).

context, and ignores the fact that the statute goes on to expressly *exempt* individual noncitizens in removal proceedings from the bar. *See Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 36 (2012) (explaining that a basic rule of statutory construction is to "[r]ead on").

If Petitioners were correct that the statute limits injunctive relief to only one individual at a time, it would bar such relief in any case involving two or more plaintiffs. But the statute surely does not mean that if two noncitizens filed suit together raising the same claim, the court could not issue a single injunction affording both the same relief. Conversely, if class members filed dozens of separate but materially indistinguishable lawsuits challenging detention without a custody hearing, Petitioners' interpretation of Section 1252(f)(1) would prohibit a court that consolidated these cases from issuing one order, instead requiring it to issue dozens of identical "individual" injunctive relief orders. There is no material difference between affording relief to multiple individuals and affording relief to a class of individuals. The Court should avoid interpretations that would lead to absurd results. *See United States v. Wilson,* 503 U.S. 329, 334 (1992). If Congress had intended this, it would have explicitily included language to displace Rule 23, as it did in the neighboring subsection.

CONCLUSION

For the reasons set forth above, this Court should deny the petition for a writ of certiorari.

Dated December 9, 2020

Respectfully submitted,

Matt Adams
Counsel of Record
Aaron Korthuis
NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Avenue, Suite 400
Seattle, WA 98104
(206) 957-8611
matt@nwirp.org

Michael K.T. Tan
Judy Rabinovitz
Anand Balakrishnan
Omar C. Jadwat
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004

Trina Realmuto
NATIONAL IMMIGRATION LITIGATION ALLIANCE
10 Griggs Terrace
Brookline, MA 02446

Kristin Macleod-Ball
AMERICAN IMMIGRATION COUNCIL
1331 G Street NW, Suite 200
Washington, DC 20005

David Cole
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
915 15th Street NW
Washington, DC 20005

Cecillia D. Wang
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111

Counsel for Respondents