No.

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL.,
PETITIONERS

v.

YOLANY PADILLA, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 8 U.S.C. 1225(b)(1)(B)(ii)—which authorizes the government to detain aliens who are placed in expedited removal proceedings, but who then establish a credible fear of persecution based on a protected ground—violates the Due Process Clause of the Fifth Amendment because it contains no provision authorizing bond hearings.

2. Whether 8 U.S.C. 1252(f)(1) prohibits lower courts from granting classwide injunctions against the operation of 8 U.S.C. 1221-1232.

PARTIES TO THE PROCEEDING

Petitioners (appellants below) are U.S. Department of Homeland Security (DHS); U.S. Immigration and Customs Enforcement (ICE); U.S. Customs and Border Protection (CBP); U.S. Citizenship and Immigration Services (USCIS); Department of Justice Executive Office for Immigration Review; William P. Barr, Attorney General; Chad F. Wolf, Acting Secretary of Homeland Security; Matthew T. Albence, Senior Official Performing the Duties of the Director of ICE; Marc J. Moore, ICE Seattle Field Office Director; Mark A. Morgan, Chief Operating Officer and Senior Official Performing the Duties of the Commissioner of CBP; Kenneth T. Cuccinelli, Senior Official Performing the Duties of Director of USCIS; Charles Ingram, Warden of the Federal Detention Center, SeaTac; David Shinn, Warden of the Federal Correctional Institute, Victorville; Lowell Clark, Warden of the Northwest Detention Center; and James Janecka, Warden of the Adelanto Detention Facility.

Respondents (appellees below) are Yolany Padilla, Ibis Guzman, Blanca Orantes, and Baltazar Vasquez, for themselves and on behalf of a class of similarly situated individuals.

The U.S. Department of Health and Human Services (HHS); Office of Refugee Resettlement (ORR); Alex M. Azar, Secretary of HHS; Scott Lloyd, Director of ORR; Matthew T. Albence, Acting Deputy Director of ICE; John P. Sanders, Acting Commissioner of CBP; and Elizabeth Godfrey, ICE Seattle Field Office Acting Director were defendants in the district court.

RELATED PROCEEDINGS

United States District Court (W.D. Wash.)

Padilla v. *U.S. Immigration and Customs Enforcement*, No. 18-cv-928 (July 2, 2019)

United States Court of Appeals (9th Cir.):

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the federal parties, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-47a) is reported at 953 F.3d 1134. An order of the court of appeals (App., *infra*, 48a-51a) is unreported. An order of the district court (App., *infra*, 52a-75a) is reported at 387 F. Supp. 3d 1219. An additional order of the district court (App., *infra*, 76a-98a) is reported at 379 F. Supp. 3d 1170. An additional order of the district court (App., *infra*, 99a-113a) is not published in the Federal Supplement but is available at 2019 WL 1056466.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 2020. On March 19, 2020, this Court extended

the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower court judgment. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 114a-118a.

STATEMENT

A. Legal Background

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, sets forth a streamlined procedure, known as expedited removal, that the Department of Homeland Security (DHS) may invoke to remove certain aliens who indisputably have no authorization to be admitted to the United States. 8 U.S.C. 1225(b)(1). As relevant here, the government may invoke expedited removal if an alien unlawfully entered the United States without being admitted or paroled, has been continuously present in the United States for less than two years, lacks valid entry documents or attempts to gain admission through fraud or misrepresentation, and has been designated for application of expedited-removal procedures by the Secretary of Homeland Security. 8 U.S.C. 1225(b)(1)(A); see 8 U.S.C. 1182(a)(6)(C) and (7).[1] In 2004, the Secretary designated for application of expedited-removal procedures certain inadmissible aliens who are encountered within 100 air miles of the U.S. border and within 14 days of having unlawfully entered the United States. See *Designating Aliens for*

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[1] The statute refers to the Attorney General, but a separate statute transfers the designation authority to the Secretary. See *Clark* v. *Martinez*, 543 U.S. 371, 374 n.1 (2005).

Expedited Removal, 69 Fed. Reg. 48,877 (Aug. 11, 2004).[2]

As a general rule, if an immigration officer finds that an alien is eligible for and should be placed in expedited removal, the officer may order the alien removed without further hearing or review. 8 U.S.C. 1225(b)(1)(A)(i). But that general rule is subject to an exception: if an alien placed in expedited removal "indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country," the immigration officer must refer the alien to an asylum officer for a screening interview. 8 C.F.R. 235.3(b)(4); see 8 U.S.C. 1225(b)(1)(A)(ii).

The object of the screening interview is to determine whether the alien has a "credible fear" of persecution based on a protected ground or of torture. See 8 U.S.C. 1225(b)(1)(B)(v); 8 C.F.R. 208.30(e). If the asylum officer (subject to review by a supervisor and, if the alien requests, an immigration judge) finds that the alien lacks a credible fear, DHS may remove the alien without further hearing or review. 8 U.S.C. 1225(b)(1)(B)(iii); 8 C.F.R. 208.30(e)(8). But if the alien establishes that he has a credible fear, then under the applicable regulations, he receives full consideration of his application

[2] In 2019, the Secretary issued a notice designating additional aliens for application of expedited-removal procedures. See *Designating Aliens for Expedited Removal*, 84 Fed. Reg. 35,409, 35,413-35,414 (July 23, 2019). A district court issued a preliminary injunction barring the application of that designation. See *Make The Road N.Y.* v. *McAleenan*, 405 F. Supp. 3d 1 (D.D.C. 2019). The court of appeals reversed that injunction, but as of the filing of this petition, it has not yet issued its mandate. See *Make The Road N.Y.* v. *Wolf*, 962 F.3d 612 (D.C. Cir. 2020). The designation in effect at all times relevant to the proceedings below was thus the designation issued in 2004.

for relief or protection in proceedings before an immigration judge. See 8 C.F.R. 208.30(f). This brief uses the shorthand term "transferred alien" to refer to an alien who is placed in expedited removal proceedings, found to have a credible fear, and then transferred to proceedings before an immigration judge for resolution of the application for asylum or other protection.

2. This case concerns the detention of transferred aliens. The INA provides that, if "the officer determines at the time of the interview that an alien has a credible fear of persecution," then "the alien *shall be detained* for further consideration of the application for asylum." 8 U.S.C. 1225(b)(1)(B)(ii) (emphasis added). In other words, the INA requires the detention of transferred aliens until the resolution of their asylum applications without the opportunity for release on bond. The only exception to that rule is that DHS may "parole" an alien into the United States "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. 1182(d)(5)(A); see 8 C.F.R. 212.5(b).

Years ago, in *In re X-K-*, 23 I. & N. Dec. 731 (2005), the Board of Immigration Appeals ruled that certain transferred aliens—those apprehended after crossing the border illegally, as opposed to those encountered at a port of entry—may seek bond hearings before immigration judges. *Id.* at 736. The Board believed that the statute was "silent" on the subject of bond in those circumstances and that such aliens could therefore invoke the general regulations allowing bond hearings for aliens in removal proceedings. *Id.* at 734; see 8 C.F.R. 1003.19(h)(2), 1236.1(d)(1).

This Court's decision in *Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018), although involving somewhat different issues, rested on reasoning that is irreconcilable with

the Board's decision in *X-K-*. As relevant here, the Court concluded that Section 1225(b)(1)(B)(ii)—which, again, states that "the alien shall be detained for further consideration of the application for asylum," 8 U.S.C. 1225(b)(1)(B)(ii)—"mandate[s] detention of aliens throughout the completion of applicable proceedings," *Rodriguez*, 138 S. Ct. at 845. The Court further explained that "'[d]etained' does not mean 'released on bond.'" *Id.* at 851. Finally, the Court noted that the INA expressly authorizes release on parole for "'urgent humanitarian reasons or significant public benefit,'" and "[t]hat express exception to detention," the Court concluded, "implies that there are no *other* circumstances under which aliens detained under § 1225(b) may be released." *Id.* at 844 (quoting 8 U.S.C. 1182(d)(5)(A)).

After *Rodriguez*, in *In re M-S-*, 27 I. & N. Dec. 509 (2019), the Attorney General revisited and overruled the Board of Immigration Appeals' previous decision in *X-K-*. *Id.* at 518-519. In accordance with *Rodriguez*, the Attorney General instead concluded that Section 1225(b)(1)(B)(ii) "requires detention until removal proceedings conclude"—except for the possibility of parole—and "cannot be read to contain an implicit exception for bond." *Id.* at 516-517. The Attorney General's construction of the INA is "controlling." 8 U.S.C. 1103(a)(1).

B. Factual Background and Proceedings Below

1. Named respondents Yolany Padilla, Ibis Guzman, Blanca Orantes, and Baltazar Vasquez are transferred aliens: they entered the country unlawfully, were placed in expedited removal proceedings, were found to have a credible fear of persecution or torture, and were transferred to proceedings before an immigration judge

for consideration of their applications for relief or protection. App., *infra*, 101a-102a. At the time, the Board of Immigration Appeals' decision in *X-K-* was still in place, and respondents accordingly all received bond hearings. *Ibid.* Respondents then brought this action in district court in June 2018, claiming, among other things, that those bond hearings were procedurally inadequate. *Id.* at 4a.

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., *infra*, 100a; see *id.* at 99a-113a. On respondents' motion for a preliminary injunction, the court held that they were likely to succeed on their claim that the existing procedures for those bond hearings violated the Due Process Clause of the Fifth Amendment. *Id.* at 81a-93a. Invoking the procedural-due-process balancing test set out in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the court fashioned a new set of procedures for those hearings. App., *infra*, 99a-113a. Specifically, the court issued a preliminary injunction ordering the government to:

1. Conduct bond hearings within seven days of a bond hearing request by a class member, and release any class member whose detention time exceeds that limit;

2. Place the burden of proof on Defendant Department of Homeland Security in those bond hearings to demonstrate why the class member should

not be released on bond, parole, or other conditions;

3. Record the bond hearing and produce the recording or verbatim transcript of the hearing upon appeal; and

4. Produce a written decision with particularized determinations of individualized findings at the conclusion of the bond hearing.

Id. at 97a-98a.

After the injunction was issued, but before the effective date set by the district court, the Attorney General issued his decision in *M-S-*, overruling *X-K-* and concluding that transferred aliens have no statutory entitlement to bond hearings in the first place. App., *infra*, 55a-56a. Respondents then amended their complaint to add a claim that the statute, as interpreted by the Attorney General in *M-S-*, violated the Due Process Clause. *Ibid.*

The district court modified its injunction in light of the Attorney General's decision. App., *infra*, 52a-75a. In what the court labeled "Part A" of the new injunction, the court reaffirmed the original injunction's imposition of procedural requirements for class members' bond hearings. *Id.* at 53a (emphasis omitted). In "Part B," the court held that "the statutory prohibition at [Section 1225(b)(1)(B)(ii)] against releasing [transferred aliens] on bond * * * violates the U.S. Constitution," and ordered that class members be accorded bond hearings with the procedural guarantees just discussed. *Ibid.* (emphasis omitted). The court rejected the government's contention that it was prohibited from granting a classwide injunction by 8 U.S.C. 1252(f)(1), which states that "no court (other than the Supreme 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." 8 U.S.C. 1252(f)(1); see App., *infra*, 59a-62a.

2. The court of appeals denied the government's motion for a stay pending appeal with respect to Part B of the injunction, but granted the motion for a stay pending appeal with respect to Part A. App., *infra*, 48a-51a. As a result, the government was required to continue to provide bond hearings to transferred aliens, but was not required to follow the procedural requirements that the district court had imposed on those hearings. *Ibid.*

3. a. A divided court of appeals affirmed in part, vacated in part, and remanded. App., *infra*, 1a-47a.

The court of appeals first affirmed Part B of the injunction—the part holding unconstitutional the statutory prohibition on bond hearings for transferred aliens. App., *infra*, 9a-20a. As relevant here, the court concluded that respondents were "likely to succeed on their claim that they are constitutionally entitled to individualized bond hearings." *Id.* at 12a. In reaching that conclusion, the court reasoned that, "'[g]iven the substantial liberty interests at stake,'" "bail proceedings for noncitizens are necessary." *Ibid.* (citation omitted). The court rejected the government's contention that respondents lack rights under the Due Process Clause because they have not yet been admitted to the United States, reasoning that "once a person is standing on U.S. soil—regardless of the legality of his or her entry—he or she is entitled to due process." *Id.* at 19a. The court also rejected the government's reliance on *Demore* v. *Kim*, 538 U.S. 510 (2003), a case in which this Court held that the mandatory detention of certain

criminal aliens without bond hearings complied with the Due Process Clause. App., *infra*, 13a-15a. The court stated that the duration of detention in this case—in the court's view, "anywhere from six months to over-a-year"—is "far longer than the periods at issue in *Demore*." *Id.* at 14a-15a.

The court of appeals then vacated Part A of the injunction—the part requiring that class members receive bond hearings within seven days of requesting them, that DHS bear the burden of proof in such hearings, that the government record such hearings, and that the government produce written decisions at the end of such hearings. App., *infra*, 22a-23a. The court explained that "[t]he current record is * * * insufficient to support the district court's findings with respect to likelihood of success, the harms facing [respondents], and the balance of the equities implicated by Part A of the preliminary injunction." *Id.* at 22a. But the court left the district court free to reimpose those procedural requirements on a more developed record. *Id.* at 23a.

After addressing the merits, the court of appeals rejected the government's contention that Section 1252(f)(1) deprived the district court of jurisdiction to issue the classwide injunction. App., *infra*, 24a-28a. The court of appeals stated that Section 1252(f)(1) is "silen[t] as to class actions," and it contrasted that provision with a "neighboring subsection" that "expressly prohibits class actions." App., *infra*, 25a (citing 8 U.S.C. 1252(e)(1)(B)). The court read Section 1252(f)(1)'s limitation of injunctions to the application of a statutory provision to an "individual alien" as precluding only challenges brought by "organizational plaintiffs," not challenges brought on behalf of a class of aliens. *Id.* at 26a.

b. Judge Bade dissented. App., *infra*, 32a-47a.

On jurisdiction, Judge Bade concluded that Section 1252(f)(1) bars a lower court from issuing a classwide injunction against the operation of 8 U.S.C. 1225(b)(1)(B)(ii). App., *infra*, 32a-42a. She observed that this Court has stated that Section 1252(f)(1) "prohibits federal courts from granting classwide injunctive relief against the operation of [certain statutory provisions." *Id.* at 33a (quoting *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 481-482 (1999)). She also explained that, even setting aside this Court's cases, the word "individual" in the statutory term "an individual alien" would be serve no function if classes of aliens could obtain injunctions against the operation of the specified statutory provisions. *Id.* at 35a.

On the merits, Judge Bade concluded that the district court's injunction "is overbroad and extends far beyond the demands of due process." App., *infra*, 42a. She read this Court's cases to mean that, "as a constitutional matter, the government need only provide bond hearings to detained aliens once the detention period becomes 'prolonged' or fails to serve its immigration purpose," a period, she opined, "generally understood to be six months." *Id.* at 45a. Yet, Judge Bade pointed out, "the longest period a named plaintiff [in the class] waited to obtain a bond hearing after securing a positive credible fear determination was about three weeks"—"a period far shorter than the presumptively reasonable six months." *Id.* at 46a n.7.

REASONS FOR GRANTING THE PETITION

The court of appeals erred in holding that aliens transferred from expedited removal proceedings have a constitutional entitlement to a bond hearing. And even assuming that a detained transferred alien would be

constitutionally entitled to a bond hearing in certain circumstances, the court further erred in holding that 8 U.S.C. 1252(f)(1) allows a lower court to issue a classwide injunction to remedy that purported violation. The court's decision on the merits incorrectly holds an Act of Congress unconstitutional, and its decision on the propriety of a classwide remedy contradicts this Court's precedents and conflicts with the decisions of two other courts of appeals. The decision below also intrudes upon the political branches' responsibility for immigration policy, compromises the United States' ability to protect its territorial sovereignty from illegal immigration, and adds to the burdens that are already overwhelming the country's immigration system. This Court's review of both issues therefore is warranted.

A. The Court Of Appeals Erred In Holding That Section 1225(b)(1)(B)(ii) Violates The Due Process Clause

Section 1225(b)(1)(B)(ii) provides, with respect to aliens initially processed for expedited removal, that "[i]f the officer determines at the time of the interview that an alien has a credible fear of persecution[,] * * * the alien shall be detained for further consideration of the application for asylum." 8 U.S.C. 1225(b)(1)(B)(ii). The Attorney General, relying in part on the Court's decision in *Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018), has determined, that transferred aliens have no statutory right to bond hearings under that provision. See pp. 4-5, *supra*. Neither the district court nor the court of appeals questioned the Attorney General's reading as a matter of statutory interpretation. The court of appeals instead affirmed the district court's preliminary injunction in relevant part on the ground that the statute violates the Due Process Clause of the Fifth Amendment. App., *infra*, 9a.

That ruling is incorrect for three reasons. First, respondents have failed to establish that they may invoke the Due Process Clause to seek release into the United States. Second, respondents also have failed to establish that the Due Process Clause, even if it may be invoked in these circumstances, requires the government to accord them bond hearings. Finally, at a minimum, respondents have failed to establish that the statute violates the Due Process Clause as to the whole class.

1. Over a century ago, this Court held that, as to "foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law," "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 660 (1892). The Court has since reiterated that principle time and again. See, *e.g.*, *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982) ("[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application."); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.").

Respondents fall within the scope of that rule. Under the definition of the class, respondents are all aliens. App., *infra*, 100a. All of them have "entered the United States without inspection." *Ibid.* And all of them were "initially subject to expedited removal proceedings under 8 U.S.C. § 1225(b)," *ibid.*, because they were encountered within 100 air miles of the border and within 14 days of having unlawfully entered the United States, see pp. 2-3, *supra*. In short, respondents have "never

been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law." *Nishimura Ekiu*, 142 U.S. at 660. As to them, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *Ibid.*

The court of appeals concluded that the cases just discussed pertain only to "noncitizens apprehended at a port-of-entry" and that, "once a person is standing on U.S. soil—regardless of the legality of his or her entry —he or she is entitled to due process." App., *infra*, 18a-19a. But this Court recently rejected that very argument in *DHS* v. *Thuraissigiam*, 140 S. Ct. 1959 (2020), a case in which an alien claimed rights under the Due Process Clause on the ground that he "was not taken into custody the instant he attempted to enter the country" but instead "succeeded in making it 25 yards into U.S. territory before he was caught." *Id.* at 1982. The Court explained that the "century-old rule regarding the due process rights of an alien seeking initial entry * * * would be meaningless if it became inoperative as soon as an arriving alien set foot on U. S. soil." *Ibid.* The Court further explained that extending due process rights to "an alien who tries to enter the country illegally" would "undermine the 'sovereign prerogative' of governing admission to this country and create a perverse incentive to enter at an unlawful rather than a lawful location." *Id.* at 1982-1983 (citation omitted).

In this case, the named respondents were, like the alien in *Thuraissigiam*, apprehended at or near the border, roughly contemporaneously with their illegal entry. See, *e.g.*, Third Am. Compl. ¶ 58 ("On or about May 18, 2018, Ms. Padilla and [her son] entered the United States. As they were making their way to a

nearby port of entry, they were arrested by a Border Patrol agent for entering without inspection."); see also *id.* ¶¶ 69, 78, 91. The other class members likewise were encountered within 100 air miles of the border and within 14 days of having unlawfully entered the United States. See pp. 2-3, *supra*. The fact that respondents have set foot on U.S. soil does not entitle them to invoke the Due Process Clause in an effort to attain release into the United States.

2. Even assuming that respondents could invoke the Due Process Clause, they could not establish that detention without bond hearings violates the Constitution. This Court has long affirmed the constitutionality of immigration detention, explaining that "[p]roceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation." *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896); see *Carlson* v. *Landon*, 342 U.S. 524, 538 (1952).

Most notably, in *Demore* v. *Kim*, 538 U.S. 510 (2003), the Court upheld an Act of Congress that required the government to detain certain criminal aliens without bail pending completion of their removal proceedings. *Id.* at 517-531. The alien in *Demore* had far more significant ties to the United States than the aliens in this case; whereas the aliens in this case were apprehended and placed in expedited-removal proceedings shortly after illegally entering the United States, the alien in *Demore* had entered the United States lawfully, had become a lawful permanent resident, and had resided in the United States for over ten years before committing

a crime that made him deportable. *Id.* at 513. If detention without bail was permissible in *Demore*, it certainly is here.

The court of appeals distinguished *Demore* on the ground that it involved a shorter period of detention. The Court in *Demore* stated that "the detention at stake * * * lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal," 538 U.S. at 530, whereas the court here estimated that respondents "may expect to be detained for anywhere from six months to over-a-year," App., *infra*, 14a. But the court of appeals' emphasis on the duration of the detention was misplaced.

Under this Court's precedents, detention is ancillary to the conduct of removal proceedings and to the actual removal of an alien who is ordered removed. Accordingly, detention pending the completion of particular immigration proceedings ordinarily may continue as long as those proceedings remain ongoing. Such detention is not subject to any fixed numerical cap, such as six or twelve or eighteen months. This Court has explained that immigration detention generally remains constitutional at least as long as it "bears a reasonable relation to the purpose for which the individual was committed." *Demore*, 538 U.S. at 527 (citation omitted). Detention pending the completion of removal proceedings "necessarily serves the purpose of preventing * * * aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." *Id.* at 528. Detention does not cease to serve that purpose simply because a particular period of time has lapsed.

This Court has indicated that immigration detention may raise constitutional concerns if it is "indefinite" or "potentially permanent." *Zadvydas* v. *Davis*, 533 U.S. 678, 696 (2001). Detention pending the completion of removal proceedings does not raise such concerns. The duration of removal proceedings varies and will be unknown in any particular case until it is completed, but such detention is neither indefinite nor potentially permanent. The detention ends when removal proceedings end, as they always do. See *Demore*, 538 U.S. at 528-531.

Indeed, a focus on the duration of detention alone is particularly inapt because that duration may result from the alien's own choices. The procedures established by Congress and the Attorney General for the conduct of removal proceedings afford aliens numerous procedural protections, including a right of appeal to the Board and judicial review, as well as opportunities to apply for various forms of relief. Some aliens apply for "different forms of * * * discretionary relief"; some "ask for multiple continuances"; some file appeals. *Sopo* v. *United States Attorney General*, 825 F.3d 1199, 1216 (11th Cir. 2016), vacated as moot, 890 F.3d 952 (11th Cir. 2018). The fact that aliens who take advantage of the procedure and substantive avenues for relief afforded to them may be detained while the system adjudicates their claims is not a sign of a *lack* of due process; it is a sign that extensive process has been provided and found by the aliens to be beneficial. But once invoked, completing any process takes time. Indeed, this Court acknowledged in *Demore* that the adjudicatory framework and associated provisions for detention may require a detained alien to make difficult choices about whether to seek further review, but it observed

that "the legal system is replete with situations requiring the making of difficult judgments as to which course to follow." 538 U.S. at 530 n.14 (citation and ellipsis omitted).

Here, respondents have been detained pending the completion of proceedings to adjudicate their asylum applications. Their detention "necessarily serves" the legitimate immigration purposes of "preventing * * * aliens from fleeing prior to or during their removal proceedings" and of "increasing the chance that, if ordered removed, the aliens will be successfully removed." *Demore*, 538 U.S. at 528. Detention also may serve to protect society from the possibility of harm by aliens who are deemed a threat to the community if released. *Id.* at 531-533 (Kennedy, J., concurring). And respondents' detention is limited, not indefinite or potentially permanent, because it will end when their proceedings end. See *id.* at 529. Respondents' detention accordingly comports with the Constitution. *Id.* at 531.

3. Even if respondents could invoke the Due Process Clause in seeking release into the United States, and even if the detention of a particular alien might at some point or in some circumstances become unconstitutional, the court of appeals and district court still would lack a sound basis for a classwide determination of unconstitutionality. Just as a facial challenge to a statute can succeed only if the statute violates the Constitution in all of its applications, see *Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1128 (2019), so too a classwide challenge can succeed only if the statute violates the Constitution as applied to all members of the class. A court's power to enjoin enforcement of a statute or declare it unconstitutional extends only as far as the constitutional violation; "injunctive relief should be no more burdensome to the

defendant than necessary to provide complete relief to the plaintiffs." *Madsen* v. *Women's Health Center, Inc.*, 512 U.S. 753, 765 (1994) (citation omitted). It follows that a court has no authority to enjoin the enforcement of a statute or declare it unconstitutional as to an entire class if the statute is valid as to some members of the class.

In this case, the district court certified a class composed of "*all* 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., *infra*, 100a (emphasis added). A classwide injunction against the enforcement of Section 1225(b)(1)(B)(ii) thus could be justified, if at all, only if Section 1225(b)(1)(B)(ii) violates the Constitution as applied to *all* such aliens, irrespective of the length of their detention or other circumstances. As explained above, however, the detention requirement in that provision is presumptively *valid* in all its applications. If detention were nevertheless alleged to be inconsistent with due process in a particular instance, such a claim could properly be raised only in an individual, as-applied challenge.

B. The Court Of Appeals Erred In Holding That Section 1252(f)(1) Permits Classwide Injunctions

Even assuming that detention under Section 1225(b)(1)(B)(ii) without a bond hearing might violate the Constitution in a particular instance, any injunction against the enforcement of that statute would have to be limited to the individual aliens who brought the suit and established a violation in the statute's application to

them. Section 1252(f)(1) deprives the district court of jurisdiction to issue an injunction for the benefit of an entire class. The court of appeals held that Section 1252(f)(1) permits classwide injunctions, but that decision contradicts both the controlling precedent of this Court and the plain terms of the statute.

1. Section 1252(f)(1) provides:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no 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, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 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). The reference to "part IV of this subchapter" is to 8 U.S.C. 1221-1232, a series of provisions addressing the "Inspection, Apprehension, Examination, Exclusion, and Removal" of aliens. 8 U.S.C. Ch. 12, Subch. II, Pt. IV (caption) (capitalization altered). The statutory provision at issue in this case, Section 1225(b)(1)(B)(ii), is included in Part IV and thus is covered by Section 1252(f)(1)'s jurisdictional bar.

In three previous cases, this Court has described Section 1252(f)(1) as prohibiting classwide injunctions against the operation of 8 U.S.C. 1221-1232. In *Reno* v. *American-Arab Anti-Discrimination Committee* (*AADC*), 525 U.S. 471 (1999), the Court explained that "[Section 1252(f)(1)] prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-123[2], but specifies that this ban does not extend to individual cases." *Id.* at 481-482. In *Nken*

v. *Holder*, 556 U.S. 418 (2009), the Court described Section 1252(f)(1) as "a provision prohibiting classwide injunctions against the operation of removal provisions." *Id.* at 431. And in *Rodriguez*, the Court explained that Section 1252(f)(1) "prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1232." 138 S. Ct. at 851 (brackets and citation omitted).

The applicability of Section 1252(f)(1) to class actions brought by aliens was not directly at issue in *AADC* and *Nken*, so the Court's statements in those cases were arguably dicta. The statement in *Rodriguez*, however, was a holding. In *Rodriguez*, a class of aliens subject to immigration detention argued that they were entitled to bond hearings under the applicable statutes and the Constitution. 138 S. Ct. at 839. The Court rejected the class's statutory claims, but remanded the case to the Ninth Circuit for consideration of the class's constitutional claims. *Id.* at 851. The Court instructed the Ninth Circuit that, on remand, it "should first decide whether it continues to have jurisdiction despite 8 U.S.C. 1252(f)(1)," which, the Court noted, "'prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1232.'" *Ibid.* (brackets and citation omitted). The Court's reading of Section 1252(f)(1) thus formed part of the remand instructions and was necessary to the remand judgment, making it a holding and not a dictum. See *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

The court of appeals reasoned that, because this Court remanded *Rodriguez* to the Ninth Circuit rather

than simply holding that there was no jurisdiction to issue the requested classwide injunction, the Court must have viewed the availability of classwide injunctive relief as "unresolved." App., *infra*, 25a. That misreads *Rodriguez*. The Court's opinion states:

> Section 1252(f)(1) thus 'prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1232.' [*AADC*], 525 U.S. at 481. * * * The Court of Appeals held that this provision did not affect its jurisdiction over respondents' *statutory* claims because those claims did not 'seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct not authorized by the statutes.' 591 F.3d at 1120. This reasoning does not seem to apply to an order granting relief on constitutional grounds, and therefore the Court of Appeals should consider on remand whether it may issue classwide injunctive relief based on respondents' constitutional claims.

Rodriguez, 138 S. Ct. at 851 (brackets and ellipsis omitted). As that passage shows, the Court stated the governing legal rule in plain terms: Section 1252(f)(1) "prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1232." *Ibid.* (brackets and citation omitted). The Court then remanded the case so that the Ninth Circuit could reconsider the continuing viability of a separate rationale on which the Ninth Circuit had previously relied—namely, that the aliens sought to enjoin the officers' conduct rather than the operation of the statutes. Put simply, the purpose of the remand was to enable the Ninth Circuit to reconsider the Ninth Circuit's own previous ruling—not to enable it to reconsider and reverse *this Court's* ruling that Section 1252(f)(1) "prohibits federal courts

from granting classwide injunctive relief against the operation of §§ 1221-1232." *Ibid.* (brackets and citation omitted).

2. Even setting aside precedent and treating the question presented as an issue of first impression, the court of appeals' reading of Section 1252(f)(1) is still wrong. Section 1252(f)(1) begins by stating a broad restriction on courts' jurisdiction to award injunctions: "Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of [8 U.S.C. 1221-1232]." 8 U.S.C. 1252(f)(1). Section 1252(f)(1) then carves out a narrow exception to that restriction: a court may award an injunction "with respect to the application of such provisions to an individual alien against whom proceedings under [8 U.S.C. 1221-1232] have been initiated." *Ibid.*

The critical words for purposes of this case are "an individual alien." The word "individual," used as an adjective, means "[o]f, relating to, or involving a single person or thing, as opposed to a group." *Black's Law Dictionary* 924 (11th ed. 2019) (emphasis omitted). A class of aliens is not "an individual alien"; by definition, a class is a group, not a single person. That is why this Court has described "[t]he *class* action" as "'an exception to the usual rule that litigation is conducted by and on behalf of the *individual* named parties only.'" *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 348 (2011) (emphasis added; citation omitted). A class action is the antithesis of an action by an individual party.

The grammar of Section 1252(f)(1) reinforces the plain meaning of the adjective "individual." In stating the general rule against injunctions, Congress used

both the singular and the plural: "Regardless of * * * the identity of the *party or parties*." 8 U.S.C. 1252(f)(1) (emphasis added). But in stating the exception to that rule, Congress used only the singular: "*an* individual alien." *Ibid.* (emphasis added). That contrast indicates that Congress meant the general jurisdictional restriction to apply regardless of the number of parties involved, but the exception to apply only where a court enjoins the application of the specified provisions to a single alien.

The same conclusion follows from the principle that a court should, if possible, read a statute so that "no clause, sentence, or word shall be superfluous, void, or insignificant." *Lamar, Archer & Cofrin, LLP* v. *Appling*, 138 S. Ct. 1752, 1761 (2018) (citation omitted). The only possible function of the adjective "individual" in the phrase "an individual alien" is to exclude classwide injunctions. To read Section 1252(f)(1) to allow injunctions for classes would leave the adjective "individual" with no work to do, and would in effect read the word out of the statute.

The court of appeals' contrary analysis lacks merit. The court read the words "individual alien" to "prohibit injunctive relief with respect to organizational plaintiffs." App., *infra*, 26a. But Section 1252(f)(1) applies "[r]egardless * * * of the identity of the party or parties bringing the action." 8 U.S.C. 1252(f)(1). That language unambiguously establishes that the jurisdictional bar applies to all types of plaintiffs, not just organizational plaintiffs. In addition, the word "alien" in the phrase "an individual alien" already denotes a natural person and already excludes organizational plaintiffs. If the word "individual" served only to exclude organizational plaintiffs, it would add nothing to the statute.

The court of appeals also contrasted the language of Section 1252(f)(1) (which bars injunctions except with respect to "an individual alien") with the nearby Section 1252(e)(1)(B) (which bars courts from "certify[ing] a class under Rule 23" in certain cases). App., *infra*, 25a (quoting 8 U.S.C. 1252(e)(1)(B)). All that contrast shows, however, is that whereas Section 1252(e)(1)(B) bars the certification of classes altogether, Section 1252(f)(1) bars classwide *injunctive* relief and does not categorically bar other forms of relief if independently proper and justified. See *Nielsen* v. *Preap*, 139 S. Ct. 954, 962 (2019) (discussing classwide declaratory relief). The contrast in no way suggests that Section 1252(f)(1) allows the relief ordered here—a classwide *injunction* against the operation of 8 U.S.C. 1225(b)(1)(B)(ii).

Finally, the court of appeals relied on *Califano* v. *Yamasaki*, 442 U.S. 682 (1979), in which this Court read a different statute authorizing suit by "any individual" to permit "class relief." App., *infra*, 25a-26a (quoting *Yamasaki*, 442 U.S. at 700-701). The court failed to explain why it attached more significance to *Yamasaki*, which concerned a different statute, than to *AADC*, *Nken*, and *Rodriguez*, which concerned the very statute at issue here. In any event, the text of the statute in *Yamasaki* differs in material ways from the text of the statute here. The statute in *Yamasaki*, by authorizing suits by individuals, excluded organizational plaintiffs but did not clearly prohibit individuals from joining together in classes. The statutory provision here, by contrast, begins with the words "Regardless * * * of the identity of the party or parties bringing the action," and permits an injunction only with respect to application of a statutory provision to an "individual alien." 8 U.S.C. 1252(f)(1). That text shows that the whole point of the

statute was not simply to exclude particular types of plaintiffs but to restrict classwide relief.

C. Both Questions Presented Warrant This Court's Review

1. The court of appeals' decision on the merits warrants review because the court held an Act of Congress unconstitutional. This Court has recognized that judging the constitutionality of a federal statute is "the gravest and most delicate duty" of the federal judiciary. *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (citation omitted). The Court has therefore applied "a strong presumption in favor of granting writs of certiorari to review decisions of lower courts holding federal statutes unconstitutional," even in the absence of a circuit conflict. *Maricopa County* v. *Lopez-Valenzuela*, 574 U.S. 1006, 1007 (2014) (statement of Thomas, J., respecting the denial of the application for a stay); see, *e.g.*, *Barr* v. *American Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2345-2346 (2020); *Agency for International Development* v. *Alliance for Open Society International, Inc.*, 140 S. Ct. 2082, 2086 (2020); *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575, 1578 (2020); *Allen* v. *Cooper*, 140 S. Ct. 994, 1000 (2020); *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2298 (2019); *Matal* v. *Tam*, 137 S. Ct. 1744, 1755 (2017); *Zivotofsky* v. *Kerry*, 576 U.S. 1, 9 (2015); *Department of Transportation* v. *Association of American R.R.s*, 575 U.S. 43, 46 (2015); *United States* v. *Alvarez*, 567 U.S. 709, 714 (2012) (plurality opinion); *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 14 (2010); *United States* v. *Comstock*, 560 U.S. 126, 132-133 (2010).

That course remains appropriate even though the court of appeals considered the case at the preliminary-injunction stage and remanded the case to the district court after vacating a part of its injunction. This Court

has often granted writs of certiorari where lower federal courts have, on constitutional grounds, issued preliminary injunctions against the enforcement of Acts of Congress. See, *e.g.*, *Agency for International Development* v. *Alliance for Open Society International, Inc.*, 570 U.S. 205, 212 (2013); *Gonzales* v. *Raich*, 545 U.S. 1, 9 (2005); *Ashcroft* v. *American Civil Liberties Union*, 542 U.S. 656, 660-661 (2004); *Ashcroft* v. *American Civil Liberties Union*, 535 U.S. 564, 573 (2002); *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533, 539-540 (2001). What is more, although the court of appeals stated that respondents were "*likely* to succeed on their claim that they are constitutionally entitled to individualized bond hearings," App., *infra*, 12a (emphasis added), it affirmed an injunction providing that the class "*is* constitutionally entitled to a bond hearing," *id.* at 74a (emphasis added). Further, although the court of appeals remanded the case to the district court for further findings with respect to the particular procedural requirements that the bond hearings must follow, the court of appeals and respondents have not suggested that additional proceedings in the district court would affect the requirement to hold the bond hearings in the first place. Accordingly, in the face of an injunction that bars the enforcement of an Act of Congress nationwide and classwide on constitutional grounds, this Court's review is called for now.

2. The court of appeals' remedial holding regarding Section 1252(f)(1) similarly warrants this Court's review. That holding conflicts with precedent of this Court. See Sup. Ct. R. 10(c). The Court held in *Rodriguez* that Section 1252(f)(1) "prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1232." 138 S. Ct. at 851 (brackets and

citation omitted); see *Nken*, 556 U.S. at 431; *AADC*, 525 U.S. at 481. In conflict with *Rodriguez*, the court of appeals held here that "§ 1252(f)(1) does *not* on its face bar class actions or classwide relief." App., *infra*, 25a (emphasis added).

The court of appeals' holding regarding Section 1252(f)(1) also warrants review because it conflicts with the decisions of two other courts of appeals. See Sup. Ct. R. 10(a). The Tenth Circuit has held that "§ 1252(f) forecloses jurisdiction to grant class-wide injunctive relief to restrain operation of §§ 1221-[1232]." *Van Dinh* v. *Reno*, 197 F.3d 427, 433 (1999). The Sixth Circuit has similarly held that courts "do not have jurisdiction under § 1252(f)(1) to issue class-based injunctive relief against the removal and detention statutes," *Hamama* v. *Adducci*, 912 F.3d 869, 878 (2018), cert. denied, No. 19-924 (July 2, 2020), and that "Congress stripped all courts, save for the Supreme Court, of jurisdiction to enjoin or restrain the operation of 8 U.S.C. §§ 1221-1232 on a classwide basis," *Hamama* v. *Adducci*, 946 F.3d 875, 877 (2020). The dissent in this case observed, and the majority did not deny, that the decision here has "create[d] a circuit split." App., *infra*, 46a (Bade, J., dissenting).

3. The significant practical consequences of the decision below underscore the need for this Court's review. The Court has explained that "control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature." *Plasencia*, 459 U.S. at 34. It has further explained that "[s]uch matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952).

The court of appeals' merits and remedial holdings both undermine that principle. The merits decision enables courts to invoke the Due Process Clause to set aside the political branches' policy judgments about immigration detention. And the remedial decision allows lower federal courts to issue sweeping classwide injunctions against the operation of federal removal and detention statutes, even though Congress has insisted that any such injunction be limited to "an individual alien." 8 U.S.C. 1252(f)(1).

In addition, this Court has recognized the United States' overriding interest in protecting its territorial sovereignty through the use of all the tools made available by Congress, including detention of aliens, to address and diminish illegal immigration. See *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155, 163 (1993). The court of appeals' merits holding compromises that interest by enabling aliens to obtain release into the United States even though Congress has instructed that they "shall be detained." 8 U.S.C. 1225(b)(1)(B)(ii). The court's holding regarding Section 1252(f)(1) similarly compromises that interest by enabling courts to issue classwide injunctions against the operation of detention provisions.

Finally, this Court has taken note of the "burdens" that are "currently 'overwhelming our immigration system.'" *Thuraissigiam*, 140 S. Ct. at 1966 (citation omitted). The court of appeals' merits holding adds to those burdens, because it compels the Executive to continue to provide bond hearings to transferred aliens even though Congress and the Executive both agree that no such hearings should be provided. The court's remedial

holding similarly exacerbates those burdens, by enabling courts to impose new requirements through broad classwide injunctions.

4. This Court should grant certiorari now, rather than granting, vacating, and remanding in light of its intervening decision in *Thuraissigiam*. See p. 13, *supra* (discussing inconsistency between a portion of the court of appeals' analysis and *Thuraissigiam*). The district court here has enjoined the government from effectuating, classwide and nationwide, the statutory prohibition in Section 1225(b)(1)(B)(ii) against releasing transferred aliens on bond. See pp. 7-8, *supra*. The court of appeals has declined to stay that portion of the injunction. See p. 8, *supra*. As a result, that portion of the injunction remains in effect today. Postponing review by remanding the case in light of *Thuraissigiam* would allow that injunction to remain in effect even longer, and would thus prolong the "irreparable injury" that the United States suffers "[a]ny time" it is "enjoined by a court from effectuating statutes enacted by representatives of its people." *Maryland* v. *King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2020

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-35565
D.C. No. 2:18-cv-00928-MJP

YOLANY PADILLA; IBIS GUZMAN; BLANCA ORANTES; BALTAZAR VASQUEZ, PLAINTIFFS-APPELLEES

v.

IMMIGRATION AND CUSTOMS ENFORCEMENT; U.S. DEPARTMENT OF HOMELAND SECURITY; U.S. CUSTOMS AND BORDER PROTECTION; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; MATTHEW ALBENCE, ACTING DIRECTOR OF ICE; CHAD WOLF, ACTING SECRETARY OF DHS; MARK MORGAN, ACTING COMMISSIONER OF CBP; KEN CUCCINELLI, SENIOR OFFICIAL PERFORMING THE DUTIES OF THE DIRECTOR OF USCIS; MARC J. MOORE, SEATTLE FIELD OFFICE DIRECTOR, ICE; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; WILLIAM P. BARR, ATTORNEY GENERAL, UNITED STATES ATTORNEY GENERAL; LOWELL CLARK, WARDEN OF THE NORTHWEST DETENTION CENTER IN TACOMA, WASHINGTON; CHARLES INGRAM, WARDEN OF THE FEDERAL DETENTION CENTER IN SEATAC, WASHINGTON; DAVID SHINN, WARDEN; JAMES JANECKA, WARDEN OF THE ADELANTO DETENTION FACILITY, DEFENDANTS-APPELLANTS

AND

U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, FKA DEPARTMENT OF SOCIAL SERVICES; OFFICE OF REFUGEE RESETTLEMENT; ALEX M. AZAR II, SECRETARY OF HHS; SCOTT LLOYD, DIRECTOR OF ORR; MATTHEW ALBENCE, ACTING DEPUTY DIRECTOR

OF
ICE; JOHN P. SANDERS, ACTING COMMISSIONER OF CBP; ELIZABETH GODFREY, ACTING DIRECTOR OF SEATTLE FIELD OFFICE, ICE, DEFENDANTS

Argued and Submitted: Oct. 22, 2019
San Francisco, California
Filed: Mar. 27, 2020

Appeal from the United States District Court
for the Western District of Washington
Marsha J. Pechman, District Judge, Presiding

OPINION

Before: SIDNEY R. THOMAS, Chief Judge, and MICHAEL DALY HAWKINS and BRIDGET S. BADE, Circuit Judges.

Opinion by Chief Judge THOMAS; Dissent by Judge BADE

THOMAS, Chief Judge:

In this interlocutory appeal, we consider whether the district court abused its discretion in granting a preliminary injunction ordering the United States to provide bond hearings to a class of noncitizens who were detained after entering the United States and were found by an asylum officer to have a credible fear of persecution. We conclude that it did not, and we affirm the order of the district court, in part, and direct the district court to reconsider some of the technical aspects of its order.

I

Plaintiffs are a class of noncitizens detained pursuant to 8 U.S.C. § 1225(b). Section 1225(b) provides for "expedited removal" of "arriving" noncitizens at ports-of-entry and inadmissible noncitizens apprehended within the United States who cannot prove that they have been in the United States for more than two years. *See* Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409-01, 35,413-14 (July 23, 2019);[1] *see also* 8 U.S.C. § 1225(b)(1)(A)(iii)(II). Plaintiffs are in this latter category.

DHS removes noncitizens eligible for expedited removal "without further hearing or review," subject to only one exception. 8 U.S.C. § 1225(b)(1)(A)(i). If the noncitizen indicates an intent to apply for asylum or a fear of persecution, DHS must refer the noncitizen for an interview with an asylum officer. *Id.* § 1225(b)(1)(A)(ii); 8 C.F.R. § 208.30. If the asylum officer determines that the noncitizen's fear of persecution is credible, the noncitizen is referred to full removal proceedings, in which the noncitizen may apply for asylum or other forms of relief from removal. *See* 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. §§ 208.30(f), 1003.42(f). Subject to review, if the

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[1] At the time the district court certified the class and the injunction was issued below, the government applied expedited removal to inadmissable noncitizens arriving at a port-of-entry and any inadmissible noncitizen apprehended within 100 miles of the border and present in the country for fewer than 14 days. *See* Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877-01, 48879-80 (Aug. 11, 2004). In July 2019, however, the Department of Homeland Security ("DHS") announced that it would expand expedited removal to the statutory limit. *See* Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409-01, 35,413-14 (July 23, 2019); *see also* 8 U.S.C. § 1225(b)(1)(A)(iii)(II).

asylum officer finds no credible fear of persecution, the noncitizen will be removed. 8 U.S.C. § 1225(b)(1)(B)(iii). A supervisor reviews the asylum officer's credible fear determination, 8 C.F.R. §§ 208.30(e)(7), 235.3(b)(2), (b)(7), and a noncitizen may also request de novo review by an immigration judge, 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. § 1003.42.

If the asylum officer determines at the time of the credible fear interview that the noncitizen has a credible fear of persecution, the noncitizen must "be detained for further consideration of the application for asylum." 8 U.S.C. § 1225(b)(1)(B)(ii). If the asylum officer determines that the noncitizen does not have a credible fear of persecution, the statute requires that the noncitizen be detained during the review process "pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed." *Id.* § 1225(b)(1)(B)(iii)(IV).

Until July 2019, noncitizens like plaintiffs, who were apprehended within the United States and initially subject to expedited removal, but who established credible fear and were transferred to full removal proceedings, were considered to be entitled to bond hearings before an immigration judge, as noncitizens in full removal proceedings usually are. *See Matter of X-K-*, 23 I. & N. Dec. 731, 731 (BIA 2005).

In June 2018, Yolany Padilla, Ibis Guzman, and Blanca Orantes filed a class action complaint challenging the government's alleged policy and practice of separating families seeking asylum and delaying credible fear interviews and bond hearings for detained asylum seekers. Plaintiffs moved for class certification and for a

preliminary injunction requiring "timely bond hearings that comport with due process."

The district court first certified a nationwide Bond Hearing Class consisting of:

> All 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.

Padilla v. U.S. Immigr. & Customs Enf't, No. C18-928 MJP, 2019 WL 1056466, at *1 (W.D. Wash. Mar. 6, 2019).[2]

The district court also granted the motion for a preliminary injunction, implementing certain procedural requirements for class members' bond hearings. Specifically, the preliminary injunction required the Executive Office for Immigration Review ("EOIR") to conduct bond hearings within seven days of a class member's request and release any member whose detention without a hearing exceeds that limit. *Padilla v. U.S. Immigr. & Customs Enf't*, 379 F. Supp. 3d 1170, 1172 (W.D. Wash. 2019). The injunction also provided that in those hearings, the burden of proof must be placed on DHS to demonstrate why the class member should not be released on bond, parole, or other conditions. *Id.*

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[2] The parties later stipulated that "the Bond Hearing Class includes individuals who otherwise satisfy the requirements for class membership but were determined to have a credible fear of torture, rather than only individuals determined to have a credible fear of persecution."

It required the government to record the bond hearings and produce the recordings or verbatim transcripts upon appeal. Finally, the injunction required the government to produce a written decision with particularized findings at the conclusion of each bond hearing. *Id.*

Shortly after this order, the Attorney General ("AG") overruled *Matter of X-K-*, which established that noncitizens similarly situated to the members of the bond hearing class are entitled to bond hearings, as "wrongly decided." *Matter of M-S-*, 27 I. & N. Dec. 509, 510 (A.G. 2019). The AG interpreted 8 U.S.C. § 1225(b)(1)(B)(ii) to require mandatory detention without bond hearings for asylum seekers who were initially subject to expedited removal but later transferred to full removal proceedings after establishing a credible fear. *See Matter of M-S-*, 27 I. & N. Dec. at 515-17. Under *Matter of M-S-*, the only possibility for release available to noncitizens in this category is a discretionary grant of parole by DHS for "urgent humanitarian reasons or significant public benefit" pursuant to 8 U.S.C. § 1182(d)(5). *Id.* at 516-17. The AG delayed implementation of *Matter of M-S-* for 90 days in light of its "significant impact . . . on detention operations." *See id.* at 519 n.8.

Plaintiffs then filed a third amended complaint challenging *Matter of M-S-* on due process grounds and moved to modify the injunction.[3] Defendants moved to vacate the injunction.

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[3] Plaintiffs also challenged, *inter alia*, the AG's interpretation of 8 U.S.C. § 1225(b)(1)(B)(ii), but did not seek preliminary relief on that basis.

The district court modified the previously issued preliminary injunction, dividing it into two parts "to facilitate appellate review." *Padilla v. U.S. Immigr. & Customs Enf't*, 387 F. Supp. 3d 1219, 1222 (W.D. Wash. 2019). In Part A, the court reaffirmed its previously entered injunctive relief. *Id.* In Part B, the court essentially maintained the status quo before *Matter of M-S-*. *Id.* The court:

> [m]odif[ied] the injunction to find that the statutory prohibition at [§ 1225(b)(1)(B)(ii)] against releasing on bond persons found to have a credible fear and awaiting a determination of their asylum application violates the U.S. Constitution; the Bond Hearing Class is constitutionally entitled to a bond hearing before a neutral decisionmaker (under the conditions enumerated [in Part A]) pending resolution of their asylum applications.

Id.

The government timely appealed both orders, moved for an administrative stay of the injunction, and a stay pending appeal. A motions panel of this court denied the government's request to stay Part B of the injunction, in which the district court held that class members are constitutionally entitled to bond hearings, but granted the request to stay Part A, which imposed procedural requirements on those bond hearings.[4]

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[4] Plaintiffs have moved to stay further appellate proceedings pending the Supreme Court's decision in *Thuraissigiam v. DHS*, 917 F.3d 1097, 1100 (9th Cir. 2019), *cert. granted sub nom. DHS v. Thuraissigiam*, No. 19-161, 2019 WL 5281289 (U.S. Oct. 18, 2019). The motion is DENIED.

II

We have jurisdiction of this interlocutory appeal under 28 U.S.C. § 1292(a)(1). "We review the district court's decision to grant or deny a preliminary injunction for abuse of discretion." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (per curiam) (citation omitted). "Our review is limited and deferential." *Id.* The district court abuses its discretion when it makes an error of law. *Id.* "We review the district court's legal conclusions de novo, [and] the factual findings underlying its decision for clear error." *K.W. ex rel. D.W. v. Armstrong*, 789 F.3d 962, 969 (9th Cir. 2015) (citation omitted). "We do not 'determine the ultimate merits,' but rather 'determine only whether the district court correctly distilled the applicable rules of law and exercised permissible discretion in applying those rules to the facts at hand.'" *Saravia v. Sessions*, 905 F.3d 1137, 1141-42 (9th Cir. 2018) (quoting *Fyock v. Sunnyvale*, 779 F.3d 991, 995 (9th Cir. 2015)).

We also review the scope of the preliminary injunction, such as its nationwide effect, for abuse of discretion. *California v. Azar*, 911 F.3d 558, 568 (9th Cir. 2018), *cert. denied sub nom. Little Sisters of the Poor Jeanne Jugan Residence v. California*, 139 S. Ct. 2716 (2019). "We review de novo the existence of the district court's jurisdiction." *Rodriguez v. Cty. of Los Angeles*, 891 F.3d 776, 790 (9th Cir. 2018).

III

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he

is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Where the government is a party to a case in which a preliminary injunction is sought, the balance of the equities and public interest factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). After consideration of the arguments presented by both parties and several *amici curiae* and thorough review of the record, we conclude that the district court did not abuse its discretion in issuing Part B of the preliminary injunction and ordering that plaintiffs receive bond hearings; however, because the record is insufficient to support Part A of the preliminary injunction, we remand for further findings and reconsideration with respect to the particular process due to plaintiffs. On remand, the district court must further develop the factual record and revisit the scope of injunctive relief.

A

1

The Due Process Clause of the Fifth Amendment forbids the government from "depriv[ing]" any "person . . . of . . . liberty . . . without due process of law." The Supreme Court has made clear that all persons in the United States—regardless of their citizenship status, means or legality of entry, or length of stay—are entitled to the protections of the Due Process Clause. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (although "certain constitutional protections . . . are unavailable to aliens outside of our geographic borders . . . once 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"); *see also United States v. Raya-Vaca*, 771 F.3d 1195, 1202-03 (9th Cir. 2014) (observing that the "Supreme Court has categorically declared that once an individual has entered the United States, he is entitled to the protection of the Due Process Clause" and that "[e]ven an alien who has run some fifty yards into the United States has entered the country"); *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1108 (9th Cir. 2001) ("[O]nce an alien has 'entered' U.S. territory, legally or illegally, he or she has constitutional rights, including Fifth Amendment rights.").

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Zadvydas*, 533 U.S. at 690. Under the Due Process Clause, a person must be afforded adequate notice and hearing before being deprived of liberty. *See Mathews*, 424 U.S. at 333. "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) (quoting *Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011)).

The Supreme Court has held repeatedly that non-punitive detention violates the Constitution unless it is strictly limited, which typically means that the detention must be accompanied by a prompt individualized hearing before a neutral decisionmaker to ensure that the imprisonment serves the government's legitimate goals. *See, e.g.*, *United States v. Salerno*, 481 U.S. 739, 750-51 (1987) (pretrial detention of arrestees constitutional where statute provides for "extensive safeguards," including a "full-blown adversary hearing," in which the government must "provide[] by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community"); *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992) (individual entitled to "constitutionally adequate procedures to establish the grounds for his confinement"); *Kansas v. Hendricks*, 521 U.S. 346, 360, 364 (1997) (civil commitment statute that provided for confinement of "only a narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural standards," did not violate due process). Indeed, the Supreme Court has required individualized hearings for far lesser interests. *See Zadvydas*, 533 U.S. at 692 (criticizing administrative custody reviews and noting "[t]he Constitution demands greater procedural protection even for property"); *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970).

Immigration detention, like all non-punitive detention, violates the Due Process Clause unless "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. at 356). Although "[t]he government has legitimate interests in protecting the public and in ensuring that non-citizens in removal proceedings

appear for hearings, any detention incidental to removal must 'bear[ ] [a] reasonable relation to [its] purpose.'" *Hernandez*, 872 F.3d at 990 (quoting *Zadvydas*, 533 U.S. at 690).

"[G]iven the substantial liberty interests at stake," *Singh*, 638 F.3d at 1200, courts have repeatedly affirmed the importance of providing detained noncitizens individualized hearings before neutral decisionmakers. *See Hernandez*, 872 F.3d at 990 (requiring "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" (quoting *Singh*, 638 F.3d at 1203)); *Casas-Castrillon v. DHS*, 535 F.3d 942, 950 (9th Cir. 2008) (individuals subjected to prolonged detention pending judicial review of their removal orders are entitled to a bond hearing and an "individualized determination as to the necessity of [their] detention"); *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 862, 869 (2018) (Breyer, J., dissenting) (reviewing Supreme Court caselaw, which "almost always has suggested" that bail proceedings for noncitizens are necessary and that "[t]he Due Process Clause foresees bail eligibility as part of 'due process'"); *Salerno*, 481 U.S. at 746 ("When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner.").

Thus, we conclude that the district court did not abuse its discretion in applying *Mathews* and concluding that the plaintiffs were likely to succeed on their claim that they are constitutionally entitled to individualized bond hearings before a neutral decisionmaker.

The Supreme Court's decisions in *Zadvydas* and *Demore v. Kim*, 538 U.S. 510 (2003), are not to the contrary. In *Zadvydas*, the two petitioners were in a unique situation: they had been adjudicated removable and were being detained ostensibly to enable their deportation; however, their detention lasted longer than the usual 90-day removal period because no country would accept them. *Zadvydas*, 533 U.S. at 683-87. The Court avoided the constitutional question presented by potentially indefinite detention by construing the statute, under which detention was mandatory for the 90-day removal period and then discretionary, as limiting detention to a period "reasonably necessary" to effectuate removal. *See id.* at 689. In other words, the Court construed the statute in such a way as to ensure that detention pursuant to it was reasonably limited to its narrow purpose. *See id.*

In *Demore*, the Supreme Court held constitutional the detention of a noncitizen, who had conceded that he was deportable, pursuant to a statute that imposed detention without bond on a subset of noncitizens deportable for having committed enumerated crimes. *See* 538 U.S. at 526-28, 531; *see also* 8 U.S.C. § 1226(c). The Court held that this "narrow" detention policy "during the limited period" necessary to arrange for removal was reasonably related to the government's purpose of effectuating removal and protecting public safety for reasons that do not apply here. *Demore*, 538 U.S. at 526-28; *see also Jennings*, 138 S. Ct. at 869 (Breyer, J., dissenting) (describing *Demore* as "a deviation from the history and tradition of bail and alien detention"). In particular,

the Court in *Demore* placed great weight on congressional findings that the particular individuals subject to this detention policy presented a heightened risk of flight and danger to the community. *Demore*, 538 U.S. at 518-20. The Court also emphasized that the periods of detention at issue were typically very short—an average of 47 days and a median of 30 days in approximately 85 percent of cases, and an average of four months and a slightly shorter median time in the remaining 15 percent of cases. *See id.* at 529-30.[5] Further, the Court observed, these statistics did not include the "many" cases where a noncitizen was never subject to mandatory detention under the statute because his or her removal proceedings were completed while he or she served time for the underlying conviction. *Id.* at 529.

Here, in contrast, the government presented no evidence that Congress considered plaintiffs to present a particular risk of flight or danger—indeed, individuals in the same position as class members have been receiving bond hearings under *Matter of X-K-* for years as well as for many years before *Matter of X-K-* was decided. *See* 23 I. & N. Dec. at 731. Moreover, every plaintiff here will necessarily be subject to mandatory detention, and the duration of that detention is not similarly "limited." *See Demore*, 538 U.S. at 531. Indeed, the record here suggests that, based on statistics from the years 2010 through early 2019, plaintiffs may expect to be detained for anywhere from six months to over-a-year while their applications for asylum or protection

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[5] We acknowledge, however, that the government recently informed the Supreme Court that, with respect to duration of detention, "the statistics it gave to the Court in *Demore* were wrong." *Jennings*, 138 S. Ct. at 869 (Breyer, J., dissenting).

are fully adjudicated. This is far longer than the periods at issue in *Demore* or *Zadvydas*.

3

The government argues that such prolonged detention without a bond hearing is nonetheless constitutional because the government may release certain noncitizens on parole pursuant to 8 U.S.C. § 1182(d)(5)(A). *See Matter of M-S-*, 27 I. & N. Dec. at 519. By statute, however, DHS may parole noncitizens "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A); 8 C.F.R. § 212.5 (parole is "generally [] justified only on a case-by-case basis for 'urgent humanitarian reasons' or 'significant public benefit,' provided the aliens present neither a security risk nor a risk of absconding"). Moreover, parole decisions are solely in the discretion of the Secretary of DHS and are not judicially reviewable, 8 U.S.C. § 1252(a)(2)(B)(ii),[6] although individuals may seek a reconsideration based on changed circumstances, 8 C.F.R. § 212.5. The "term of parole expires 'when the purposes of such parole . . . have been served.'" *Matter of M-S-*, 27 I. & N. Dec. at 516 (noting limited circumstances under which parole may be granted by statute (quoting 8 U.S.C. § 1182(d)(5)(A))). By its terms, therefore, the parole process does not test the necessity of detention; it contains no mechanisms for ensuring that a noncitizen will be released from detention if his or her detention does not "bear[] [a] reasonable relation," *Zadvydas*, 533 U.S. at 690, to the government's "legitimate interests in protecting the public [or] in ensuring that non-citizens in

[6] These sections refer to the AG, but those functions have been transferred to the Secretary of DHS. *See* 6 U.S.C. §§ 251, 552(d); *Clark v. Suarez Martinez*, 543 U.S. 371, 374 n.1 (2005).

removal proceedings appear for hearings," *Hernandez*, 872 F.3d at 990.

The government urges us to consider, in the first instance, interim parole guidance issued in the wake of the preliminary injunction; however, this guidance is consistent with the statute and regulations and provides no additional procedural protections. To be considered for parole under the interim guidance, a noncitizen must first "satisfy" an officer that he or she is not a security or flight risk, at which point the officer may order release on parole for "urgent humanitarian reasons" or if detention is not in the public interest. Detention "may not be in the public interest . . . where, in light of available detention resources, detention of the subject alien would limit the ability of ICE to detain another alien whose release may pose a greater risk of flight or danger to the community." Under this guidance, ICE officers make parole determinations by checking one of five boxes on a form that requires no factual findings, no specific explanation, and no evidence of deliberation. Indeed, one of the checkboxes corresponds to five possible reasons for denying parole, without space to indicate which applies in a particular case.

In short, parole review is nothing like the "full-blown adversary hearing" that the Supreme Court has found adequate to justify civil confinement, *see, e.g.*, *Salerno*, 481 U.S. at 750-51, and it is "not sufficient to overcome the constitutional concerns raised by prolonged mandatory detention," *Rodriguez v. Robbins*, 715 F.3d 1127, 1144 (9th Cir. 2013); *see also Zadvydas*, 533 U.S. at 692 (suggesting that "the Constitution may well preclude granting an administrative body the unreviewable authority to make determinations implicating fundamental

rights" (citation and quotation marks omitted)); *St. John v. McElroy*, 917 F. Supp. 243, 251 (S.D.N.Y. 1996) (due process not satisfied by parole review; instead, it requires an "impartial adjudicator" to review detention since, "[d]ue to political and community pressure, the INS . . . has every incentive to continue to detain"). The district court thus did not abuse its discretion in concluding that the parole process is inadequate to ensure that class members are only detained where a valid governmental purpose outweighs their fundamental liberty interest.

4

The government also insists that plaintiffs' detention without bond does not present due process concerns because each individual alien can file a habeas petition to challenge the legality of his or her detention. In essence, the government argues for transferring the work of bond hearings in the first instance from the immigration courts to the district courts. Judicial economy would not be well-served by such a system.

Moreover, the obligation to provide due process exists regardless of whether a detainee files a habeas petition. *See Sopo v. U.S. Attorney Gen.*, 825 F.3d 1199, 1217 n.8 (11th Cir. 2016) ("The constitutional principles at play here, of course, apply to the government's conduct —detaining criminal aliens—whether a § 2241 petition is filed or only potentially forthcoming."), *vacated as moot*, 890 F.3d 952 (11th Cir. 2018). Plaintiffs should not be required to endure further delays while they contest the constitutionality of their detention.

The district court also properly reviewed the evidence before it and underscored the barriers that may

prevent many detained noncitizens in the plaintiff class from successfully filing and litigating habeas petitions. The district court had before it declarations testifying to the fact that noncitizens such as plaintiffs are frequently pro se, have limited English skills, and lack familiarity with the legal system, and that immigration detention centers have inadequate law libraries.

Thus, on this record, we cannot say that the district court abused its discretion by determining the theoretical availability of the habeas process did not alone satisfy due process.

5

The government also suggests that non-citizens lack any rights under the Due Process Clause. As we have discussed, this position is precluded by *Zadvydas* and its progeny. The government relies on inapposite cases that address the peculiar constitutional status of noncitizens apprehended at a port-of-entry, but permitted to temporarily enter the United States under specific conditions. *See, e.g.*, *Shaughnessy v. United States ex rel. Mezei* ("*Mezei*"), 345 U.S. 206, 208-09, 213-15 (1953) (noncitizen excluded while still aboard his ship, but then detained at Ellis Island pending final exclusion proceedings gained no additional procedural rights with respect to removal by virtue of his "temporary transfer from ship to shore" pursuant to a statute that "meticulously specified that such shelter ashore 'shall not be considered a landing'"); *Leng May Ma v. Barber*, 357 U.S. 185 (1958) (noncitizen paroled into the United States while waiting for a determination of her admissibility was not "within the United States" "by virtue of her physical presence as a parolee"); *Kaplan v. Tod*, 267 U.S. 228 (1925) (noncitizen excluded at Ellis Island but detained

instead of being deported immediately due to suspension of deportations during World War I "was to be regarded as stopped at the boundary line").

Indeed, these cases, by carving out exceptions not applicable here, confirm the general rule that once a person is standing on U.S. soil—regardless of the legality of his or her entry—he or she is entitled to due process. *See, e.g.*, *Mezei*, 345 U.S. at 212 ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."); *Leng May Ma*, 357 U.S. at 187 (explaining that "immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality," and recognizing, "[i]n the latter instance . . . additional rights and privileges not extended to those in the former category who are merely 'on the threshold of initial entry'" (quoting *Mezei*, 345 U.S. at 212)); *Kwai Fun Wong v. United States*, 373 F.3d 952, 973 (9th Cir. 2004) (explaining that "the entry fiction is best seen . . . as a fairly narrow doctrine that primarily determines the *procedures* that the executive branch must follow before turning an immigrant away" because "[o]therwise, the doctrine would allow any number of abuses to be deemed constitutionally permissible merely by labelling certain 'persons' as non-persons"). We thus conclude that the district court did not err in holding that plaintiffs are "persons" protected by the Due Process Clause.

6

For all these reasons, we conclude that the district court did not abuse its discretion in concluding that the

plaintiffs were likely to prevail on the merits of their due process claim regarding the availability of bond hearings.

B

Nor did the district court abuse its discretion in concluding that the plaintiffs would suffer irreparable harm absent the grant of a preliminary injunction. The district court found that, in the absence of preliminary relief, plaintiffs would suffer irreparable harm in the form of "substandard physical conditions, low standards of medical care, lack of access to attorneys and evidence as Plaintiffs prepare their cases, separation from their families, and retraumatization of a population already found to have legitimate circumstances of victimization." *Padilla*, 387 F. Supp. 3d at 1231. Contrary to the government's unsubstantiated arguments, the record supports the district court's conclusion, and we see no abuse of discretion.

C

The district court also did not abuse its discretion in determining that the balance of the equities and public interest favors plaintiffs with respect to Part B of the preliminary injunction.

The district court found that the equities on Plaintiffs' side consist of the deprivation of a fundamental constitutional right and its attendant harms, which range from physical, emotional, and psychological damages to unnecessarily prolonged family separation. *Padilla*, 387 F. Supp. 3d at 1231; *see also Padilla*, 379 F. Supp. 3d at 1181. The court also observed that "it is always in the public interest to prevent the violation of a party's constitutional rights." *Padilla*, 387 F. Supp.

3d at 1232 (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)). On the other side, the district court weighed defendants' expressed interests in the administration of immigration law, in controlling their dockets, and in allocating their limited resources as they see fit—*i.e.*, "the efficient administration of the immigration laws." *Padilla*, 387 F. Supp. 3d at 1231; *see also Padilla*, 379 F. Supp. 3d at 1181. The court concluded that the balance of hardships "tips decidedly in plaintiffs' favor." *Padilla*, 387 F. Supp. 3d at 1232 (quoting *Hernandez*, 872 F.3d at 996).

Defendants argue that the district court erred in balancing the equities because the government suffers irreparable injury anytime a statute is enjoined. This court has recognized that there is "some authority" for the idea that "a state may suffer an abstract form of harm whenever one of its acts is enjoined," but, "to the extent that is true . . . it is not dispositive of the balance of harms analysis." *Latta v. Otter*, 771 F.3d 496, 500 (9th Cir. 2014) (quoting *Indep. Living Ctr. of So. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 658 (9th Cir. 2009) (alterations omitted), *vacated and remanded on other grounds*, 132 S. Ct. 1204 (2012)); *see also id.* at 500 n.1 (noting that "[i]ndividual justices, in orders issued from chambers, have expressed the view that a state suffers irreparable injury when one of its laws is enjoined, [but] [n]o opinion for the Court adopts this view" (citations omitted)). The district court thus did not commit legal error in this respect. *See also Robbins*, 715 F.3d at 1145 (finding that balance of equities favored detained noncitizens and noting that the government "cannot suffer harm from an injunction that merely ends an unlawful practice").

In sum, we conclude that the district court did not abuse its discretion in determining that the balance of the equities and public interest favors plaintiffs.

D

Because the district court did not abuse its discretion in applying the *Winter* factors to determine whether plaintiffs were entitled to a preliminary injunction requiring that they receive bond hearings, we affirm Part B of the preliminary injunction.

IV

We now consider the specific procedural requirements the district court imposed in its preliminary injunction order for the required bond hearings.

As we have noted, "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333 (citation and quotation marks omitted). Accordingly, bond hearings must be held promptly and must involve adequate procedural protections to ensure that detention is reasonably related to preventing flight or danger to the community. *See Hernandez*, 872 F.3d at 990. The current record is, however, insufficient to support the district court's findings with respect to likelihood of success, the harms facing plaintiffs, and the balance of the equities implicated by Part A of the preliminary injunction—and particularly with respect to the requirement that the class members receive a bond hearing within seven days of making such a request or be released.

The record contains evidence describing wait times faced by detained noncitizens generally and class mem-

bers prior to *Matter of M-S-*, but does not contain sufficient specific evidence justifying a seven-day timeline, as opposed to a 14-day, 21-day, or some other timeline. The district court also made insufficient findings regarding the extent to which the procedural requirements in Part A—and their nationwide scope—may burden the immigration courts. Critically, since the entry of the preliminary injunction, the number of individuals currently in expedited removal proceedings—and thus the number of class members—may have increased dramatically. *See* Designating Aliens for Expedited Removal, 84 Fed. Reg. at 35,413-14 (expanding expedited removal to the statutory limit). The government submitted on appeal declarations explaining the operational difficulties that the procedural requirements in Part A will cause. Such evidence is properly considered in the first instance by the district court.

The threat of irreparable harm to plaintiffs, the balancing of the equities, and the public interest implicated by Part A of the preliminary injunction present intensely factual questions. The factual landscape has shifted as this case has developed, including the time between the district court's first preliminary injunction order and modified preliminary injunction order, and the district court did not consider these developments when entering the modified preliminary injunction order. Accordingly, although we affirm Part B of the preliminary injunction, we remand this case to the district court for further factual development on the *Winter* factors with respect to Part A of the preliminary injunction. As set forth below, we also direct the district court on remand to revisit the injunction's scope.

V

The defendants argue that, under 8 U.S.C. § 1252(f)(1), the district court lacked authority to grant injunctive relief in this case. We disagree.

Section 1252(f)(1) provides that "no court (other than the Supreme 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." All of the individuals in the plaintiff class here are "individual[s] against whom proceedings under such part have been initiated." *See id.*

Although the Supreme Court has analyzed the impact of § 1252(f)(1) on classwide relief in suits filed by organizations, it has never had an opportunity to consider the meaning of the statute's exception clause and its effect on the availability of classwide relief where every member of a class is "an individual alien against whom proceedings under such part have been initiated." *See id.* The Supreme Court observed in *Reno v. American-Arab Anti-Discrimination Committee* ("*AADC*") that § 1252(f)(1) is "nothing more or less than a limit on injunctive relief. It prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1231, but specifies that this ban does not extend to individual cases." 525 U.S. 471, 481-82 (1999). The Court made this observation in the course of rejecting an argument that the subsection provided an affirmative grant of jurisdiction. *See id.*

Because *AADC* was not a class action, "[t]he Court in *AADC* did not consider, and had no reason to consider,

the application of § 1252(f)(1) to [] a class" in which "[e]very member . . . falls within the provision's exception." *Jennings*, 138 S. Ct. at 875 (2018) (Breyer, J., dissenting). In *Jennings*, the Supreme Court made clear that the question is unresolved, quoting *AADC*, but remanding to this court to consider in the first instance whether classwide injunctive relief is available under § 1252(f)(1)). *See id.* at 851.

As we noted in *Rodriguez v. Marin*, § 1252(f)(1) does not on its face bar class actions or classwide relief. 909 F.3d 252, 256 (9th Cir. 2018) (remanding in turn to the district court to consider in the first instance whether § 1252(f)(1) precluded the injunctive relief sought there). We decline the government's invitation to read into the text, or in *AADC*, a broad but silent limitation on the district court's powers under Federal Rule of Civil Procedure 23. "In the absence of a direct expression by Congress of its intent to depart from the usual course of trying 'all suits of a civil nature' under the Rules established for that purpose, class relief is appropriate in civil actions brought in federal court." *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979).

Section 1252(f)(1)'s silence as to class actions is especially significant because its neighboring subsection, § 1252(e)(1)(B), adopted at the same time by the same Congress, expressly prohibits class actions. *See* 8 U.S.C. § 1252(e)(1)(B) (barring 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"); *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018). Congress knows how to speak unequivocally when it wants to alter the availability of class actions in immigration cases. It did not do so here.

See Hayes, 591 F.3d at 1119 (construing § 1252(f)(1) narrowly as not banning classwide declaratory relief in light of § 1252(e)'s breadth); *Am. Immigration Lawyers Ass'n v. Reno* ("*AILA*"), 199 F.3d 1352, 1359 (D.C. Cir. 2000) (noting that § 1252(e) contains a "ban on class actions" while § 1252(f)(1) contains a different limitation); *see also Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) ("[W]hen 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." (quotation marks and citation omitted)).

The government contends that our interpretation of § 1252(f)(1) as applied to this case renders superfluous the word "individual" in the phrase "individual alien." However, the word "individual" is not superfluous if Congress intended it to prohibit injunctive relief with respect to organizational plaintiffs. *Cf. Califano*, 442 U.S. at 701 (explaining that a statute authorizing a suit by "any individual" and "contemplat[ing] case-by-case adjudication" does not foreclose classwide relief because "[w]here the district court has jurisdiction over the claim of each individual member of the class, [FRCP] 23 provides a procedure by which the court may exercise that jurisdiction over the various individual claims in a single proceeding"); *Brown v. Plata*, 563 U.S. 493, 531 (2011) (provision stating that a remedy shall extend no further than necessary to remedy the violation of the rights of a "particular plaintiff or plaintiffs" was not a limitation on classwide injunctive relief, but instead meant that the "scope of the order must be determined with reference to the constitutional violations established by the specific plaintiffs before the court").

The statute's legislative history supports our reading. *See Pac. Coast Fed'n of Fishermen's Ass'ns v. Glaser*, 937 F.3d 1191, 1196 (9th Cir. 2019) (explaining that courts "may use canons of construction, legislative history, and the statute's overall purpose to illuminate Congress's intent"). Congress adopted § 1252(f)(1) after a period in which organizations and classes of persons, many of whom were not themselves in proceedings, brought preemptive challenges to the enforcement of certain immigration statutes. *See, e.g.*, *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 47-51 (1993) (appeal from orders invalidating INS regulations in class actions brought by immigration rights groups); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 487-88 (1991) (appeal from order holding certain INS practices unconstitutional and requiring INS to modify its practices in action brought by immigrant rights group on behalf of a class of farmworkers); *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1026 (5th Cir. Unit B 1982) (affirming finding that new asylum procedures violated due process in case brought by an organization on behalf of a class of Haitians who had petitioned for political asylum); *see also AILA*, 199 F.3d at 1359-60 ("Congress meant to allow litigation challenging the new system by, and only by, aliens against whom the new procedures had been applied").

The statute's legislative history also reveals that Congress was concerned that § 1252(f)(1) not hamper a district court's ability to address imminent rights violations. *See* H.R. Rep. No. 104-469(I), at 161 (1996) (explaining that § 1252(f)(1) limited courts' "authority to enjoin procedures established by Congress to reform the process of removing illegal aliens from the U.S.," but

preserved their ability to "issue injunctive relief pertaining to the case of an individual alien, and thus protect against any immediate violation of rights"). This history supports the view that Congress intended § 1252(f)(1) to restrict courts' power to impede the new congressional removal scheme on the basis of suits brought by organizational plaintiffs and noncitizens not yet facing proceedings under 8 U.S.C. §§ 1221-1232. Here, where the class is composed of individual noncitizens, each of whom is in removal proceedings and facing an immediate violation of their rights, and where the district court has jurisdiction over each individual member of that class, classwide injunctive relief is consistent with that congressional intent.

Thus, upon interlocutory review, we conclude that § 1252(f)(1) did not bar the district court from granting preliminary injunctive relief for this class of noncitizens, each of whom is an individual noncitizen against whom removal proceedings have been initiated.

VI

Although defendants dispute the district court's authority to issue classwide injunctive relief under § 1252(f)(1), defendants do not challenge the scope of the preliminary injunction. We conclude that the district court did not abuse its discretion in granting a preliminary injunction with respect to the nationwide class.

Where, as here, a district court has already certified a nationwide class, the concerns associated with broad injunctions are minimized. "If a class action is otherwise proper, and if jurisdiction lies over the claims of the members of the class, the fact that the class is nationwide in scope does not necessarily mean that the

relief afforded the plaintiffs will be more burdensome than necessary to redress the complaining parties." *Califano*, 442 U.S. at 702. *Cf. Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501 (9th Cir. 1996) ("[I]njunctive relief generally should be limited to apply only to named plaintiffs where there is no class certification."). "[T]he scope of [a] remedy is determined by the nature and extent of the . . . violation," *Milliken v. Bradley*, 433 U.S. 267, 270 (1977), and "not by the geographical extent of the plaintiff," *Califano*, 442 U.S. at 702.

The nationwide class in this case is defined by a shared alleged constitutional violation. *See Padilla*, No. C18-928 MJP, 2019 WL 1056466, at *6 (W.D. Wash. Mar. 6, 2019). The injunction seeks to remedy that constitutional violation. In certifying the class, the court observed that, in addition to establishing numerosity, commonality, typicality and adequacy, plaintiffs had demonstrated "that the challenged conduct is 'such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Id.* (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011)). The court further concluded that certification of a nationwide class was "manifestly" appropriate, and it rejected defendants' request to limit the scope of class certification. *See id.*[7] Defendants did not seek

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[7] The district court rejected defendants' request to limit the class to individuals located in the Western District of Washington. *Id.* The court noted that class representatives were transferred all over the country before landing in Washington and that detained immigrants are routinely transferred throughout the country prior to adjudicating their cases. *Id.* The court also found that defendants apply a uniform "indefinite detention" policy across the country and that class members face the same allegedly improper circumstances

to appeal class certification on any grounds, nor have they suggested at any point during this appeal that the nationwide scope of the certified class is improper. We have already concluded that the district court did not abuse its discretion in holding that members of the certified class are constitutionally entitled to bond hearings. Therefore, we cannot conclude that the district court abused its discretion in issuing classwide preliminary injunctive relief. Nonetheless, on remand, in considering the appropriate procedures that must be followed with respect to the required bond hearings, the district court must revisit the nationwide scope of the injunction to ensure that it is not "more burdensome than necessary to redress the complaining parties." *See Califano*, 442 U.S. at 702.

VII

In sum, the district court did not abuse its discretion in concluding that plaintiffs are likely to succeed on their challenge under the Due Process Clause to the detention of class members without any opportunity for a bond hearing. The district court likewise did not abuse its discretion in finding plaintiffs would suffer irreparable harm absent preliminary relief and that the balance of the equities and public interest favored plaintiffs. Part B of the district court's preliminary injunction is thus

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of detention regardless of their location. *Id.* The court could not identify—and defendants did not cite—any ongoing litigation of the same issue in other districts. *Id.* Finally, noting that the overwhelming majority of class members are not sufficiently resourced to pursue individual litigation, the court rejected defendants' argument that class members should be afforded the opportunity to seek "speedier individual recovery." *Id.* Defendants have not raised any similar arguments on appeal.

AFFIRMED, except to the extent that it requires that bond hearings be administered under the conditions enumerated in Part A.

We **VACATE** and **REMAND** Part A of the preliminary injunction to the district court for further factual development and consideration of the procedures that must be followed with respect to the required bond hearings. The district court must further develop the relevant factual record and revisit the scope of the injunction.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

BADE, Circuit Judge, dissenting:

In keeping with the current trend in constitutional challenges to the enforcement of immigration statutes, the district court issued a classwide, nationwide preliminary injunction against the operation of 8 U.S.C. § 1225(b)(1)(B)(ii). But Congress plainly barred lower courts from issuing such injunctions except as to "an individual alien," 8 U.S.C. § 1252(f)(1), and the Supreme Court has construed § 1252(f)(1) as a jurisdictional bar on a lower court's ability to issue classwide injunctive relief. Despite this authority (and the plain language of the statute, general statutory construction principles, and the holdings of two of our sister circuits), the majority opinion finds jurisdiction in this case.

I respectfully dissent.

I.

Section 1252(f)(1) is straightforward. It provides that:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no 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). Recognizing the simplicity of this language, the Supreme Court has repeatedly interpreted this statute as a bar on classwide injunctive relief against the operation of 8 U.S.C. §§ 1221-1232. *See*

Jennings v. Rodriguez, 138 S. Ct. 830, 851 (2018) (confirming that § 1252(f)(1) bars federal courts from issuing classwide injunctive relief against the operation of §§ 1221-1232); *Nken v. Holder*, 556 U.S. 418, 431 (2009) (describing § 1252(f)(1) as "a provision prohibiting class wide injunctions against the operation of removal provisions"); *Reno v. Am.-Arab Anti-Discrimination Comm.* ("*AADC*"), 525 U.S. 471, 481-82 (1999) ("By its plain terms, and even by its title, that provision is nothing more or less than a limit on injunctive relief. It prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-123[2], but specifies that this ban does not extend to individual cases.").

The majority opinion brushes these cases aside because the Supreme Court has yet to construe § 1252(f)(1) in a case brought by a class of aliens all of whom were in removal proceedings. Maj. Op. 30-31. Although the majority opinion is correct that *AADC* and *Nken* were not class actions brought by aliens in removal proceedings, *Jennings* was such a class proceeding. And in that case, the Court was dubious that a lower court would have jurisdiction to issue a classwide injunction in the context of a constitutional challenge to §§ 1221-1232. *See Jennings*, 138 S. Ct. at 851 (explaining that the Ninth Circuit's reasoning for exercising jurisdiction over a class action statutory claim seeking injunctive relief against the operation of §§ 1225-1226 "does not seem to apply to an order granting relief on constitutional grounds").[1]

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[1] In *Jennings*, the Ninth Circuit exercised jurisdiction over a statutory challenge brought by a class of aliens in removal proceedings because the claim was premised on conduct allegedly "not author-

Nothing in the Supreme Court's precedent suggests that the Court has changed its mind since deciding *Jennings*. And, even if we characterize the Court's repeated statements about § 1252(f)(1) as dicta, we are "advised to follow" them. *Lemoge v. United States*, 587 F.3d 1188, 1193 (9th Cir. 2009) (quoting *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1129 (9th Cir. 2006) (en banc)); *see, e.g.*, *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) (en banc) (noting that "Supreme Court dicta have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold" (internal quotation marks and citation omitted)). The majority opinion does not follow the Court's interpretation of § 1252(f)(1), but then fails to persuasively explain why the Court would—despite its skepticism in *Jennings*—rule differently in the circumstances of this case.

Even if we could (or should) sidestep *Jennings*, *Nken*, and *AADC*, a proper statutory analysis leads to the same result. The majority opinion's conclusion that jurisdiction exists is based on a faulty reading of § 1252(f)(1)'s plain language and misapplication of statutory construction principles.

II.

When construing a statute, "no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation

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ized by the statutes" and therefore the claim did not go to the "operation of" the removal provisions. 138 S. Ct. at 851. Here, in contrast, Plaintiffs do not argue that their constitutional challenge seeks to prevent conduct not authorized by § 1225(b)(1)(B)(ii); they directly challenge the "operation of" that statute.

omitted). The majority opinion's reading of § 1252(f)(1) —specifically its interpretation of "an individual alien" —departs from this long-established rule. As the majority opinion construes the statute, the word "individual" stands as a mere superfluity. *See Hamama v. Adducci* ("*Hamama I*"), 912 F.3d 869, 877 (6th Cir. 2018) ("There is no way to square the concept of a class action lawsuit with the wording 'individual' in [§ 1252(f)(1)].").

The majority opinion defines "individual" as the opposite of "organization," apparently concluding that Congress added "individual" to § 1252(f)(1) to ensure that "alien" refers to a person, not an artificial entity. Maj. Op. 32. But this definition renders "individual" superfluous because an organizational or artificial entity "alien" does not exist for purposes of the immigration statutes. *See* 8 U.S.C. § 1101(a)(3) (defining "alien" as "any person not a citizen or national of the United States"). To be given effect, "individual" can only be read as an *adjective* providing a separate, numerical limitation on the clause's noun, "alien." *See Individual*, Black's Law Dictionary (11th ed. 2019) (defining "individual" when used as an adjective as "[e]xisting as an indivisible entity" or "[o]f, relating to, or involving a *single* person or thing, as opposed to a group" (emphasis added)).[2]

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[2] The Dictionary Act instructs that when a statute includes a word "importing the singular," that word applies to "several persons, parties, or things" "unless the context indicates otherwise." 1 U.S.C. § 1. Here, "alien" is a singular term and thus should generally be construed as applying to multiple aliens. The context of § 1252(f)(1), however, indicates otherwise: by adding the adjective "individual," Congress placed a specific, standalone numerical limitation on the term "alien." If the Dictionary Act required both "individual" and "alien" to be read as applying to multiple persons, "individual" becomes superfluous.

The majority opinion's construction would be palatable only if Congress had replaced the phrase "an individual alien" with "any alien" or "an alien"—as it did in over a dozen other subsections of the statute. *See, e.g.*, 8 U.S.C. §§ 1252(a)(2)(C), 1252(b)(3)(B), 1252(b)(4)(C), 1252(b)(9), 1252(e)(1)(A), 1252(e)(4)(B), 1252(f)(2), 1252(g).[3] Had Congress used either of these alternatives, there would be no separate numerical limitation on "alien," there would be no reason for us to define "individual," and the majority opinion's perceived legislative goal of preventing organization-led preemptive challenges to immigration statutes would be achieved. But we cannot rewrite the statute, *see Dodd v. United States*, 545 U.S. 353, 359 (2005) ("[W]e are not free to rewrite the statute that Congress has enacted."), nor can we overlook Congress's use of different language in separate provisions of the same statute, *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004). Congress specifically precluded lower courts from issuing injunctive relief except as to "an individual alien," and that is the language we must enforce. *See Dodd*, 545 U.S. at 359. And because Congress "use[d] certain language in one part of the statute and different language in another, [we] assume[] different meanings were intended." *Sosa*, 542 U.S. at 711 n.9 (citation omitted).

III.

The majority opinion also posits that if Congress intended to bar classwide injunctive relief, it would have explicitly barred class actions like it did in a neighboring statute, 8 U.S.C. § 1252(e)(1)(B). Maj. Op. 31-32. But

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[3] In § 1252, the phrase "an individual alien" is found only in subsection (f)(1), while "an alien" and "any alien" are used fifteen times in subsections (a), (b), (e), (f)(2), and (g).

barring class certification altogether (the function of § 1252(e)(1)(B)) fundamentally differs from barring a type of relief that a court can issue (the function of § 1252(f)(1)). The two statutes serve different purposes, and § 1252(f)(1) does not preclude class actions wholesale; it narrowly limits the available relief.

The majority opinion relies, in part, on *Califano v. Yamasaki*, 442 U.S. 682 (1979), to argue that Congress did not intend to prohibit classwide injunctive relief in § 1252(f)(1). This reliance on *Califano*, a case analyzing a provision in the Social Security Act, 42 U.S.C. § 405(g), is misplaced. In *Califano*, the Court found that a statute affirmatively authorizing a suit by "[a]ny individual" did not foreclose class actions because Federal Rule of Civil Procedure 23 "provides a procedure by which [a] court may exercise . . . jurisdiction over the various individual claims in a single proceeding." 442 U.S. at 701. But 42 U.S.C. § 405(g) and 8 U.S.C. § 1252(f)(1) differ materially in form and in substance. The former explicitly authorizes "[a]ny individual" to file a lawsuit and thus is a jurisdictional *conferring* statute. *See* 42 U.S.C. § 405(g). It does not prohibit a court from issuing a specific form of relief, nor does it carve out an exception to a general statutory bar. In contrast, the latter is a jurisdictional *stripping* statute that categorically bars a type of relief but carves out a narrow exception for "an individual alien." *See* 8 U.S.C. § 1252(f)(1). It does not fully foreclose a class or multiparty lawsuit, *see Rodriguez v. Marin*, 909 F.3d 252, 259 (9th Cir. 2018), nor does it grant jurisdiction, *see AADC*, 525 U.S. at 481-82. And in contrast to § 405(g)'s use of "individual" as a standalone noun, § 1252(f)(1) uses "individual" as an adjective to numerically limit "alien."

In short, *Califano* "does not stop the [c]ourt from looking at a particular statute that uses the word 'individual' and determining that, even if the use of 'individual' does not always bar class actions, it does bar them in the particular statute at issue." *Hamama I*, 912 F.3d at 878.

Section 1252(f)(1)'s title ("Limit on *injunctive* relief") and its first clause ("*Regardless* of the nature of the action or claim or of the identity of the party *or parties* bringing the action") further demonstrate its functional difference from 8 U.S.C. § 1252(e)(1)(B) and 42 U.S.C. § 405(g). As recognized by the Supreme Court, § 1252(f)(1)'s title portends what the language of the statute makes plain: the statute generally prohibits injunctive relief. *See AADC*, 525 U.S. at 481-82. And its opening clause recognizes that a lower court has jurisdiction over cases filed by multiple "parties," but states that "[r]egardless" of whether the action is brought by one "party" or multiple "parties," lower courts cannot issue injunctive relief except as to "an individual alien against whom proceedings under such part have been initiated." 8 U.S.C. § 1252(f)(1). Thus, by its explicit terms, § 1252(f)(1) bars *both* classwide injunctions and injunctive relief for aliens who are not in removal proceedings.

IV.

Perhaps seeking a foothold for its shaky analysis, the majority opinion also resorts to the statute's legislative history. Maj. Op. 32-34. But "where, as here, the words of the statute are unambiguous, the judicial inquiry is complete." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (internal quotation marks and citation omitted); *see Robinson v. Shell Oil Co.*, 519 U.S. 337, 340

(1997) ("Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent." (internal quotation marks and citation omitted)). The majority opinion fails to identify any ambiguity in § 1252(f)(1), nor have I discovered any such language.

In any event, the scant discussion in the statute's legislative history specifically addressing § 1252(f)(1) does not salvage the majority opinion's interpretation. Without explaining the relevance, the majority opinion first notes that Congress enacted § 1252(f)(1) after a "period" when organizational plaintiffs filed "preemptive challenges" against "the enforcement of certain immigration statutes." Maj. Op. 32. This statement may be true as far as it goes, but we should not bootstrap our interpretation of a statute on a hypothesis that Congress silently intended the legislation to prevent organization-led preemptive lawsuits of which it may have been unaware.[4]

The majority opinion also relies on a House Committee report to support its reading of § 1252(f)(1) as allowing classwide injunctive relief when each class member "is in removal proceedings and facing an immediate violation of rights." Maj. Op. 33-34. The relevant portion of this report provides, in full, as follows:

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[4] We, of course, can assume that Congress was "aware of relevant judicial precedent" when it enacted § 1252(f)(1), *see Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010), but for what "relevant judicial precedent" would we assume such Congressional awareness? The majority opinion does not identify any pre-§ 1252(f)(1) case addressing the threshold jurisdictional question at issue here—nor can it: the statutory bar on classwide injunctive relief did not exist until the enactment of § 1252(f)(1) in 1996.

> Section 306 also limits the authority of Federal courts other than the Supreme Court to enjoin the operation of the new removal procedures established in this legislation. These limitations do not preclude challenges to the new procedures, but the procedures will remain in force while such lawsuits are pending. In addition, courts may issue injunctive relief pertaining to the case of an individual alien, and thus protect against any immediate violation of rights. However, single district courts or courts of appeal do not have authority to enjoin procedures established by Congress to reform the process of removing illegal aliens from the U.S.

H.R. Rep. No. 104-469(I), at 161 (1996).

Although this report holds "no binding legal effect," *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 684 (9th Cir. 2007), the majority opinion emphasizes the phrase "immediate violation of rights." In so doing, it overlooks the preceding clause: "courts may issue injunctive relief pertaining to *the case* of *an individual alien*." H.R. Rep. No. 104-469(I), at 161 (emphasis added). Like the statute itself, this language specifically describes the scope of the carve out using singular phrasing. And the next sentence firmly states that lower courts cannot "enjoin procedures established by Congress to reform the process of removing illegal aliens from the U.S." *Id.* Contrary to the majority opinion's view, this report shows that Congress wanted to prevent lower courts from issuing sweeping injunctions —such as the classwide, nationwide injunction at issue here—against its enacted removal procedures.

In sum, the legislative history does not support the majority opinion's reading of § 1252(f)(1). It is ambiguous at best and cannot override the clear statutory language. *See Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1814 (2019) ("[E]ven those of us who believe that clear legislative history can illuminate ambiguous text won't allow ambiguous legislative history to muddy clear statutory language." (internal quotation marks and citation omitted)).

V.

I am not the first to conclude that § 1252(f)(1) bars classwide injunctive relief under the circumstances of this case. In a constitutional challenge to continued detention under the immigration statutes brought by a class of aliens in removal proceedings, the Sixth Circuit applied the Supreme Court's reading of § 1252(f)(1) to hold that the statute bars classwide injunctive relief. *See Hamama I*, 912 F.3d at 877 ("In our view, [*AADC*] unambiguously strips federal courts of jurisdiction to enter class-wide injunctive relief[.]"); *see also Hamama v. Adducci* ("*Hamama II*"), 946 F.3d 875, 877 (6th Cir. 2020) ("Congress stripped all courts, save for the Supreme Court, of jurisdiction to enjoin or restrain the operation of 8 U.S.C. §§ 1221-1232 on a class-wide basis." (citing 8 U.S.C. § 1252(f)(1))). The Tenth Circuit reached the same result. *See Van Dinh v. Reno*, 197 F.3d 427, 433 (10th Cir. 1999) (holding that "§ 1252(f) forecloses jurisdiction to grant class-wide injunctive relief to restrain operation of §§ 1221-[12]3[2] by any court other than the Supreme Court").

We should "decline to create a circuit split unless there is a compelling reason to do so." *Kelton Arms Condo. Owners Ass'n, Inc. v. Homestead Ins. Co.*, 346

F.3d 1190, 1192 (9th Cir. 2003). The majority opinion fails to identify such a "compelling reason." As a result, even though we trail two other circuits in addressing this issue, the majority opinion makes us the first and only circuit to conclude that § 1252(f)(1) does not bar classwide injunctive relief.

VI.

Even if the district court had jurisdiction to issue classwide injunctive relief, the preliminary injunction is overbroad and extends far beyond the demands of due process.

The district court certified the Bond Hearing Class as:

> All 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.

Padilla v. U.S. Immigration & Customs Enf't, No. C18-928 MJP, 2019 WL 1056466, at *1 (W.D. Wash. Mar. 6, 2019). The district court then issued the two-part preliminary injunction that is the subject of this appeal. In Part A of the injunction, the district court ordered the government to provide bond hearings with various procedures that supposedly are required by the Constitution, including that the hearings be conducted within seven days of a request. *Padilla v. U.S. Immigration & Customs Enf't*, 387 F. Supp. 3d 1219, 1232 (W.D. Wash. 2019). In Part B, the district court "f[ound] that the statutory prohibition at [§ 1225(b)(1)(B)(ii)] against

releasing on bond persons found to have a credible fear and awaiting a determination of their asylum application violates the U.S. Constitution." *Id.* In Part B, the district court also found that "the Bond Hearing Class is constitutionally entitled to a bond hearing before a neutral decisionmaker (under the conditions enumerated [in Part A]) pending resolution of their asylum applications." *Id.*

The majority opinion concludes that "[t]he current record is . . . insufficient to support the district court's findings with respect to likelihood of success, the harms facing plaintiffs, and the balance of the equities implicated by Part A of the preliminary injunction—and particularly with respect to the requirement that the class members receive a bond hearing within seven days of making such a request or be released." Maj. Op. 28. The majority opinion finds that the record "does not contain sufficient specific evidence justifying a seven-day timeline, as opposed to a 14-day, 21-day, or some other timeline." Maj. Op. 28. Ultimately, the majority opinion affirms Part B "except to the extent that it requires that bond hearings be administered under the conditions enumerated in Part A" and remands Part A for "further factual development and consideration" of the bond hearing procedures. Maj. Op. 36.

This holding raises multiple concerns, and Part B's breadth is the most troublesome. Plaintiffs concede that they do not assert a facial challenge to § 1225(b)(1)(B)(ii). Nonetheless, in Part B the district court deems the statute unconstitutional in its entirety, rather than as applied to the Bond Hearing Class. *See Padilla*, 387 F. Supp. 3d at 1232 ("[F]ind[ing] that the statutory prohibition at [§ 1225(b)(1)(B)(ii)] against releasing on bond

persons found to have a credible fear and awaiting a determination of their asylum application violates the U.S. Constitution[.]"). Section 1225(b)(1)(B)(ii) requires the government to detain multiple categories of aliens, not only those aliens who meet the definition of the Bond Hearing Class.[5] But the district court did not exclude from its sweeping finding of unconstitutionality the application of the statute to detain other aliens who are not members of the Bond Hearing Class, such as "arriving" aliens under § 1225(b)(1)(A)(ii). By rendering § 1225(b)(1)(B)(ii) wholly unconstitutional, Part B is overbroad.[6]

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[5] Section 1225(b)(1)(B)(ii) mandates detention of any alien referred to in § 1225(b)(1)(A)(ii) who an asylum officer determines has a credible fear of persecution. *See* 8 U.S.C. § 1225(b)(1)(B)(i)-(ii). Section 1225(b)(1)(A)(ii) refers to two types of aliens: (1) those "arriving in the United States"; and (2) those "described" in § 1225(b)(1)(A)(iii), including an alien "who has not been admitted or paroled into the United States, and who has not affirmatively shown . . . that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility." 8 U.S.C. § 1225(b)(1)(A)(ii)-(iii). Members of the Bond Hearing Class are in the latter group, and do not include arriving aliens.

[6] The law has long recognized a distinction between the process due to aliens arriving at our borders and to those who have already entered the country. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."). And unlike members of the Bond Hearing Class, arriving aliens have not entered the country. *See, e.g.*, *Alvarez-Garcia v. Ashcroft*, 378 F.3d 1094, 1097 (9th Cir. 2004) ("[A]lthough aliens seeking admission into the United States may physically be allowed within its borders pending a determination of admissibility, such aliens are legally considered to be detained at the border and hence as never having effected entry into

Furthermore, the majority opinion suggests that although the record does not support a seven-day deadline for bond hearings, it may support a 14-day, 21-day, or other unspecified but presumably similarly limited deadline. *See* Maj. Op. 28. But decisions made in similar contexts by the Supreme Court and this court establish that due process is not so demanding. Rather, these cases hold that, as a constitutional matter, the government need only provide bond hearings to detained aliens once the detention becomes "prolonged" or fails to serve its immigration purpose, a period generally understood to be six months. *See Clark v. Martinez*, 543 U.S. 371, 386 (2005) (applying a "6-month presumptive detention period"); *Demore v. Kim*, 538 U.S. 510, 527-31 (2003) (upholding as constitutional the detention of aliens for the entire duration of removal proceedings under 8 U.S.C. § 1226(c)); *Zadvydas*, 533 U.S. at 699, 701-02 (holding that six months is a "presumptively reasonable period of detention" under 8 U.S.C. § 1231(a)(6)); *Marin*, 909 F.3d at 256-57 (expressing doubt "that any statute that allows for arbitrary prolonged detention without any process is constitutional"); *Diouf v. Napolitano*, 634 F.3d 1081, 1092 n.13 (9th Cir. 2011) (defining detention under 8 U.S.C. § 1231(a)(6) as "prolonged when it has lasted six months and is expected to continue more than minimally beyond six months").[7]

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this country."). The detention of arriving aliens under § 1225(b)(1)(B)(ii) was not an issue before the district court (or this court) in this as-applied challenge.

[7] The impact of a longer detention period runs deeper than the preliminary injunction; it creates an Article III standing dilemma for the Bond Hearing Class. Standing requires, among other things, an actual or imminent injury in fact, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and "at least one named plaintiff" in a

Although "detention during deportation proceedings [i]s a constitutionally valid aspect of the deportation process," *Demore*, 538 U.S. at 523, the majority opinion cites no decision from the Supreme Court or this court suggesting that two or three weeks constitutes "prolonged" detention.[8]

VII.

The majority opinion does not square with the plain text of § 1252(f)(1), is inconsistent with multiple Supreme Court cases, and needlessly creates a circuit split. Despite Congress unequivocally barring lower courts from issuing classwide injunctions against the operation of certain immigration statutes, the majority opinion gives a green light for the district courts in this circuit (as well as this court) to issue (and uphold) such relief. And, even if the district court had jurisdiction to issue injunctive relief, the preliminary injunction is overbroad and exceeds what the Constitution demands.

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class action must establish standing, *see Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc). As the district court found, the longest period a named plaintiff for the Bond Hearing Class waited to obtain a bond hearing after securing a positive credible fear determination was about three weeks, *see Padilla*, 2019 WL 1056466, at *1-2, a period far shorter than the presumptively reasonable six months.

[8] As to the other procedural requirements imposed by the district court in Part A of the preliminary injunction (*e.g.*, placing the burden of proof on the government, requiring the government to record the bond hearing and produce the recording or a verbatim transcript on appeal, and requiring the government to provide a written decision with particularized determinations of individualized findings on the same day as the hearing), I agree with the majority opinion that the record does not support those procedures, and I find it exceedingly unlikely that the Constitution mandates them.

I would vacate the preliminary injunction and remand for further proceedings with instructions to dismiss the claims for classwide injunctive relief. I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-35565
D.C. No. 2:18-cv-00928-MJP
Western District of Washington, Seattle

YOLANY PADILLA; ET AL., PLAINTIFFS-APPELLEES

v.

IMMIGRATION AND CUSTOMS ENFORCEMENT; ET AL., DEFENDANTS-APPELLANTS

AND

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, FKA DEPARTMENT OF SOCIAL SERVICES; ET AL., DEFENDANTS

[Filed: July 22, 2019]

ORDER

Before: SCHROEDER, CANBY, and CHRISTEN, Circuit Judges.

The temporary stay imposed on July 12, 2019 is lifted. Appellants' emergency motion for a stay of the district court's April 5, 2019 and July 2, 2019 orders pending appeal (Dkt. Entry No. 10) is granted in part and denied in part.

Our court has interpreted *Nken v. Holder*, 556 U.S. 418 (2009), to stand for the proposition that a stay applicant:

> "must show that irreparable harm is probable *and either*: (a) a strong likelihood of success on the merits and that the public interest does not weigh heavily against a stay; or (b) a substantial case on the merits and that the balance of hardships tips sharply in the petitioner's favor."

Leiva-Perez v. Holder, 640 F.3d 962, 970 (9th Cir. 2011) (emphasis added).

In Part B, the district court ordered that the Bond Hearing Class is constitutionally entitled to bond hearings pending resolution of their asylum applications. The government raises a serious question whether, under 8 U.S.C. § 1252(f)(1), the district court lacked the authority to enter Part B of this classwide injunctive relief. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018); *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 481-82 (1999); *see also Nken*, 556 U.S. at 431 (describing § 1252(f)(1) as "a provision prohibiting classwide injunctions against the operation of removal provisions"); *Hamama v. Adducci*, 912 F.3d 869, 877 (6th Cir. 2018) (same). But the government does not contend that § 1252(f)(1) prohibited the district court from entering an injunction with respect to the individual class representatives' Part B claims. Nor has the government made a persuasive showing that it will suffer irreparable harm if it is required to provide bond hearings pending the outcome of this appeal in the same way it had done for several years before the Attorney General issued *Matter of M-S-*, 27 I. & N. Dec. 509, 509 (BIA 2019). *See Leiva-Perez*, 640 F.3d at 970. Further,

the government failed to show a likelihood of success on the merits of its underlying argument that the government may indefinitely detain the plaintiffs without affording bond hearings at all. We therefore decline to stay Part B of the district court's injunction.

In Part A, the district court's injunction requires that the Executive Office of Immigration Reform (EOIR) hold hearings within seven days, release any class member whose detention exceeds that limit, produce a verbatim transcript, shift the burden of proof to the Department of Homeland Security, and issue written decisions on the same day a bond hearing is held. Although the government has not been able to quantify the number of individuals who have received credible fear determinations and are subject to detention, it nevertheless makes a persuasive showing that the requirements of Part A are particularly burdensome. We conclude that permitting Part A's procedural requirements to take effect pending the outcome of this appeal—which would require the government to implement a set of rules that may be only temporary—would impose short-term hardship for the government and its immigration system, and that the public interest does not weigh heavily against a stay. Accordingly, we stay Part A of the district court's injunction.

This result maintains the *status quo ante* during what is now an expedited appeals process. *See Nken*, 556 U.S. at 429 ("A stay 'simply suspend[s] judicial alteration of the status quo[.]'" (quoting *Ohio Citizens for Responsible Energy v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)). Our decision leaves the pre-existing framework in place while a merits panel resolves this appeal.

Appellants' request to expedite the consideration of the merits of this preliminary injunction appeal is granted. The current briefing schedule shall remain in effect. The clerk shall place this appeal on the calendar for October 2019. *See* 9th Cir. Gen Order 3.3(g).

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C18-928 MJP

YOLANY PADILLA; ET AL., PLAINTIFFS

v.

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT;
ET AL., DEFENDANTS

Filed: July 2, 2019

**ORDER ON MOTIONS RE:
PRELIMINARY INJUNCTION**

The above-entitled Court, having received and reviewed:

1. Defendants' Motion to Vacate the Court's Preliminary Injunction Order (Dkt. No. 114), Plaintiffs' Response in Opposition (Dkt. No. 126), and Defendants' Reply in Support (Dkt. No. 128);

2. Plaintiffs' Motion for Modification of the Existing Preliminary Injunction (Dkt. No. 131), Defendants' Response in Opposition (Dkt. No. 139), and Plaintiffs' Reply in Support (Dkt. No. 140);

all attached declarations and exhibits; and relevant portions of the record, and having heard oral argument on the motions, rules as follows:

IT IS ORDERED that the injunction entered by this Court on April 5, 2019 is MODIFIED as follows:

PART A: The Court AFFIRMS its previously-entered injunctive relief requiring Defendant Executive Office for Immigration Review to:

1. Conduct bond hearings within seven days of a bond hearing request by a class member, and release any class member whose detention time exceeds that limit;
2. Place the burden of proof on Defendant Department of Homeland Security in those bond hearings to demonstrate why the class member should not be released on bond, parole, or other conditions;
3. Record the bond hearing and produce the recording or verbatim transcript of the hearing upon appeal; and
4. Produce a written decision with particularized determinations of individualized findings at the conclusion of the bond hearing.

PART B: The Court MODIFIES the injunction to find that the statutory prohibition at Immigration and Nationality Act § 235(b)(1)(B)(ii) against releasing on bond persons found to have a credible fear of persecution if returned to their country and awaiting a determination of their asylum application violates the U.S. Constitution; the Bond Hearing Class is constitutionally entitled to a bond hearing (under the conditions enumerated above) pending resolution of their asylum applications.

IT IS FURTHER ORDERED that the injunction as modified will go into effect 14 days from the date of this order.

Summary

On March 16, 2019, this Court certified a Bond Hearing Class consisting of immigrants who have entered the United States without inspection, requested asylum, and who the Government has determined have a credible fear of persecution if they return home. The Court ruled, if the members of this class are given a bond hearing, it must comply with the Due Process Clause. An injunction ordering the Defendants to do so has already issued.

The first decision was based, not only on the Court's analysis of the constitutional due process owed to these class members, but also on 50 years of statutory and case law supporting the right of persons detained for non-criminal reasons to be released upon posting bond. Shortly after that injunction was issued, the Attorney General published a decision announcing that immigrants in removal proceedings awaiting the determination of their application for asylum must be detained for the duration of that process, subject to release only under a highly-limited "parole" system adjudicated solely by immigration officials. In the wake of that decision, the Government moved to vacate the previously-entered injunction.

It is the finding of this Court that it is unconstitutional to deny these class members a bond hearing while they await a final determination of their asylum request.

Procedural Background

On April 5, 2019, this Court entered an Order Granting Preliminary Injunction (Dkt. No. 110) requiring Defendant Executive Office for Immigration Review to:

1. Conduct bond hearings within seven days of a bond hearing request by a class member, and release any class member whose detention time exceeds that limit;
2. Place the burden of proof on Defendant Department of Homeland Security in those bond hearings to demonstrate why the class member should not be released on bond, parole, or other conditions;
3. Record the bond hearing and produce the recording or verbatim transcript of the hearing upon appeal; and
4. Produce a written decision with particularized determinations of individualized findings at the conclusion of the bond hearing.

Compliance with the injunction was to be effected no later than May 5, 2019. Id. at 2.

On April 16, 2019, the Attorney General ("AG") issued a decision in Matter of M-S (27 I. & N. Dec. 509 (A.G. 2019)) overruling a 2005 Board of Immigration Appeals ("BIA") determination in Matter of X-K (23 I. & N. Dec. 731 (BIA 2005) which had been cited in the preliminary injunction order. On the basis of the AG's ruling, the parties (1) agreed to stay the enforcement of the preliminary injunction until May 31, 2019 (Dkt. No. 113) and (2) filed the cross-motions which are the subject of this order. Additionally, Plaintiffs filed

a Third Amended Complaint ("TAC") incorporating challenges to the AG's decision in Matter of M-S (Dkt. No. 130), and Defendants moved to dismiss it. (Dkt. No. 136.)

In Matter of M-S, the AG determined that aliens who are originally placed in expedited removal proceedings and then transferred to full removal proceedings after establishing a credible fear do not become eligible for bond upon transfer and that Matter of X-K, in which the BIA had ruled that such aliens were entitled to bond hearings under § 1225(b) of the Immigration and Nationality Act ("INA"), "was wrongly decided." 27 I. & N. Dec. at 510. The AG found that aliens classified as "entering without inspection" ("EWI") were subject to mandatory detention without bond following a successful credible fear determination and could be released only upon being paroled for "urgent humanitarian reasons or significant public benefit" under 8 U.S.C. § 1182(d)(5)(A). Id. at 516.

Discussion

District courts possess the discretionary authority to "modify or revoke an injunction as changed circumstances may indicate." Lapin v. Shulton, Inc., 333 F.2d 169, 170 (9th Cir. 1964). "[S]ound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance, have changed." Sys. Fed. No. 91 v. Wright, 364 U.S. 642, 647 (1961).

The Court is unquestionably facing "changed circumstances" as a result of the AG's decision in M-S. While much of the analysis underlying the issuance of the initial preliminary injunction in this matter concerned

Plaintiffs' constitutional rights in the context of their situation, there is no question that analysis sprang from an understanding (as a result of the ruling in X-K) that the class members were entitled to a bond hearing under the INA.

This order will undertake a fresh analysis of Plaintiffs' claims and their request for modified injunctive relief in light of those changed circumstances, but first must examine a series of threshold issues which the Government has raised as bars to continued injunctive relief.

I. Threshold issues

A. Standing and mootness

The Government argues that the claims of the bond hearing class were premised on the ruling in X-K (i.e., that they were eligible for a bond hearing that they were not receiving in a timely manner and with the appropriate amount of due process) and thus have been "mooted" by the M-S determination that the statute does not entitle them to a bond hearing. The claims of the bond hearing class survive the ruling in M-S: nowhere in the Second (and now, the Third) Amended Complaint do Plaintiffs cite X-K as the basis for the relief they seek—their claims are premised on the fundamental unconstitutionality of the Government's claimed right to detain them indefinitely (*see* Dkt. No. 26 at ¶¶ 13, 151-52; Dkt. No. 130 at ¶¶ 8, 117-29) and allegations that the ruling in M-S and the policies and practices of Defendants violate the APA. (Dkt. No. 130, ¶¶ 142-146, 152-159.)

That the named Plaintiffs (Vasquez and Orantes) are not currently being detained is also cited as grounds for challenging their standing and their ability to serve as

class representatives. This is not a sound argument for two reasons: First, the INA gives Defendants the right to revoke a bond order at any time on the basis of "changed circumstances." 8 U.S.C. § 1226(b). The Government submits a declaration from the Deputy Assistant Director of ICE's Office of Enforcement and Removal Operations (ERO) which states that "[a]t this time, ERO does not intend to re-detain aliens who, after having established credible fear, have an ICE custody release determination or an Immigration Court final bond determination pursuant to INA § 236 issued prior to July 15, 2019." (Dkt. No. 137, Decl. of Hott at ¶ 6.) The Court is not persuaded that the conditional "at this time" language divests Plaintiffs of standing—the Government's unwillingness to unconditionally assert that Plaintiffs will not be re-detained means that the specter of re-detention looms and these Plaintiffs and many members of their class face the real and imminent threat of bondless and indefinite detention absent the relief they seek.[1]

Second, as this Court has already ruled, the claims of the bond hearing class continue to be "inherently transitory" and thus the named Plaintiffs are permitted to represent the interests of class members whose claims may both come ripe and/or expire during the course of the litigation. (*See* Dkt. No. 102 at 8, Dkt. No. 110 at 5); Sosna v. Iowa, 419 U.S. 393, 402 (1975). Additionally, now that the class is certified to pursue its due pro-

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[1] The Court notes, along these lines, that as a result of the decision in M-S the respondent, who was initially ordered released on bond, was ordered "detained until his removal proceedings conclude." 27 I. & N. at 510.

cess claims, that class "'acquire[s] a legal status separate from the interest asserted by [the class representative],' so that an Article III controversy now exists 'between a named defendant and a member of the [certified] class.'" Pitts v. Terrible Herbst, Inc., 653 F.3d 1081, 1090 (9th Cir. 2011) (*quoting* Sosna at 399; alterations in original).

B. 8 U.S.C. § 1252(f)(1)

In an earlier order denying Defendants' first motion to dismiss this matter, this Court declined to be bound by 8 U.S.C. § 1252(f)(1), which states that "no court . . . shall have jurisdiction or authority to enjoin or restrain the operation of the provisions" of the INA "other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." The Court held that "Plaintiffs are not asking the Court to enjoin or restrain the operation of the provisions of any statute, but instead seek an injunction against actions and policies that violate those statutes." (Dkt. No. 91 at 19.) That holding was unquestionably grounded in the Matter of X-K, which held that Plaintiffs are entitled to a bond hearing under the INA. With the AG's determination that X-K "was wrongly decided," the parties (and the Court) are required to address the impact of § 1252(f)(1).

The Government's position is straightforward: the effect of this provision is to ban classwide injunctive relief on any issue touching on the enforcement of the INA. Since it is now "settled" (from the Government's perspective) that the INA excludes Plaintiffs from bond hearings pending final adjudication of their asylum application, it can be argued that an injunction which orders bond hearings for Plaintiffs as a class "enjoin[s] or

restrain[s] the operation" of the statute "other than with respect to the application of such provisions to an individual alien." There is support for this position in the Supreme Court's Jennings v. Rodriguez opinion: "Section 1252(f)(1) thus 'prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-123[2].'" 130 S. Ct. at 851; *quoting* Reno v. AAADC, 525 U.S. 471, 481 (1999).

Plaintiffs respond by citing to Califano v. Yamasaki, 442 U.S. 682 (1979), where the Supreme Court found (in regard to a different statutory scheme) that language authorizing a suit by "[any] individual" did not foreclose the availability of classwide relief. The Califano Court ruled that "[w]here the district court has jurisdiction over the claim of each individual member of the class, [FRCP] 23 provides a procedure by which the court may exercise that jurisdiction over the various individual claims in a single proceeding;" i.e., a class action. Id. at 700.

Upon remand from the Jennings Court, the Ninth Circuit appears to be in agreement that Califano is applicable to a § 1252(f)(1) analysis.

> [W]e have jurisdiction under 8 U.S.C. § 1252(f)(1) . . . All of the individuals in the putative class are 'individuals against whom proceedings under such part have been initiated' and are pursuing habeas claims, albeit as a class, which nowhere appears affected by § 1252(f)(1).

Rodriguez v. Marin, 909 F.3d 252, 256-57 (9th Cir. 2018). The same is true here as regards the Bond Hearing Class. Additionally, "it is especially significant that § 1252(f)(1) is silent as to a prohibition on class actions

when another subsection in the same provision expressly prohibits class actions." Arroyo v. U.S. Dept. of Homeland Security, No. 8:19-cv-00815-JGB-SHK at *10 (C.D. Cal. June 20, 2019) (citing 8 U.S.C. § 1252(e)(1(B). "Congress's failure to prohibit class actions for plaintiff already in removal proceedings is meaningful and intentional." Id.

And there are further grounds upon which to base the Court's authority to grant injunctive relief to this class. Plaintiffs' TAC invokes the Court's habeas jurisdiction (Dkt. No. 130 at ¶ 8), and their briefing cites the Supreme Court's holding in INS v. St. Cyr, 533 U.S. 289, 310-14 (2001) that federal courts will not read a statute to restrict their power to grant habeas relief unless Congress specifically and explicitly revokes the authority granted under the federal habeas statute (28 U.S.C. § 2241) by name. This approach is endorsed by the Ninth Circuit: in Rodriguez v. Marin, the Court similarly found that "Section 1252(f)(1) also does not bar the habeas class action because it lacks a clear statement repealing the court's habeas jurisdiction." 909 F.3d 252, 256 (9th Cir. 2018).

The Government argues that the St. Cyr "clear statement" rule is inapplicable where (1) individual habeas relief is still available and (2) there is no blanket ban on habeas *jurisdiction* (i.e., the Court still has its power to grant habeas relief, just not habeas *injunctive* relief). But the Second and Third Circuits have held that the clear statement rule applies even when a statute does not bar all judicial review. Liu v. INS, 293 F.3d 36, 37 (2nd Cir. 2002)(clear statement still required even where petitioner has other means—e.g., a petition for

review—to raise the same issues); *cf.* Chmakov v. Blackman, 266 F.3d 210, 215 (3rd Cir. 2001). As the Government has noted, there is Sixth Circuit precedent specifically on this point:

> [T]here is nothing in § 1252(f)(1) that suspends the writ of habeas corpus. It is true that habeas is barred as to *injunctive relief* for *class actions*, but there is nothing barring a class from seeking a traditional writ of habeas corpus (which is distinct from injunctive relief

Hamama v. Homan, 912 F.3d 869, 879 (6th Cir. 2018) (emphasis in original). But this Court is not compelled to follow the dictates of the Sixth Circuit (and, per the remand in Rodriguez v. Marin, the Ninth Circuit still considers the issue of classwide injunctive relief to be an open question). There is nothing in St. Cyr and nothing in applicable Ninth Circuit jurisprudence to indicate that, absent a specific restriction, this Court is not authorized to exercise the full panoply of its habeas powers, including its equitable powers to enjoin conduct found unconstitutional. On that basis, § 1252(f)(1) does not operate to bar the classwide injunctive relief sought by Plaintiffs.

C. § 1252(e)(3)

The Government also challenges the Court's jurisdiction. 8 U.S.C. § 1252(e)(3) ("Challenges on Validity of the System") provides that

> [j]udicial review of determinations under section 1225(b) . . . and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of (i) whether such section, or

> any regulation issued to implement such section, is constitutional.

The Government contends that Plaintiffs' TAC represents the kind of "systemic challenge to the constitutionality of 8 U.S.C. § 1225" which, pursuant to the mandate above, may only properly be brought in the District of Columbia. (Dkt. No. 114, Defendants' Motion to Vacate at 17.)

This is not a persuasive position. Section 1252(e)(3) is included as part of a statute that is addressed to "Judicial review of orders under section 235(b)(1)" (which in turn is concerned with "Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled"). As such, § 1252(e)(3) is addressed to challenges to the removal *process* itself, not to detentions attendant upon that process. The Court is guided by the reasoning of the Supreme Court in Jennings, which noted (in finding jurisdiction to consider challenges to the detention process under §1225):

> For present purposes, it is enough to note that respondents are not asking for review of an order of removal; they are not challenging the decision to detain them in the first place or to seek removal; and they are not even challenging any part of the process by which their removability will be determined.

130 S. Ct. at 841. It is these types of claims to which § 1252(e)(3) is addressed; Plaintiffs' challenge to the constitutionality of their detention is not subject to the strictures of that provision.

The Court's decision in this regard is further buttressed by the complete absence of any mention of § 1252(e)(3) as a bar to jurisdiction in either Jennings or

Rodriguez v. Marin. In a case involving plaintiffs challenging their detention under § 1225(b), neither the Government, the Supreme Court nor the Ninth Circuit saw fit to raise § 1252(e)(3) as an impediment to consideration of the merits of the claims. This Court will follow suit and move on to a consideration of the merits of Plaintiffs' request to modify the present injunction in this matter.

II. The Preliminary Injunction

Neither side disputes that the injunction previously entered in this matter cannot remain in effect in its current form. The Court retains an inherent authority to modify an existing injunction on the basis of changed circumstance (including a change in the law). Sys. Fed. No. 91 v. Wright, 364 U.S. 642, 647 (1961). Defendants argue that the modification requested here necessitates a finding that this is a "mandatory" injunction—one which "orders a responsible party to take action" (Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 879 (9th Cir. 2009))—and thus is subject to a higher standard of proof. The Court disagrees. Even in its modified form, this remains a "prohibitory" injunction, one intended to preserve the status quo (which, at this point, is represented both by the original preliminary injunction and by the 50 years preceding this litigation during which EWI aliens have been considered entitled to bond hearings to test the necessity of their detention) and seeking only to "prevent[] future constitutional violations." Hernandez v. Sessions, 872 F.3d 976, 998 (9th Cir. 2017).

The Court analyzes the request for modification using traditional elements that must be established prior to the issuance of injunctive relief:

1. Likelihood of success on the merits
2. Irreparable harm in the absence of the injunction
3. A balance of equities which favors the moving party
4. The existence of a public interest which favors the injunction

Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

1. Likelihood of success on the merits

Backed by the AG's findings that § 1225(b) mandates detention without bond for these Plaintiffs, the Government cites to the jurisprudential maxim that "acts of Congress enjoy a strong presumption of constitutionality." Schwenk v. Hartford, 204 F.3d 1187, 1204 (9th Cir. 2000). Giving that maxim its due does not abrogate the Court's authority under the habeas statute to determine if these Plaintiffs are "in custody in violation of the Constitution." 28 U.S.C. § 2241(c)(3).

The Court previously utilized the Mathews balancing test to determine Plaintiffs' likelihood of success on the merits and will do so again. The test examines and weighs:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

a. Private interest

The Supreme Court has definitively established the immigrant detainees' constitutionally-protected interest in freedom from unnecessary incarceration. Zadvydas v. Davis, 533 U.S. 678, 690 (2001). The Ninth Circuit has recognized that, in the area of non-criminal detention of immigrants, "the private interest at issue here is 'fundamental': freedom from imprisonment is at the 'core of the liberty protected by the Due Process Clause.'" Hernandez v. Sessions, 872 F.3d 976, 993 (9th Cir. 2017) (quoting Foucha v. Lousiana, 504 U.S. 71, 80 (1992)). The Ninth Circuit described the fundamental nature of that interest as "beyond dispute." Id.

The Government attempts to argue that Plaintiffs are essentially "excludable aliens," entitled only to the rights Congress sees fit to grant them. Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1982). The Court has already found that these Plaintiffs are not "excludable" aliens with no inherent due process rights; nothing about the current posture of this case has altered the validity of that analysis. (*See* Dkt. No. 110, Order Granting Preliminary Injunction ("PI Order") at 6.) Plaintiffs are "non-arriving aliens" who, having been apprehended within the territorial boundaries of this county, are entitled to due process protections. United States v. Raya-Vaca, 771 F.3d 1995, 1202 (9th Cir. 2014). Among those protections is a longstanding prohibition against indefinite civil detention with no opportunity to test its necessity. The Ninth Circuit has expressed "grave doubts that any statute that allows for arbitrary prolonged detention without any process is

constitutional." Rodriguez v. Marin, 909 F.3d 252, 256. (9th Cir. 2018).

The Government points to cases like Zadvydas and Demore v. Hyung Joon Kim (538 U.S. 510 (2003))—which upheld the reasonableness of six-month detention periods—to argue that Plaintiffs are not likely to succeed on their request for a seven-day timeline on bond hearings. But the length of time until hearing is not the issue currently before the Court[2] as it considers modification of the injunction already in place—the issue in this motion is whether or not it is constitutional to have no bond hearing at all.

Further, the Government's cases are distinguishable from the instant matter to the extent that longer periods of detention were found appropriate. The aliens in Zadvydas were already adjudicated removable and simply awaiting deportation, which is not the case with Plaintiffs. Demore concerned a detention policy narrowly tailored to a subset of noncitizens who had committed one of a specified list of crimes which made them risks upon release; Plaintiffs here are subject to indefinite detention without regard for their criminal history or the fact that they have been adjudged credibly fearful of returning to their homelands. The Demore Court relied on a massive record of research and statistics demonstrating that the targeted subset of aliens were categorically risks of flight and dangers to the community. 538 U.S. at 518-21. There is no similar evidence in the instant case.

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[2] To the extent it is, the Court has already ruled. *See* PI Order at 13-14.

The Court finds that Plaintiffs have established a constitutionally-protected interest in their liberty, a right to due process which includes a hearing before a neutral decision maker to assess the necessity of their detention, and a likelihood of success on the merits of that issue.

Plaintiffs have also asserted a cause of action under the Administrative Procedures Act ("APA"), alleging that the AG's decision in Matter of M-S represents a revision to an existing regulation in violation of the "notice and comment" requirement of the APA. 5 U.S.C. § 553(b)-(d). Plaintiffs' legal theory is that the AG's finding that immigrants detained awaiting an asylum determination are not entitled to bond hearings under § 1225(b) represents "rulemaking;" i.e., a change to an existing rule or regulation. The APA requires, prior to amending or repealing an existing rule, notice of the proposed change in the Federal Register with a 30-day period prior to implementation of the revision or withdrawal and an opportunity for comment by interested persons. Id. The Court does not find a likelihood of success on the merits of Plaintiffs' APA claim as it regards this issue.

The rules which Plaintiffs contend are being repealed are 8 C.F.R. §§ 1236.1(d) and 1003.19(h)(2)(i). § 1236.1(d) ("Appeals from custody decisions") state:

> (1) Application to immigration judge. After an initial custody determination by the district director, including the setting of a bond, the respondent may, at any time before an order under 8 CFR part 1240 becomes final, request amelioration of the conditions under which he or she may be released. Prior to such final order, and except as otherwise provided in

> this chapter, the immigration judge is *authorized to exercise the authority in section 236 of the Act* . . . to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released, as provided in § 1003.19 of this chapter.

(Emphasis supplied.) § 1003.19 is an adjunct regulation to § 1236.1, covering "[c]ustody and bond determinations made by the service pursuant to 8 C.F.R. part 1236."

These regulations concern the authority of immigration officials and judges under "section 236 of the Act," which is also known as § 1226 of the INA. Plaintiffs' asylum applications are being processed (and they are being detained) pursuant to section 235 (or § 1225) of the Act, and the regulation which they allege is being revised or repealed in violation of the APA is inapplicable to them. Under these circumstances, the Court cannot find that they have a likelihood of succeeding on the merits of that particular claim.

b. Risk of deprivation/value of procedural safeguards

Quoting from the Court's previous findings:

> The Hernandez court, conducting a similar Mathews analysis in the context of immigrant detention, described the [risk of deprivation of a bond hearing] as follows: "[T]here is a significant risk that the individual will be needlessly deprived of the fundamental right to liberty." 872 F.3d at 993.

(Dkt. No. 110, PI Order at 12.) That risk remains as valid today as it was then.

The "value of the procedural safeguard" of a bond hearing is self-evident. To begin with, immigration detention can be upheld only where "a special justification . . . outweighs the 'individuals' constitutionally protected interest in avoiding physical restraint.'" Zadvydas, 553 U.S. at 690 (*quoting* Kansas v. Hendricks, 521 U.S. 346, 356 (1997)); *see also* United States v. Salerno, 481 U.S. 739 747 (1987). The purposes of immigration detention are simple and straightforward: to facilitate removal (if removal is deemed justified), and to prevent flight and harm to the community. Id. at 690-91; Hernandez, 872 F.3d at 990. Detention that does not serve those legitimate ends violates due process; bond hearings are the most efficacious mean of insuring those purposes are being served.

c. The Government's interest

To demonstrate their interest, Defendants cite their commitment to "the efficient administration of the immigration laws at the border." (Dkt. No. 139, Defendants' Response at 24.) The Court has already indicated its disinclination to "exalt expense over fundamental rights to liberty" (PI Order at 15), quoting the Ninth Circuit in Hernandez:

> [T]he government has no legitimate interest in detaining individuals who have been determined not to be a danger to the community and whose appearance at future immigration proceedings can be reasonably ensured . . .

872 F.3d at 990.

The Court finds a private interest held by this class that is being affected by governmental action, a substan-

tial risk of its erroneous deprivation under the AG's interpretation of the INA, and probable value in according Plaintiffs their right to a bond hearing, none of which are outweighed by the Government's interest in proceeding in accordance with the AG's dictates. While the same cannot be said for Plaintiffs' APA claim, the Court finds that the class has demonstrated a likelihood of success on their constitutional challenge to the complete elimination of bond hearings for its members.

2. *Irreparable harm*

As the Court has previously found, "any deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" Hernandez, id. at 995 (citation omitted). All the harms attendant upon their prolonged detention cited in the original ruling on Plaintiffs' request for injunctive relief remain applicable here—substandard physical conditions, low standards of medical care, lack of access to attorneys and evidence as Plaintiffs prepare their cases, separation from their families, and re-traumatization of a population already found to have legitimate circumstances of victimization.

> Finally, there is the incalculable harm to those class members who, facing an uncertain length of time in custody and an arduous and obstacle-strewn road to establishing . . . []their right to asylum[], simply abandon their claim and accept deportation back to countries where, as it has already been established to the Government's satisfaction, they face persecution, torture, and possibly death.

PI Order at 17.

The Government's arguments to the contrary lack substance. Defendants cite to the "speculative" nature

of any possible harm cited by the named Plaintiffs—even if that were true (see the Court's findings *supra* regarding the Government's "at this time . . . " declaration), Plaintiffs Orantes and Vasquez represent a class of persons who are currently in custody and for whom detention without bond is not a theoretical concept. Defendants again cite to the bond hearing class's access to individual habeas petitions to challenge their detention—the Court has already commented on the "grim irony" of the members of this class being forced to endure further delays while they contest the constitutionality of their detention.

The Court finds that Plaintiffs have succeeded in demonstrating "irreparable harm" in the absence of injunctive relief.

3. *Equities/public interest*

When the Government is a party to the case, the public interest and balance of equities factors "merge." Drakes Bay Oyster Co. v. Jewell, 747 F.3d 1073, 1092 (9th Cir. 2014). The equities favoring Plaintiffs continue to be: The deprivation of their constitutional rights, the physical/emotional/psychological damage engendered by their indefinite detention, the separation from their families, and the negative impact on their ability to properly prepare their cases.

On its side, the Government cites "the efficient administration of the immigration laws," which has been addressed *supra*. The words of the Ninth Circuit in Hernandez continue to ring true:

> "Faced with such a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor."

872 F.3d at 996 (quoting Lopez v. Heckler, 713 F.2d 1432, 1437 (9th Cir. 1983)).

Defendants also caution the Court against creating a "Jennings subset"—what they characterize as an "exception" to the Jennings holding that detention is statutorily required under § 1225. But Jennings made no finding regarding the constitutionality of § 1225 and the case does not stand for the proposition that indefinite mandatory detention while awaiting determination of an asylum application is constitutionally permissible. The Court sees nothing in the Supreme Court's ruling in Jennings that favors the Government's position in this litigation.

The Ninth Circuit has previously found that "it is always in the public interest to prevent the violation of a party's constitutional rights." Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012). The Court finds that the balance of equities and the public interest favor granting injunctive relief to Plaintiffs.

Conclusion

The Plaintiffs of the Bond Hearing Class have succeeded in establishing all the requisite elements for granting their request for modified injunctive relief: a change in circumstances, a continuing likelihood of success on the merits on at least one of their claims, irreparable harm if their relief is not granted, a balance of

equities in their favor, and a benefit to the public interest if granted the relief they seek. Accordingly, the Court GRANTS the requested relief.

Anticipating that an appeal will swiftly follow the publication of this order, the Court divides the modified injunction into two parts to facilitate appellate review:

PART A: Affirming its previously-entered injunctive relief requiring Defendant Executive Office for Immigration Review to:

1. Conduct bond hearings within seven days of a bond hearing request by a class member, and release any class member whose detention time exceeds that limit;
2. Place the burden of proof on Defendant Department of Homeland Security in those bond hearings to demonstrate why the class member should not be released on bond, parole, or other conditions;
3. Record the bond hearing and produce the recording or verbatim transcript of the hearing upon appeal; and
4. Produce a written decision with particularized determinations of individualized findings at the conclusion of the bond hearing.

PART B: Modifying the injunction to find that the statutory prohibition at Immigration and Nationality Act § 235(b)(1)(B)(ii) against releasing on bond persons found to have a credible fear and awaiting a determination of their asylum application violates the U.S. Constitution; the Bond Hearing Class is constitutionally entitled to a bond hearing before a neutral decisionmaker

(under the conditions enumerated above) pending resolution of their asylum applications.

The preliminary injunction, as modified, will enter into effect 14 days from the date of this order.

The clerk is ordered to provide copies of this order to all counsel.

Dated: July 2, 2019

MARSHA J. PECHMAN
MARSHA J. PECHMAN
United States Senior District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C18-928 MJP

YOLANY PADILLA, ET AL., PLAINTIFFS

v.

US IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL., DEFENDANTS

Filed: Apr. 5, 2019

ORDER GRANTING PRELIMINARY INJUNCTION

The above-entitled Court, having received and reviewed:

1. Plaintiffs' Motion for Preliminary Injunction (Dkt. No. 45),
2. Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction (Dkt. No. 82),
3. Plaintiffs' Reply in Support of Motion for Preliminary Injunction (Dkt. No. 85), all attached declarations and exhibits, and relevant portions of the record, and having heard oral argument thereon, rules as follows:

IT IS ORDERED that the motion is GRANTED. With regard to the Bond Hearing Class, Defendant Executive Office for Immigration Review must, within 30 days of this Order:

1. Conduct bond hearings within seven days of a bond hearing request by a class member, and release any class member whose detention time exceeds that limit;
2. Place the burden of proof on Defendant Department of Homeland Security in those bond hearings to demonstrate why the class member should not be released on bond, parole, or other conditions;
3. Record the bond hearing and produce the recording or verbatim transcript of the hearing upon appeal; and
4. Produce a written decision with particularized determinations of individualized findings at the conclusion of the bond hearing.

Background

Under the Immigration and Nationality Act ("INA"), detained asylum seekers who are determined by Defendant U.S. Immigration and Customs Enforcement ("ICE") to have a credible fear of persecution are entitled to request release from custody during the pendency of the asylum process. See Matter of X-K, 23 I. & N. Dec. 731 (BIA 2005). The initial decision of whether the detainees may be released is made by Defendant Department of Homeland Security ("DHS") (see 8 C.F.R. § 236.1(c)(8)), and the asylum seekers may request review of the DHS determination before an immigration

judge ("IJ") by means of a bond hearing. See 8 U.S.C. § 1226(a); 8 C.F.R. § 1003.19(a).

The agencies' own guidelines and regulations reflect a recognition of the significance of the deprivation of liberty and the need for expeditious processing of these requests. See, e.g., 8 C.F.R. § 1003.47(k) (referring to "the expedited nature" of initial custody redetermination cases); 52 Fed. Reg. 2931, 2932 (Aliens and Nationality; Rules of Procedure Before Immigration Judges: Jan. 29, 1987) (emphasizing the need for procedures at that time to "maximize the prompt availability of Immigration Judges for respondents applying for bond determinations"); Immigration Court Practice Manual § 9.3(d)(2016) ("In general, after receiving a request for a bond hearing, the Immigration Court schedules the hearing for the earliest possible date . . . "). The DHS regulations allow for bond hearings even prior to the agency filing immigration charges. 8 C.F.R. § 1003.14(a). The critical nature of the interest at stake is reflected in an underlying theme calling for hearings of this nature to be held as expeditiously as possible.

Despite this mandate, Plaintiffs have submitted a plethora of declarations reflecting a practice by Defendant Executive Office for Immigration Review ("EOIR") of delaying bond hearings for members of this class for weeks, even months, following a hearing request. (See Dkt. No. 37 at 14, Motion for Class Certification; Dkt. No. 46, Decl. of Antonini at ¶ 5; Dkt. No. 47, Decl. of Beckett at ¶ 5; Dkt. No. 48, Decl. of Byers at ¶ 5; Dkt. No. 50, Decl. of Inlender at ¶¶ 12-13; Dkt. No. 51, Decl. of Jong at ¶¶ 3-4; Dkt. No. 52, Decl. of Koh at ¶ 14; Dkt. 53, Decl. of Levy at ¶ 6; Dkt. No. 54, Decl. of Love at ¶¶ 4-5; Dkt. No. 55, Decl. of Lunn at ¶ 5; Dkt. No. 56,

Decl. of Mercado at ¶ 10; Dkt. No. 57, Decl. of Orantes at ¶ 13; Dkt. No. 58, Decl. of Shulruff at ¶ 4; Dkt. No. 60, Decl. of Yang at ¶¶ 5-6.

Members of the Bond Hearing class face other obstacles to securing their freedom. At the bond hearing, the IJ bases his or her decision on an evaluation of whether the asylum seeker poses a danger to the community and is likely to appear at future proceedings. 8 C.F.R. §§ 1236.1(d)(1), 1003.19; Matter of Adeniji, 22 I. & N. 1102, 1112 (BIA 1999). Unique among civil detention hearings, however, EOIR places the burden of establishing these factors on the detainees instead of the government. Matter of Guerra, 24 I. & N. Dec. 37, 40 (BIA 2006).

An asylum seeker denied bond can appeal the IJ's decision to the Board of Immigration Appeals ("BIA") or seek another bond hearing in front of the IJ based on a material change in circumstances. 8 C.F.R. §§ 1003.19(e), (f). But the potential appellant must make the decision of whether to appeal without the aid of a record of the initial bond proceeding or a written decision detailing the reasons for the ruling. There is no requirement that immigration courts record their proceedings or provide a transcript thereof, and the IJs do not release a written decision unless an administrative appeal of the bond decision has already been filed. See, e.g., Immigration Court Practice Manual §§ 9.3(e)(iii), e(vii); BIA Practice Manual §§ 4.2(f)(ii), 7.3(b)(ii).

In addition to the deprivation of liberty, detainees face a number of other hardships attendant upon their incarceration: separation from their families, substandard conditions, subpar medical and/or mental health care, and decreased access to legal assistance and the other

resources required to pursue their goal of asylum (leading to a decreased likelihood of success). See, e.g., Ingrid Eagly & Stephen Shafter, Am. Imm. Council, *Access to Counsel in Immigration Court* (2016), https://tinyurl.com/y7hbl2rm; Dkt., Decl. of Lunn at ¶ 7; Dkt. No. 49, Decl. of Cooper at ¶¶ 3-14, 17-20. The stakes are high, and the obstacles to success can loom even higher.

Discussion

The elements to be established prior to the issuance of injunctive relief are well-known:

1. Likelihood of success on the merits
2. Irreparable harm in the absence of the injunction
3. A balance of equities which favors the moving party
4. The existence of a public interest which favors the injunction

Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

Here in the Ninth Circuit a "sliding scale" approach to this analysis is utilized—if the balance of hardships tips sharply in favor of the moving party, that party is only required to demonstrate claims that raise serious legal questions, as well as meet the other two criteria. See, e.g., Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131-35 (9th Cir. 2011).

1. Likelihood of success on the merits

Prior to addressing the substantive merits of the claims of the Bond Hearing Class, the Court turns briefly to the Defendants' argument that these Plaintiffs have no standing to bring this motion because they have no cognizable injury; i.e., they are no longer being detained and have been given bond hearings. The Court has previously addressed the recognized right of these class representatives to prosecute "inherently transitory" claims (claims which by their nature may expire for any one individual during the course of the litigation) for those remaining members of the class who are still being injured by the policy or practice. See Sosna v. Iowa, 419 U.S. 393, 402 (1975); (Dkt. No. 102, Order Certifying Class at 8.)

Further, there is ample precedent for the granting of injunctive relief on behalf of a class at the behest of class representatives who were not suffering the complained-of injury at the time of the request. See Hernandez v. Sessions, 872 F.3d 976, 986 (9th Cir. 2017) (injunction granted concerning certain bond determination practices although Plaintiffs were no longer in custody); Ms. L. v. ICE, 310 F. Supp. 3d 1133, 1146-47 (S.D. Cal. 2018) (enjoining immigrant family separation even though Plaintiffs were already reunited with their children); R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 191 (D.D.C. 2015) (enjoining a detention policy at the request of Plaintiffs who had been previously released).

Turning to the likelihood of success on the merits, the parties are in agreement that these issues should be analyzed using the balancing test enunciated in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), which calls for the court to weigh:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

A. Private interest

It has long been recognized that immigration detainees have a constitutionally-protected interest in their freedom. Zadvydas v. Davis, 533 U.S. 678, 690 (2001). The Ninth Circuit has recognized that, in the area of non-criminal detention of immigrants, "the private interest at issue here is 'fundamental': freedom from imprisonment is at the 'core of the liberty protected by the Due Process Clause.'" Hernandez v. Sessions, 872 F.3d 976, 993 (9th Cir. 2017) (quoting Foucha v. Louisiana, 504 U.S. 71, 80 (1992)). The Ninth Circuit described the fundamental nature of that interest as "beyond dispute." Id.

The extent of those due process rights is among the many issues hotly-contested by these parties. Defendants ask the Court to find that these Plaintiffs are no different from any other immigrants who present themselves at an official Point of Entry (POE) and request admission to this country, a class of "excludable aliens" which has been found to have no inherent due process rights. See Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953).

Again, the Court cites its earlier Order on Motion to Dismiss for a previous ruling that, because these Plaintiffs (and the class they represent) were already within the territorial borders of the U.S. when they were detained, they are not considered on a similar footing to "excludable" aliens. (See Dkt. No. 91, Order on Motion to Dismiss at 8-10.) "[O]nce an individual has entered the country, he is entitled to the protection of the *Due Process Clause.*" United States v. Raya-Vaca, 771 F.3d 1995, 1202 (9th Cir. 2014) (emphasis in original)[1]; see also Zadvydas, 553 U.S. at 693. The Court finds that this class of plaintiffs has a considerable private interest at stake: A constitutional right to press their due process claims, including their right to be free from indeterminate civil detention, and their right to have the bond hearings conducted in conformity with due process.

Defendants also argue that Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (the Supreme Court case cited by this Court in initially finding jurisdiction over this lawsuit; (Dkt. No. 91, Order on Motion to Dismiss at 6-7)) "concluded that the statute bars such aliens from being afforded a bond hearing during the pendency of their removal proceedings." (Dkt. No. 82, Response at 10 (citing 138 S. Ct. at 845.)) This is an oversimplified and inaccurate reading of that portion of the ruling, which concerns 8 U.S.C. § 1225(b)(1), and quotes its language

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[1] Defendants' argument that Raya-Vacais "strictly limited" to criminal defendants is not supported by the opinion. The "criminal case limitation" is applicable only to attacks on removal orders which are not at issue here. There is no restriction on the Ninth Circuit's holding regarding the due process rights of aliens apprehended within the borders of the U.S.

that "[a]ny alien . . . shall be detained pending a final determination of credible fear of persecution and, *if found not to have such a fear*, until removed." Jennings, 138 S. Ct. at 845 (emphasis supplied). The members of the Bond Hearing Class have been found "to have such a fear" and that finding removes them from the detention requirements referenced in Jennings.

The Court further finds that the fundamental liberty interest implicated by the Bond Hearing Class's prolonged and indeterminate detention extends to the procedural remedies which they are seeking as well: Being forced to bear the burden of proof and being denied both some form of automatic verbatim record and timely written findings—impacting both the likelihood of release and the ability to effectively appeal adverse determinations—can all be seen as potential threats to the class members' liberty.

Defendants reiterate the "harmless error" argument from their earlier dismissal motion, asserting that Prieto-Romero v. Clark, 534 F.3d 1053 (9th Cir. 2008) sets a standard requiring that the Plaintiffs demonstrate that the "alleged due process violations adversely affected the IJ's determination that [Plaintiff] was eligible for bond." Id. at 1066. Defendants argue that the class representatives fail under the harmless error standard because none of them are in custody and, further, that the putative class members' proof fails because they have not yet had their hearings. The Court is not persuaded, and is mindful that, in the case of both of the named representatives of the Bond Hearing Class, it was proactive intervention by the government that eliminated the need for an appeal of an adverse determination at the bond hearing. (See Dkt. No. 26, Second

Amended Complaint, ¶¶ 121, 123; Dkt. No. 61, ¶ 10.) In Pitts v. Terrible Herbst, Inc., 653 F.3d 1081 (9th Cir. 2011), Defendant attempted to "moot" Plaintiff's claim during the pendency of the lawsuit by making him an offer of judgment. The Ninth Circuit ruled that such a strategy could not defeat an otherwise valid class action: "[T]he termination of a class representative's claim does not moot the class claims." Id. at 1089.

Regarding the putative class members, there is Ninth Circuit authority that there are circumstances where, if the injury is imminent, prior or present harm need not be shown. In Amer. Trucking Assoc's v. City of Los Angeles, 559 F.3d 1046 (9th Cir. 2009), the court noted that enforcing a requirement of proven past harm would put the plaintiffs to a "Hobson's choice"—refuse to abide by the challenged regulation and lose the right to do business, or submit to the regulation and be driven out of business by the cost of compliance. Under those circumstances, the Ninth Circuit found that "the constitutional violation alone, coupled with the damages incurred, can suffice to show irreparable harm." Id. at 1058. See also Hernandez, 872 F.3d at 994 ("It is well-established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'") (citations omitted).

Plaintiffs here are faced with a similar choice - accept their indeterminate detention and receive bond hearings at the Government's pleasure with a reversed and inequitable burden of proof and procedural deficiencies which impact their ability to appeal an adverse determination or (as the Defendants have suggested) give up their asylum claim and allow themselves to be deported back to a homeland where they have already been found

to have a credible fear of injury or death. The Constitution does not require these Plaintiffs to endure such a no-win scenario.

Defendants also claim that Plaintiffs are not entitled to relief because they have not exhausted their administrative rights. The exhaustion requirement is "prudential, rather than jurisdictional," and it is within the discretion of a district court to

> waive the prudential exhaustion requirement if "administrative remedies are inadequate or not efficacious, pursuit of administrative remedies would be a futile gesture, irreparable injury will result, or the administrative proceedings would be void."

Hernandez, 872 F.3d at 987 (citation omitted). As has already been observed, "[i]t is well-established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" Hernandez, 872 F.3d at 994 (citations omitted). Furthermore, Plaintiffs' evidence demonstrates that, Defendants having shown no inclination to modify any of their policies, the administrative remedy is "inadequate." Indeed, the thrust of that evidence (regarding the lack of either an automatic verbatim record or mandatory written findings at the time of ruling) is that the current practices negatively impact their ability to effectively appeal and it would be futile to continue to pursue the administrative remedy in the face of Defendants' ongoing refusal to alter the procedural framework.

In attempting to argue that Plaintiffs have no constitutional right to a verbatim record or automatic written findings, Defendants again turn to the argument that there is not even a guaranteed right to verbatim record

in criminal proceedings. This argument was addressed —and rejected—in the Court's Order on Motion to Dismiss:

> The government goes on to claim that, because "[t]he Supreme Court has declined to impose a contemporaneous verbatim record requirement on *criminal* trials," the Court should not do so in immigration custody redetermination hearings. (Dkt. No. 36 at 18 (emphasis in original).) The problem with this argument is that every case cited in support of this proposition says the *opposite*: that indigent defendants must be provided with "a record of sufficient completeness" (Coppedge v. United States, 369 U.S. 438, 446 (1962) for an appeal or "a complete transcript of the proceedings at trial." United States v. Carrillo, 902 F.2d 1405, 1409 (9th Cir. 1990).

(Dkt. 91 at 15, n.3.)

Defendants also assert that, because there are "less intrusive ways for the Board to ensure detainees have notice of the basis for their bond decisions," Plaintiffs' interests should not be elevated over the adverse impact on the Government's interest. (Dkt. No. 82, Response at 19.) The example of a "less intrusive way" which Defendants cite is a case which remanded a bond decision to the IJ for a more thorough bond decision. In re: Fernando Antonio Garro-Rojas, 2007 WL 1430371, at *1 (BIA Mar. 23, 2007). But it is the prolongation of Plaintiffs' detention that is at the heart of the interest which they seek to protect. Defendants do not have a right to a "less intrusive" solution that continues to undermine the fundamental interest at stake here.

As an example of the nature of their interest in the issuance of written findings before their appeal is filed, Plaintiffs cite to 8 C.F.R. § 1003.3(b) (which mandates dismissal of a Notice of Appeal which is insufficiently detailed), as well as Matter of Keyte, 20 I. & N. Dec. 158, 159 (BIA 1990), wherein a notice of appeal was summarily dismissed for "offer[ing] only a generalized statement of [the] reason for the appeal." Written findings issued after the notice of appeal is filed are of little benefit to this class. Additionally, written findings, often composed weeks after the hearing itself,[2] may overlook key facts and findings, and may be subject to bias in favor of the adverse ruling. See Bergerco, U.S.A. v. Shipping Corp. of India, Ltd., 896 F.2d 1210, 1214 (9th Cir. 1990) ("[O]nce the court has entered judgment, it may become subject to the very natural weight of its conviction, tending to focus on that which supports its holding.")

Regarding Plaintiffs' interest in shifting the burden of proof at the bond hearings, Defendants again wrongly cite Jennings for their argument that Plaintiffs must continue to bear the burden of proof. (Response at 18.) The Supreme Court in Jennings declined to address the constitutional arguments on their merits, instead remanding them to the appellate court for that purpose. 138 S. Ct. at 851. In every other context (both civil and criminal detention), the Government bears the burden of proof regarding suitability for release (with the corresponding presumption in favor of release)—the Supreme Court has upheld that allocation of the burden where it was found (see United States v. Salerno, 481

[2] See Dkt. No. 49, Decl. of Cooper at ¶ 16; Dkt. No. 51, Decl. of Jong at ¶ 10.

U.S. 739, 751 (1987); Kansas v. Hendricks 521 U.S. 346, 353 (1997)), and struck it down where it was not (see Foucha v. Lousiana, 504 U.S. 71, 81 (1992); Addington v. Texas, 441 U.S. 418, 427 ("The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state."); and Zadvydas, 533 U.S. at 692 (striking down a regulation which required immigrant detainees to prove they were not dangerous)).[3]

The Court finds that Plaintiffs have succeeded in establishing the existence of the private interests (shared by the class) that are being impacted by the government action.

B. Risk of deprivation/value of procedural safeguards

The risk of deprivation occasioned by the indeterminate prolonged civil detention of this class seems almost too obvious to state. The Court's Order on Motion to Dismiss quoted the Ninth Circuit in Rodriguez v. Marin, 909 F.3d 252, 256 (9th Cir. 2018):

> We have grave doubts that any statute that allows for arbitrary prolonged detention without any process is constitutional or that those who founded our democracy precisely to protect against the government's arbitrary deprivation of liberty would have thought

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[3] Further support can be found in an S.D.N.Y. case, Martinez v. Decker, 2018 U.S. Dist. LEXIS 178577 at *13 (S.D.N.Y., October 17, 2018): "Thus, in accordance with every court to have decided this issue, the Court concludes that due process requires the Government to bear the burden of proving that detention is justified at a bond hearing under Section 1226(a)."

so. Arbitrary civil detention is not a feature of our American government.

The Hernandez court, conducting a similar Mathews analysis in the context of immigrant detention, described the second factor as follows: "[T]here is a significant risk that the individual will be needlessly deprived of the fundamental right to liberty." 872 F.3d at 993. That Defendants' procedures here occasion the deprivation of such a fundamental right suffices as an adequate description of "the risk of an erroneous deprivation of such interest through the procedures used," including the absence of any deadline for conducting the bond hearing once requested and placing the burden on the detainee to establish grounds for release. Additionally, the failure to supply a verbatim record of the hearing or a contemporaneous set of written findings jeopardizes the class members' ability to effectively appeal an adverse decision—a further incursion upon their constitutionally-protected liberty interest.

Having identified the risk, the Court moves on to examine "the probable value, if any, of additional or substitute procedural safeguards." Mathews, 424 U.S. at 335. In establishing by this injunction the requirement that Defendant EOIR hold a bond hearing for class members within seven days of their request, the Court is informed, first, by its previous findings of "a plethora of district court and Board of Immigration Appeals cases affirm[ing] the requirement of a 'prompt' or 'expeditious' bond hearing for immigrants seeking entry." (See Dkt. No. 91, Order on Motion to Dismiss at 13-14.) Further guidance is found in the Congressional mandate that, in the statutory scheme by which asylum determinations are made, Defendants are required to review

credible fear determinations "as expeditiously as possible," a phrase which is defined as requiring review "to the maximum extent practicable within 24 hours, but in no case later than 7 days." 8 U.S.C. § 1225(b)(1)(B)(III)(iii); see also 8 C.F.R. §§ 287.3(d), 1003.42(e).

Elsewhere in the civil commitment context, there is a long history of courts which have found that due process requires an expeditious hearing, often defined as a period of no longer than seven days. See, e.g., Doe v. Gallinot, 657 F.2d 1017 (9th Cir. 1982) (affirming a ruling which required a probable cause hearing for an involuntary mental health commitment after 72 hours, "but in no event . . . later than the seventh day of confinement;" Id. at 1025[4]); Saravia v. Sessions, 280 F. Supp. 3d 1168 (N.D. Cal. 2017) (finding, using a Mathews balancing test, that the due process clause required, for minors re-arrested by DHS, "the opportunity to be heard 'at a meaningful time,'" and fixed that period at no later than seven days following the re-arrest; Id. at 1197); Nguti v. Sessions, 259 F. Supp. 3d 6 (W.D.N.Y. 2017) (requiring an immigrant detainee's bond hearing to be held within one week of the order; Id. at 14). The Court finds that a timeline of seven days from the date of the bond hearing request is consistent with both Congressional intent and judicial precedent and represents a procedural safeguard providing the value of an opportunity to be heard at a meaningful time regarding this fundamental interest possessed by the class members.

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[4] The Ninth Circuit further found in Gallinot that "the seven-day limit represents a responsible balance of the competing interests involved." Id. at 1025.

The probable value of the other safeguards (the burden of proof borne by the government, an automatic contemporaneous recording of the proceedings, and written findings at the time of decision) required by this injunction has been mentioned supra and may be summarized as: (1) the burden of proof being borne by the party which has traditionally been responsible for it and which has the greater resources to elicit the necessary facts; and (2) the provision to these class members of a meaningful opportunity to decide whether to appeal an adverse determination and to prepare a sufficiently detailed notice of appeal that the process may go forward with a complete representation of their position. Generally speaking, the "probable value, if any, of additional or substitute procedural safeguards" is the increased likelihood that Plaintiffs will be deprived of their fundamental liberty interest only where absolutely necessary, and for no longer than necessary.

C. The Government's interest

"The government has legitimate interests in protecting the public and in ensuring that non-citizens in removal proceedings appear for hearings. . . . " Hernandez, *supra* at 990. The Defendants present their interests primarily in terms of the burden on their resources that implementing additional procedural safeguards (and a mandated timeline) will impose; i.e., "available resources and docketing realities." (Response at 12.) While those concerns are certainly within the scope of a Mathews balancing test (this third factor is described as "the Government's interest, including the function involved and *the fiscal and administrative burdens that the additional or substitute procedural re-*

quirement would entail"), the Court will not exalt expense over fundamental rights to liberty. As the Ninth Circuit has stated,

> [T]he government has no legitimate interest in detaining individuals who have been determined not to be a danger to the community and whose appearance at future immigration proceedings can be reasonably ensured. . . .

Hernandez, *supra* at 994.

The Court finds that the Mathews balancing test favors the Plaintiffs' position in terms of a finding of "likelihood of success on the merits"—Plaintiffs have established the existence of a fundamental liberty interest, the risk of erroneous deprivation of that interest, and the value of additional procedural safeguards. The Government interest, while hardly nonexistent, is not sufficient to outweigh the other factors.

2. Irreparable harm

The Court finds that Plaintiffs have provided solid evidentiary and jurisprudential proof of the multiple layers of irreparable injury occasioned by Defendants' policies and practices. The Court's analysis begins by noting again that the courts of the United States recognize that "any deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" Hernandez, supra at 995 (citation omitted).

Next, the analysis turns to the more concrete types of harm inflicted by prolonged detention, including physical and psychological trauma (e.g., malnutrition, poor medical care, depression; see declarations of Plaintiffs and counsel at Dkt. Nos. 46, 48, 51, 54-58). Plaintiffs attach to their opening brief a series of declarations

establishing the spectrum of harms attendant upon prolonged detention (including panic attacks, depression, and exacerbation of pre-existing trauma). (see Opening Brief at 23.) Additionally, the Ninth Circuit has cited with approval an amicus brief from the American Bar Association in Hernandez which

> describes 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 whose parents are detained.

872 F.3d at 994.

Secondarily, prolonged indefinite detention negatively impacts detainees who are required to bear the burden of proof of their eligibility for release. Detention poses "serious obstacles in demonstrating eligibility for release at a bond hearing, including impediments to gathering evidence, communicating with potential witnesses or attorneys . . . or accessing documents that immigration officials have confiscated." (Opening Brief at 24; see declarations of immigration counsel at Dkt. Nos. 46-52, 54, 59.)

Furthermore, there is the impact of the procedural deficiencies alleged by Plaintiffs on their ability to effectively appeal any adverse determinations. If the detainee does not know the grounds on which the bond request was denied, how is the detainee—or the detainee's counsel—supposed to know whether an appeal would be well-taken? As one counsel declared: "It is near impossible to advise a client on his or her chances of appeal if I have little to no idea of what the [IJ]'s reasoning was for denying bond in the first place." (Dkt. No. 51, Decl.

of Jong at ¶ 11; see also Dkt. No. 50, Decl. of Inlender at ¶ 15 ("Once an appeal is filed, the lack of a transcript means that there is no verifiable way to relay what happened before the immigration judge and, in some cases, to articulate specific errors requiring reversal.").)

Finally, there is the incalculable harm to those class members who, facing an uncertain length of time in custody and an arduous and obstacle-strewn road to establishing their right to release (to say nothing of their right to asylum), simply abandon their claim and accept deportation back to countries where, as it has already been established to the Government's satisfaction, they face persecution, torture, and possibly death. (See Dkt. Nos. 46-47, 50-53, 55, 57-60.)

Defendants' arguments to the contrary are not persuasive. They claim that there are no allegations of prolonged detention awaiting a bond hearing, but Plaintiffs' declaratory evidence is replete with assertions of waiting times of weeks and months prior to a bond hearing. (E.g., Dkt. Nos. 46, 47, 57, 61.) They argue that claims of prolonged detention "could be addressed in the ordinary course of habeas litigation when they are ripe" (Response at 24)—apparently entirely missing the grim irony of Plaintiffs being forced to undergo a further delay in detention for an entirely separate legal proceeding. Even in the face of over a dozen declarations documenting excessive delays and its effects on the class members, Defendants insist that the injuries are "speculative," lacking any proof that they are "likely."

Plaintiffs have succeeded in establishing irreparable harm from the complained-of practices.

3. Balance of equities/Public interest

When the Government is a party to the case, the public interest and balance of equities factors "merge." Drakes Bay Oyster Co. v. Jewell, 747 F.3d 1073, 1092 (9th Cir. 2014). The equities on Plaintiffs' side consist of the deprivation of a fundamental constitutional right, with accompanying harms that range from physical, emotional and psychological damage to unnecessarily prolonged separation from their families to denial of due process. The equities on Defendants' side are primarily concerned with the agencies' right to control their dockets and to allocate what are unquestionably limited resources as they see fit. This is not a close call. As the Hernandez court stated:

> "Faced with such a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor."

872 F.3d at 996 (quoting Lopez v. Heckler, 713 F.2d 1432, 1437 (9th Cir. 1983).

In considering the public interest factor in the injunctive equation, the Hernandez court found the following "public interest" factors favored plaintiffs; the Court finds them applicable here:

1. "[E]nsuring the government's bond determination procedures comply with the Constitution."
2. "In addition to potential hardships facing Plaintiffs, the court 'may consider . . . the indirect hardship to their friends and family members.'" (quoting Golden Gate Rest. Ass'n v. City & County of San Francisco, 512 F.3d 1112, 1126 (9th Cir. 2008)).

3. "[T]he general public's interest in the efficient allocation of the government's fiscal resources" (citing the $158 a day cost to confine each detainee, with a total daily cost of $6.5 million [in 2017], compared to a maximum cost of $17 a day for supervised release).

Id.

Additionally, there is Ninth Circuit precedent for the principle that "it is always in the public interest to prevent the violation of a party's constitutional rights." Melendres v. Arpaio, 695 F.3d 990, 102 (9th Cir. 2012). It is the finding of this Court that both the balance of equities and the public interest favor the granting of the injunction requested by Plaintiffs.

Conclusion

The Plaintiffs of the Bond Hearing Class have succeeded in establishing all the requisite elements for a granting of their request for injunctive relief: a likelihood of success on the merits, irreparable harm if their relief is not granted, a balance of equities in their favor, and that the public interest will be benefited by the relief they seek. Accordingly, the Court GRANTS the requested relief and orders that Defendant EOIR institute the following procedural safeguards within 30 days of this Order:

1. Conduct bond hearings within seven days of a bond hearing request by a class member, and release any class member whose detention time exceeds that limit;

2. Place the burden of proof on Defendant Department of Homeland Security in those bond hearings to demonstrate why the class member should

not be released on bond, parole, or other conditions;

3. Record the bond hearing and produce the recording or verbatim transcript of the hearing upon appeal; and

4. Produce a written decision with particularized determinations of individualized findings at the conclusion of the bond hearing.

The clerk is ordered to provide copies of this order to all counsel.

Dated: Apr. 5, 2019

MARSHA J. PECHMAN
MARSHA J. PECHMAN
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C18-928 MJP

YOLANY PADILLA, ET AL., PLAINTIFFS

v.

US IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL., DEFENDANTS

Filed: Mar. 6, 2019

ORDER GRANTING CERTIFICATION OF CLASSES

The above-entitled Court, having received and reviewed

1. Plaintiffs' Amended Motion for Class Certification (Dkt. No. 37),
2. Defendants' Opposition to Plaintiffs' Amended Motion for Class Certification (Dkt. No. 68),
3. Plaintiffs' Reply in Support of Amended Motion for Class Certification (Dkt. No. 72),

all attached declarations and exhibits, and relevant portions of the record, rules as follows:

IT IS ORDERED that the motion is GRANTED, and the following classes are certified in this matter:

(1) **Credible Fear Interview Class**: All detained asylum seekers in the United States subject to expedited removal proceedings under 8 U.S.C. § 1225(b) who are not provided a credible fear determination within ten days of *the later of* (1) requesting asylum or expressing a fear of persecution to a DHS official *or* (2) the conclusion of any criminal proceeding related to the circumstances of their entry, absent a request by the asylum seeker for a delayed credible fear interview.

(2) **Bond Hearing Class**: All 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.

IT IS FURTHER ORDERED that Plaintiffs Padilla, Guzman, Orantes and Vasquez are designated as representatives of the Credible Fear Interview Class; Plaintiffs Orantes and Vasquez as representatives of the Bond Hearing Class; and Plaintiffs' counsel as class counsel.

Background

Plaintiffs are the named representatives of a putative class seeking declaratory relief related to Defendants United States Immigration and Customs Enforcement ("ICE"), United States Department of Homeland Security ("DHS"), United States Customs and Border Pro-

tection ("CBP") and United States Citizenship and Immigration Services ("USCIS")'s policies and practices with respect to the processing of asylum and credible fear claims and the setting of bond for detained immigrants pending resolution of those claims. Their complaint was originally filed on June 25, 2018 (Dkt. No. 1) and has been amended twice to date. (Dkt. Nos. 8, 26.)[1]

A. The Named Plaintiffs

Yolany Padilla: Shortly after her apprehension for illegal entry into the United States in May 2018, Ms. Padilla expressed a fear of being removed to her native Honduras. (SAC at ¶ 40.) Six weeks later, she was interviewed by an asylum officer and one day later, found to have a credible fear. Two days later, she was granted a bond hearing, was awarded bond, and was released in late July 2018. (Id. at ¶ 66, 115.)

Ibis Guzman: Ms. Guzman is also from Honduras and underwent a similar process to Ms. Padilla. She was represented at her bond hearing but was denied bond. (Id. at ¶¶ 32, 99.) She reserved appeal, but was released in late July 2018. (Id. at ¶ 119.)

Bianca Orantes: Shortly after her apprehension for illegal entry into the United States, Ms. Orantes expressed a fear of returning to her native El Salvador. (Id. at ¶ 44.) About five weeks later, she was interviewed by an asylum officer and, one day later found to have a credible fear. (Id. at ¶ 102.) She was granted

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[1] The complaint in this case was initially filed on June 25, 2018. (Dkt. No. 1.) Since then, it has been twice amended. (Dkt. Nos. 8, 26.) The operative complaint is now the Second Amended Complaint. (Dkt. No. 26 ("SAC").) Hereinafter, all references to the complaint refer to the SAC.

a bond hearing 11 days after her credible fear determination, was denied bond, reserved appeal, but was released in late July 2018. (Id. at ¶¶ 121, 123.)

Baltazar Vasquez: Shortly after his apprehension for illegal entry into the United States, Mr. Vasquez expressed a fear of returning to his native El Salvador. (Id. at ¶ 46.) About eight weeks later, he was interviewed by an asylum officer and found to have a credible fear. Three weeks later, he was granted a bond hearing, stipulated to an $8,000 bond, waived appeal, and was released. (Id. at ¶¶ 108, 125.)

B. The Class Claims

Plaintiffs seek certification of two classes: A Credible Fear Interview Class and a Bond Hearing Class (collectively, the "Classes"), and assert the following remaining claims:

Count I (Violation of Due Process): Both Classes claim they were detained for "an unreasonable time" while awaiting their credible fear interview and bond hearings. They seek to impose (1) a ten-day deadline for the credible fear interview, running from the date on which the non-citizen expresses a fear of returning to his or her country; and (2) a seven-day deadline for the bond hearing, running from the date of a positive credible fear determination. In addition, they seek procedural changes to the bond hearing including (1) that the government bear the burden of proof; (2) that they be provided a recording or verbatim transcript of the hearing; and (3) that the bond adjudicator issue written findings after every hearing.

Count II (Administrative Procedure Act): The Bond Hearing Class claims that the procedural deficiencies

they allege in the bond hearing process are an unconstitutional part of a "final agency action" in violation of the Administrative Procedures Act, 5 U.S.C. § 706(2) ("APA").[2]

Discussion

Preliminarily, Defendants again argue that the restrictions in the immigration statutes at issue deprive this Court of jurisdiction. These arguments are identical to those which the Court has previously rejected. (See Dkt. No. 91 at 6-8; Dkt. No. 100.) The Court will not repeat its reasoning here, but will repeat its finding that it has jurisdiction to hear Plaintiffs' claims.

I. Legal Standard

Plaintiffs seek class certification under Federal Rules of Civil Procedure 23(a) and 23(b)(2). Rule 23(a) provides that a class may be certified only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Rule 23(b)(2) provides that a class may be maintained if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that . . . declaratory relief is appropriate respecting the class as a whole." A class may be certified under Rule 23(b)(2)

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[2] Count II also claims that credible fear interviews and bond hearings were being "unreasonably delayed" in violation of the APA, § 706(1). However, those claims were dismissed by the Court under Fed. R. Civ. P. 12(b)(6). (See Dkt. No. 91 at 11-12, 16-17.) Count III (Violation of Asylum Statute) has been abandoned. (Id. at 18.)

where the challenged conduct is "such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360 (2011).

II. Class Certification

A. Numerosity

Defendants do not challenge this element, and the Court finds that the requirement for numerosity has been satisfied.

B. Commonality

Plaintiffs contend that, despite the differing factual circumstances among the class members, all have suffered the same injury, and that injury is capable of classwide resolution. Wal-Mart, 564 U.S. at 350. Regarding the timing of credible fear interviews and bond hearings, the alleged injury is the failure to hold the interviews and hearings in a constitutionally timely manner (i.e., ten days and seven days, respectively, according to the complaint). Regarding the bond hearings, the alleged injury is the claimed procedural deficiencies (i.e., that the burden of proof is placed on the detainee; that no verbatim record and no written findings are provided unless the ruling is appealed). The uniform resolution which is applicable to all members of the class is a declaratory judgment that these practices are unconstitutional.

Regarding the timing of interviews and hearings, Defendants respond that the individual circumstances of the class members and varying reasons for delays in their interviews and hearings render this matter incapable of a uniform procedural resolution. For example, because some of the class members have not entered at a

recognized point of entry ("POE"), they are subject to criminal prosecution, which may affect the timing of credible fear interviews and/or bond hearings. This argument is addressed in detail in Section II.C, *infra*, with respect to typicality and adequacy of the class representatives. The Court will confine itself here to a finding that the criminal prosecutions faced by some class members will not suffice to defeat commonality.

Regarding the procedural protections available at bond hearings, Defendants claim that the balancing test in Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (which weighs the private interest affected by the government action, the risk of erroneous deprivation of the private interest, and the government interest in the action) requires an "individualized assessment," and that imposing a strict and uniform timetable on credible fear interviews and bond hearings would be inconsistent with "the flexibility inherent in due process." Mathews contains no holding to this effect, nor does it hold that a classwide deprivation of due process cannot be addressed by a uniform solution.

Defendants further contend that due process violations in the immigration context must be subjected to a "harmless error" analysis. See, e.g., Prieto-Romero v. Clark, 534 F.3d 1053, 1066 (9th Cir. 2008); Singh v. Holder, 638 F.3d 1196, 1210 (9th Cir. 2011). While this does appear to be the state of the law regarding individual litigants, neither of these cases were class action suits analyzing the commonality of class claims. The fact that certain members of the Classes may not have ultimately been harmed by the allegedly unconstitutional practices of the government does not mean that these practices are constitutional. Furthermore, a

finding that any or all of these practices are unconstitutional means, *ipso facto*, that they have the potential to harm anyone who is subjected to them. The purpose of classwide declaratory relief is to avert any such likelihood and it is self-defeating to wait until after the fact of the bond hearing to decide whether the practice is unconstitutional *and* harmful to a particular class member.

As Plaintiffs point out, "courts regularly resolve procedural due process claims on a class-wide basis when addressing the constitutionality of immigration agencies' policies and practices." See, e.g., Hernandez v. Sessions, 872 F.2d 976, 993-94 (9th Cir. 2017); Walters v. Reno, 145 F.3d 1032, 1047 (9th Cir. 1998); Rojas v. Johnson, 305 F. Supp. 3d 1176, 1194-1200 (W.D. Wash. 2018).

The Court finds that the requirement for commonality has been satisfied.

C. Typicality and Adequacy[3]

Defendants attack the named Plaintiffs' typicality and adequacy on multiple fronts, and the Court will address each in turn:

1. The Named Plaintiffs' Injury

Defendants contend that the named plaintiffs have received their credible fear determinations and bond hearings and have all been released from custody such that they are no longer facing any injury. The Court

[3] While typicality and adequacy are separate inquiries, they are in some ways overlapping and the briefing tends to conflate the two factors. Accordingly, the Court will address them together.

finds that these events do not defeat adequacy or typicality.

First, there is precedent for certifying a class where some of the proposed class members have received some of the sought-after protections but others have not. See Walters, 145 F.3d at 1037; Rojas v. Johnson, C16-1024RSM, 2017 WL 1397749, at *5-6 (W.D. Wash. Jan. 10, 2017).

Second, the resolution of the named Plaintiffs' injuries occurred *after* the filing of the litigation, and courts are traditionally reluctant to permit government agencies "to avoid nationwide litigation that challenges the constitutionality of its general practices simply by pointing to minor variations in procedure . . . designed to avoid the precise constitutional inadequacies" which are at issue. Walters, 145 F.3d at 1046.

Third, Plaintiffs' ultimate release is not a factor in a case where the nature of the class's common circumstance —immigration detention—renders their claims "inherently transitory":

> [W]here a plaintiff's claim becomes moot while she seeks to certify a class, her action will not be rendered moot if her claims are "inherently transitory" (such that the trial court could not have ruled on the motion for class certification before her claim expired), as similarly-situated class members would have the same complaint. The theory behind this rule is that such claims are "capable of repetition, yet evading review."

Rivera v. Holder, 307 F.R.D. 539, 548 (W.D. Wash. 2015) (citing Pitts v. Terrible Herbst, Inc., 653 F.3d 1081, 1090-91 (9th Cir. 2011) (describing how this "relation

back" doctrine applies in class actions)). Claims which would otherwise "evade review" are permitted to "relate back" to the filing of the complaint for purposes of the certification analysis. Sosna v. Iowa, 419 U.S., 393, 402 n.11 (1975).

Finally, Plaintiffs' claims are aimed at Defendants' *policies and practices*. If those policies and practices are ultimately determined to be unconstitutional or otherwise violative of federal law, the fact that not all class members will have been injured by those practices (due to the "inherently transitory" nature of their claims) should not affect their ability to have those practices declared unconstitutional as to all who find themselves in similar circumstances.

2. The Timing and Effect of Criminal Proceedings

Defendants argue that the named Plaintiffs are atypical, having been subject to—in addition to the normal immigration procedures—criminal prosecution (based upon their entry into the country at some place other than a POE). Tellingly, Defendants fail to provide any explanation as to *how* a criminal prosecution might impact the timing of the credible fear interview and bond hearing or change the due process analysis. In the case of at least Ms. Orantes, her credible fear interview occurred *weeks* after her criminal proceedings were concluded. Nor do the immigration regulations regarding the right to a credible fear interview and bond hearing contain any provision about criminal prosecution impacting the timing of those procedures. See 8 C.F.R. § 208.31(b). The allegedly unconstitutional delays of which the named Plaintiffs complain remain the same for them as the other class members.

In response, Plaintiffs explain:

> [J]ust as Plaintiffs do not seek to impose deadlines where delays are at the request of the applicant, they do not seek to require CFIs prior to a district court's disposition of a pending criminal charge.

(Dkt. No. 72 at 9.) Based upon this representation, the Court will revise the Credible Fear Interview Class's proposed class definition, such that the requested ten-day deadline will be run from the disposition of any pending criminal proceedings. In other words, the Credible Fear Interview Class will include "all detained asylum seekers . . . who are not provided a credible fear determination within ten days of *the later of* (1) requesting asylum or expressing a fear of persecution to a DHS official *or* (2) the conclusion of any criminal proceeding related to the circumstances of their entry, absent a request by the asylum seeker for a delayed credible fear interview."

3. The Geographical Location, Circumstances of Entry, and Challenges to Bond Determinations

Defendants' arguments that the named Plaintiffs are located in different geographical regions, entered the country under different circumstances, and faced different outcomes at their bond hearings, fare no better.

First, Defendants follow the same "indefinite detention" policy across the country, regardless of their location or the circumstances of their entry. Further, these factors do not seem to affect the uniformity of treatment received by the putative class members: Plaintiffs have submitted affidavits from immigration attorneys across

the country describing similar delays and procedural deficiencies in credible fear interviews and bond hearings. (Dkt. Nos. 39-44.)

Second, Defendants contend that Ms. Orantes and Mr. Vasquez are neither typical nor adequate to represent the bond hearing class because neither appealed their bond determination. The Court fails to see how this renders them atypical or inadequate, as they were still subject to the same allegedly improper circumstances (i.e., delayed bond hearings, alleged procedural deficiencies) as the class they seek to represent. Additionally, where a defendant's policies are immutable, a futile effort at administrative exhaustion is not required. American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1058 (9th Cir. 1995). In any event, according to the complaint, Ms. Orantes and Mr. Vazquez *did* intend to appeal their bond denials and only abandoned these efforts when they were released.

4. The Named Plaintiffs' Participation in Litigation

Lastly, Defendants argue that there is a lack of evidence of the named Plaintiffs' "interest, willingness, and understanding of the need to participate" in their litigation, based upon the absence of declarations affirming so much. As far as the Court is aware, there is no requirement that a named plaintiff submit a declaration specifically affirming their interest, willingness, and understanding of the need to participate. Further, Ms. Orantes submitted a declaration in connection with the pending request for a preliminary injunction. (See Dkt. No. 57.) The physiological, psychological, and emotional hardships she relates in those declarations

leave little doubt as to her interest in the case and willingness to pursue it. Defendants' request for additional time to depose the named Plaintiffs on these topics is rejected as both unnecessary and unduly time-consuming.

The Court finds that the requirements for typicality and adequacy have been satisfied.

D. Classwide Relief is Appropriate

For the reasons discussed in Section II.B, *supra*, concerning the commonality requirement, the Court finds that Defendants' conduct is applicable to all class members, such that declaratory relief, if granted, will be appropriate for everyone in both the Credible Fear Interview and the Bond Hearing Classes.

E. Nationwide Certification is Appropriate

Defendants ask that, should the Court certify the requested classes, it not do so on a nationwide basis. Their grounds for this request are (1) "intercircuit comity," (2) the foreclosure of similar litigation in other districts with the accompanying opportunity to address "unique local issues", and (3) the risk that nationwide certification would foreclose class members—who will not be able to opt out—from seeking "speedier individual relief."

The Court is not persuaded. As Plaintiffs point out, the proposed class representatives were transferred all over the country before landing in the Western District of Washington. That Defendants routinely transfer detained immigrants throughout the country prior to adjudicating their cases is a fact capable of judicial notice, and the Court fails to see the logic of confining the outcome of this matter to a single district.

Further, the Court's analysis of the "commonality" and "typicality" factors addresses the validity of "unique local issues"—Plaintiffs are seeking a uniform nationwide resolution because there is no provision in the applicable regulations (or the Constitution) that permits Defendants to deny due process based upon "local issues," however "unique" they may be. In any event, Defendants cite no other similar litigation elsewhere in the country, and the Court is aware of none.

Finally, the Court finds Defendants' concern that class members be afforded the opportunity to seek "speedier individual recovery" to border on the cynical. It is again a fact eligible for judicial notice that the overwhelming majority of these class members are not sufficiently resourced to pursue litigation on their own.

The Supreme Court has recognized that nationwide certification is committed to the discretion of the district court and is appropriate in some circumstances. Califano v. Yamasaki, 442 U.S. 682, 702-03 (1979). The Court finds that this is manifestly one of those circumstances, and rejects Defendants' request to limit the scope of the class certification.

Conclusion

Plaintiffs have established numerosity, commonality, typicality and adequacy, and have further demonstrated that "declaratory relief is available to the class as a whole" and that the challenged conduct is "such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." Wal-Mart, 564 U.S. at 360. The Court therefore certifies a Credible Fear Interview Class and a Bond Hearing Class as de-

fined *supra*; designates named Plaintiffs Padilla, Guzman, Orantes and Vasquez as Credible Fear Interview Class representatives and Plaintiffs Orantes and Vasquez as Bond Hearing Class representatives; and appoints Plaintiffs' counsel as class counsel.

The clerk is ordered to provide copies of this order to all counsel.

Dated: Mar. 6, 2019

MARSHA J. PECHMAN
MARSHA J. PECHMAN
United States Senior District Judge

APPENDIX F

1. 8 U.S.C. 1225(b)(1)(A)-(B) provides:

Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing

(b) Inspection of applicants for admission

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled

(A) Screening

(i) In general

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

(ii) Claims for asylum

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer

the alien for an interview by an asylum officer under subparagraph (B).

(iii) Application to certain other aliens

(I) In general

The Attorney General may apply clauses (i) and (ii) of this subparagraph to any or all aliens described in subclause (II) as designated by the Attorney General. Such designation shall be in the sole and unreviewable discretion of the Attorney General and may be modified at any time.

(II) Aliens described

An alien described in this clause is an alien who is not described in subparagraph (F), who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility under this subparagraph.

(B) Asylum interviews

(i) Conduct by asylum officers

An asylum officer shall conduct interviews of aliens referred under subparagraph (A)(ii), either at a port of entry or at such other place designated by the Attorney General.

(ii) Referral of certain aliens

If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)), the alien shall be detained for further consideration of the application for asylum.

(iii) Removal without further review if no credible fear of persecution

(I) In general

Subject to subclause (III), if the officer determines that an alien does not have a credible fear of persecution, the officer shall order the alien removed from the United States without further hearing or review.

(II) Record of determination

The officer shall prepare a written record of a determination under subclause (I). Such record shall include a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in the light of such facts, the alien has not established a credible fear of persecution. A copy of the officer's interview notes shall be attached to the written summary.

(III) Review of determination

The Attorney General shall provide by regulation and upon the alien's request for prompt review by an immigration judge of a determination under subclause (I) that the

alien does not have a credible fear of persecution. Such review shall include an opportunity for the alien to be heard and questioned by the immigration judge, either in person or by telephonic or video connection. Review shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the determination under subclause (I).

(IV) Mandatory detention

Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.

(iv) Information about interviews

The Attorney General shall provide information concerning the asylum interview described in this subparagraph to aliens who may be eligible. An alien who is eligible for such interview may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, according to regulations prescribed by the Attorney General. Such consultation shall be at no expense to the Government and shall not unreasonably delay the process.

(v) "Credible fear of persecution" defined

For purposes of this subparagraph, the term "credible fear of persecution" means that

there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 1158 of this title.

2. 8 U.S.C. 1252(f)(1) provides:

Judicial review of orders of removal

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no 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, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.