UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Ramon RODRIGUEZ VAZQUEZ, et al., Plaintiffs, v. Drew BOSTOCK, et al., Defendants.	Case No. 3:25-cv-05240-TMC **PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS** Noting Date: July 7, 2025 ORAL ARGUMENT REQUESTED

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INTRODUCTION

The Bond Denial Class and the Bond Appeals Class challenge agency policies that unlawfully deny them bond hearings and unlawfully prolong their appeals when bond is denied. Defendants assert that both classes' claims are barred by various jurisdictional provisions in 8 U.S.C. § 1252, but Supreme Court and Ninth Circuit precedent squarely foreclose those arguments. On the merits, Defendants assert that the Bond Denial Class cannot state a claim because they are all "applicants for admission." This argument not only ignores 8 U.S.C. § 1225's structure, but more critically, does not deal with 8 U.S.C. § 1226(a)'s text, applicable canons of construction, legislative history, or its longstanding application to class members. As for the Bond Appeals Class, binding precedent confirms that the Due Process Clause demands timely adjudication of Plaintiffs' custody appeals—especially given the more robust protections available to pretrial detainees, whose detention implicates the same due process principles. Accordingly, for all the reasons stated below, the Court should deny Defendants' motion to dismiss.

STATEMENT OF FACTS

I. The Tacoma Immigration Court's Practice of Denying Bond Hearings

The immigration detention provisions at issue in this case are 8 U.S.C. §§ 1226(a) and 1225(b). Dkt. 1 ¶ 30. Subsection 1226(a) provides the "default" detention authority for individuals in removal proceedings, Dkt. 29 at 5, during which an immigration judge (IJ) "decid[es] the inadmissibility or deportability of a[] [noncitizen]," 8 U.S.C. § 1229a; *see also* Dkt. 1 ¶ 38. Detention under § 1226(a) is discretionary, as it provides for release "on . . . bond or conditional parole." *Jennings v. Rodriguez*, 583 U.S. 281, 288 (2018) (citation modified). A limited subset of noncitizens in removal proceedings who "fall[] into one of several enumerated

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categories involving criminal offenses and terrorist activities" are subject to mandatory detention under § 1226(c). *Id.* at 289. Subsection 1225(b), by contrast, focuses on noncitizens arriving at U.S. ports of entry or who recently entered the United States. Dkt. 1 ¶ 40. Specifically, § 1225(b)(2)(A) mandates detention where an "examining immigration officer determines that a[] [noncitizen] seeking admission is not clearly and beyond a doubt entitled to be admitted" and places them in removal proceedings under § 1229a.

Immigration authorities have long recognized that § 1226(a) furnishes the detention authority for individuals who entered the United States without inspection but were later apprehended while present within the country. Dkt. 1 ¶¶ 32–33. Around 2022, however, immigration judges (IJs) at the Tacoma Immigration Court began holding that such individuals were instead subject to mandatory detention under § 1225(b)(2) because they are "applicant[s] for admission." *Id.* ¶ 35 (alteration in original). This policy departs from longstanding statutory practice and diverges from the approach of immigration courts nationwide. *Id.* ¶ 34. Defendants do not dispute that the Tacoma IJs have adopted this policy, nor that the policy categorically denies bond for all members of the Bond Denial Class. *See* Dkt. 49 at 27–30; *see also* Dkt. 29 at 7–8.

The Tacoma Immigration Court's change in policy has led to the denial of bond to hundreds of noncitizens detained at the Northwest ICE Processing Center, including many longtime U.S. residents who would otherwise be eligible for bond. Dkt. 1 ¶ 36; *see also, e.g.*, *id.* ¶¶ 74–76, 84 (describing named Plaintiff's circumstances). National statistics further confirm the policy's impact. In Fiscal Year (FY) 2023, Tacoma immigration judges granted bond in only 3% of cases where bond was requested—the lowest rate in the country. *Id.* ¶ 54. As of the date of Plaintiffs' complaint, over 90% of bond requests filed in FY 2025 had been denied. *Id.* ¶ 55.

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Consequently, members of the Bond Denial Class are forced to remain detained pending their removal proceedings, facing significant barriers to legal representation, prolonged separation from their families and communities, and harsh, punitive detention conditions. *Id.* ¶¶ 69–70.

II. The BIA's Delays in Issuing Custody Decisions

For most noncitizens, a bond denial marks the end of the road for any realistic chance at release. This is because appeals to the Board of Immigration Appeals (BIA or Board) do not provide a meaningful mechanism to challenge bond denials. The problem lies in Board's systematic delay: according to the agency's own data, in FY 2024, the BIA *on average* took 204 days to issue a decision in a custody appeal. *Id.* ¶ 57. Many cases take significantly longer. *Id.* ¶ 59. As a result, detained noncitizens do not have a chance to have their appeal heard before defending their removal case on the merits. *Id.* ¶ 66. This results in separated families, requires noncitizens to remain confined under prison-like conditions, and severely diminishes noncitizens' access to counsel and key evidence. *Id.* ¶¶ 66–70. The BIA's treatment of custody appeals contrasts sharply with detention for pretrial criminal detainees, who receive much faster review (review which occurs prior to trial) as mandated by the Due Process Clause. *Id.* ¶¶ 61–65.

III. Procedural History

Plaintiffs filed this lawsuit on March 20, 2025. Dkt. 1. That same day, they filed a motion for class certification, Dkt. 2, and a motion for a preliminary injunction of behalf of Named Plaintiff Ramon Rodriguez Vazquez, Dkt. 3, along with extensive supporting evidence detailing Defendants' policy and its effects, *see* Dkts. 4–10. On April 24, 2025, this Court granted Mr. Rodriguez's motion for a preliminary injunction, ordering that he receive a bond hearing. Dkt. 29. A week later, on May 2, the Court granted class certification as to the Bond Denial Class and a separate Bond Appeal Class. Dkt. 32. Specifically, the Court certified the following classes:

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> Bond Denial Class: All noncitizens without lawful status detained at the Northwest ICE Processing Center who (1) have entered or will enter the United States without inspection, (2) are not apprehended upon arrival, (3) are not or will not be subject to detention under 8 U.S.C. § 1226(c), § 1225(b)(1), or § 1231 at the time the noncitizen is scheduled for or requests a bond hearing.
>
> Bond Appeal Class: All detained noncitizens who have a pending appeal, or will file an appeal, of an immigration judge's bond hearing ruling to the Board of Immigration Appeals.

Id. at 43.

Following class certification, class counsel filed a motion for a temporary restraining order (TRO) on behalf of Bond Denial Class Member Alfredo Juarez Zeferino, seeking an order that would require Defendants to honor the alternative bond amount set at his bond hearing. Dkt. 33. This Court denied the TRO. Dkt. 38. Class counsel subsequently filed a motion for partial summary judgment on behalf of the Bond Denial Class. Dkt. 41. On June 6, Defendants filed a motion to stay the summary judgment motion, Dkt. 48, and separately filed a motion to dismiss all claims, Dkt. 49. This Court denied the motion to stay, while re-noting the motion for summary judgment for July 8. Dkt. 53. Plaintiffs now respond to Defendants' motion to dismiss.

ARGUMENT

Under Rule 12(b)(1), Defendants must demonstrate that Plaintiffs' allegations "are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). As for Defendants' arguments under Rule 12(b)(6), Defendants cannot prevail if the complaint contains "sufficient factual matter . . . to state a claim to relief that is plausible on its face." *Bain v. Cal. Tchrs. Ass'n*, 891 F.3d 1206, 1211 (9th Cir. 2018) (citation omitted). In conducting the Rule 12(b)(6) inquiry, the Court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).

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I. The Class Claims Are Not Moot.

Plaintiffs acknowledge that Mr. Rodriguez's individual claims are now moot in light of his voluntary departure. *See* Dkt. 49 at 13–14. However, where, as here, "the district court has certified a class, mooting the putative class representative's claim will not moot the class action. . . . because upon certification the class 'acquire[s] a legal status separate from the interest asserted by [the class representative],'" giving rise to Article III standing for each member of the certified class. *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1090 (9th Cir. 2011) (second and third alterations in original) (quoting *Sosna v. Iowa*, 419 U.S. 393, 399 (1975)). This Court granted class certification on May 2, 2025, *see* Dkt. 32, before Mr. Rodriguez's individual claims became moot as a result of his voluntary departure order, *see* Dkt. 49 at 14. Accordingly, the claims of the Bond Denial Class and Bond Appeal Class are properly before the Court.

II. The Court Has Jurisdiction Over the Bond Denial Class's Claims.

A. 8 U.S.C. 1252(g) Does Not Bar This Court's Jurisdiction.

Defendants first argue that 8 U.S.C. § 1252(g) bars the Bond Denial Class's claims because class members' "detention arises from the decision to commence [removal] proceedings." Dkt. 49 at 16. But the Bond Denial Class does not challenge any decision to "commence proceedings" within the meaning of § 1252(g). Accepting Defendants' interpretation would bar nearly all detention challenges brought by noncitizens, at odds with the narrow interpretation of this subsection that courts have consistently adopted.

As the Supreme Court has explained, § 1252(g) is "much narrower" than what Defendants claim. *Reno v. Am.-Arab Anti-Discrimination Comm.* (*AADC*), 525 U.S. 471, 482 (1999). Rather than encompass "all deportation-related cases," *id.* at 478, § 1252(g) insulates from litigation the immigration authorities' "exercise of [their] *discretion*," *id.* at 484 (emphasis added), with respect to the three specified actions: "commenc[ing] proceedings, adjudicat[ing]

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cases, [and] execut[ing] removal orders," *id.* at 483 (alterations in original). The subsection was thus was "directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." *Id.* at 485 n.9; *see also id.* at 485 (providing as an example of such prosecutorial discretion "'no deferred action' decisions and similar discretionary determinations"). Indeed, the Court found it "implausible" that "the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings." *Id.* at 482. Subsequent Supreme Court precedent has affirmed § 1252(g)'s narrow scope and focus on discretionary decisions. *See, e.g.*, *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 591 U.S. 1, 19 (2020) (noting § 1252(g) is "narrow").

With these principles in mind, 1252(g) does not "sweep in any claim that can technically be said to 'arise from' the three listed actions," including challenges to the proper interpretation of the INA's detention provisions. *Jennings*, 583 U.S. at 294. In fact, although the Supreme Court has reviewed several cases involving the government's application of immigration detention authorities, it has never held that such claims might be barred by § 1252(g)—including in cases concerning § 1226. *See Jennings*, 583 U.S. 281 (§§ 1226 & 1225); *Zadvydas v. Davis*, 533 U.S. 678 (2001) (§ 1231); *Demore v. Kim*, 538 U.S. 510 (2003) (§ 1226); *Johnson v. Guzman Chavez*, 594 U.S. 523 (2021) (§§ 1226 & 1231); *Johnson v. Arteaga-Martinez*, 596 U.S. 573 (2022) (§ 1231). That omission is significant because "courts, including th[e] [Supreme] Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). Moreover, in *Jennings*, the Court expressly reiterated that § 1252(g) must be "read . . . to refer to just those three specific actions themselves." 583 U.S. at 294.

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Here, the Bond Denial Class does not challenge any discretionary action to "commence proceedings." Rather, they challenge Defendants' independent conclusion that they are subject to mandatory detention while those proceedings take place. *Cf.* 8 C.F.R. § 1003.19(d) (noting IJ consideration of requests for "custody or bond . . . shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding"). Determining the detention provision under which Bond Denial Class members are detained is not discretionary, nor does resolving that question challenge Defendants' discretionary decision to place class members in removal proceedings. *See United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004) (clarifying § 1252(g) does not prevent district court jurisdiction over "a purely legal question that does not challenge the Attorney General's discretionary authority, even if the answer to that legal question—a description of the relevant law—forms the backdrop against which the Attorney General later will exercise discretionary authority"). As a result, § 1252(g) does not bar the class's claims.

B. 8 U.S.C. 1252(b)(9) Does Not Bar This Court's Jurisdiction.

Defendants' argument with respect to § 1252(b)(9) is similarly and directly foreclosed by binding Supreme Court precedent. Paragraph 1252(b)(9) is a "zipper clause" that channels review of final orders of removal into petitions for review before a federal court of appeals. *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) (en banc) (quoting *AADC*, 525 U.S. at 483). Defendants contend that § 1252(b)(9) applies here because Bond Denial Class members "challenge[] the decision and action to detain them, which arises from DHS's decision to commence removal proceedings, and is thus an action taken to remove them from the United States." Dkt. 49 at 18 (citation modified).

Jennings squarely refutes this argument. There, similar to here, the Court addressed a statutory interpretation question regarding bond hearings under § 1226 and § 1225. Before

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reaching the merits, the Court first addressed whether such detention could be said to "'aris[e] from' the actions taken to remove" the noncitizen class members in *Jennings*, thus barring the claims under § 1252(b)(9). 583 U.S. at 293 (alteration in original). The Court rejected that proposition—i.e., the same one Defendants now make—as "absurd." *Id.* As the Court explained:

> Interpreting "arising from" in this extreme way would also make claims of prolonged detention effectively unreviewable. By the time a final order of removal was eventually entered, the allegedly excessive detention would have already taken place. And of course, it is possible that no such order would ever be entered in a particular case, depriving that detainee of any meaningful chance for judicial review.

Id. Here is no different. In fact, Defendants' position is now even *more* extreme.[1] The Bond Denial Class asserts that they are detained under § 1226(a) and thus are entitled to a bond hearing at the outset of their detention, rather than after prolonged detention, as in *Jennings*. Forcing them to wait years for a petition for review to resolve that claim would "depriv[e] [them] . . . of any meaningful chance for judicial review." *Id.* Once again, it is notable that the Supreme Court has never demanded that noncitizens like Bond Denial Class members raise their challenges to detention in a petition for review in any of the immigration detention challenges the Court has heard. *See supra* p. 6 (citing cases). Furthermore, in a similar context, the Ninth Circuit recently held that § 1252(b)(9) does not bar review. *See Gonzalez v. United States Immigr. & Customs Enf't*, 975 F.3d 788, 810 (9th Cir. 2020) ("Section 1252(b)(9) is also not a bar to jurisdiction over noncitizen class members' claims because claims challenging the legality of detention pursuant to an immigration detainer are independent of the removal process."). Defendants do not address this case.

The cases Defendants do cite provide them no support. Many do not even involve

[1] Tellingly, Defendants never address this directly-on-point rationale from *Jennings*.

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detention. *See, e.g.*, Dkt. 17–18 (citing out-of-circuit cases involving challenges related to removal orders or other immigration actions). Lacking any directly relevant authority, Defendants resort to citing Justice Thomas's concurrence in judgment in *Jennings*. Dkt. 49 at 19. But that concurrence is more accurately described as a dissent regarding the majority's jurisdictional conclusion as to § 1252(b)(9). *See* 583 U.S. at 314–23 (Thomas, J., concurring in judgment). Of course, "[t]his view is not the law." *Smith v. McCormick*, 914 F.2d 1153, 1163 (9th Cir. 1990) (rejecting argument that relied on a Supreme Court dissent).

Defendants finish by mischaracterizing the Bond Denial Class claims. They claim that class members' request for a declaration regarding the basis for their detention is actually "a challenge to DHS's decision to detain them in the first instance." Dkt. 49 at 19. Citing a line from *Jennings*, they then assert that such claims might be covered by § 1252(b)(9). *Id.* (quoting *Jennings*, 581 U.S. at 294–95). But the Bond Denial Class does not challenge DHS's initial decision to detain them. Instead, they challenge the Tacoma Immigration Court's policy of considering them detained under § 1225 rather than § 1226(a) once detained. For all the reasons above, § 1252(b)(9) plainly does not cover such claims.

C. Neither 8 U.S.C. § 1252(f)(1) nor Rule 23(b)(2) Prevents Classwide Declaratory Relief.

Defendants next claim that § 1252(f)(1) prohibits the requested relief in this case because, in their view, it is coercive. They also assert that if the relief is not coercive, then Rule 23(b)(2) bars it because the declaratory relief would be an advisory opinion. The text of the applicable statutes, Supreme Court precedent, and Ninth Circuit caselaw all demonstrate both arguments are incorrect.

1. 8 U.S.C. 1252(f)(1) Does Not Bar Declaratory Relief.

Defendants' first assertion is that the declaratory relief Plaintiffs seek "is impermissibly

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coercive and violates § 1252(f)(1).” Dkt. 49 at 22. According to them, this is because the requested relief “essentially requires IJs to find that members of the [Bond Denial Class] are really detained under § 1226(a).” *Id.* Defendants claim that the relief thus “interfere[s] with the government’s efforts to operate” a provision covered by § 1252(f)(1). *Garland v. Aleman Gonzalez*, 596 U.S. 543, 551 (2022).

There are several reasons this is wrong. As an initial matter, it flies in the face of Supreme Court and Ninth Circuit precedent. The Ninth Circuit has squarely held—even after the Supreme Court’s decision in *Aleman*—that § 1252(f)(1) does not bar declaratory relief. *See Al Otro Lado v. Exec. Off. for Immigr. Rev.*, 138 F.4th 1102, 1123–24 (9th Cir. 2025). In *Al Otro Lado*, the district court had entered declaratory relief “stating that the . . . policy [at issue] violated [8 U.S.C.] § 1158 and § 1225.” *Id.* at 1123. In upholding such relief, the Court of Appeals observed—just “[a]s the Government concede[d]”—that “circuit precedent hold[s] that § 1252(f)(1) does not ‘bar classwide declaratory relief.’” *Id.* at 1123–24 (quoting *Rodriguez v. Hayes*, 591 F.3d 1105, 1119 (9th Cir. 2010)). Defendants acknowledge this holding in a footnote. Dkt. 49 at 20 n.4. But they never explain how relief that declares the “policy violated . . . § 1225” is any different than the relief requested here. *Al Otro Lado*, 138 F.4th at 1123. Similar to *Al Otro Lado*, Plaintiffs seek a ruling that declares that the Tacoma Immigration Court’s policy violates the INA by misclassifying Bond Denial Class members as detained under § 1225 rather than § 1226(a). Dkt. 41-1; *see also* Dkt. 1 at 21.

Supreme Court precedent also supports the availability of declaratory relief. In *Nielsen v. Preap*, 586 U.S. 392 (2019), the Court confronted a case that implicated § 1226 and the limitations of § 1252(f)(1). The district court in that case had issued an injunction, but the Court sidestepped the question of whether such an injunction was barred by § 1252(f)(1), explaining

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that "[w]hether the *Preap* court had jurisdiction to enter such an injunction is irrelevant because the District Court had jurisdiction to entertain the plaintiffs' request for declaratory relief." 586 U.S. at 402 (plurality opinion). While *Preap* was a plurality opinion, several other justices have expressed a similar view. *See Jennings*, 583 U.S. at 355 (2018) (Breyer, J., dissenting, joined by Ginsburg, Kagan, and Sotomayor, JJ., dissenting). More recently, in *Biden v. Texas*, the Court reaffirmed a narrow reading of § 1252(f)(1), explaining that the provision "withdraws a district court's 'jurisdiction or authority' to grant *a particular form of relief*" but does "not deprive the lower courts of all subject matter jurisdiction." 597 U.S. 785, 798 (2022) (emphasis added). In so holding, the Court cited with approval both the *Preap* plurality and the *Jennings* dissent, thus highlighting that declaratory relief remains available. *Id.* at 800.

The statute's text demonstrates why this is so. Defendants emphasize that the statute bars orders that "enjoin or restrain" the government's actions with respect to the covered provisions, asserting that the "common denominator of those terms is that they involve coercion." Dkt. 49 at 21. But that reading stretches § 1252(f)(1) beyond its plain language. Paragraph 1252(f)(1) "is nothing more or less than a limit on injunctive relief." *AADC*, 525 U.S. at 481. The text demonstrates this fact, as it limits only orders that "enjoin or restrain" the operation of sections 1221–1231[2]—legal terms of art that correspond to the two types of injunctive relief provided under the Hobbs Administrative Orders Review Act, 28 U.S.C. § 2341 *et seq.*, and the Federal Rules of Civil Procedure. *See* 28 U.S.C. § 2349(a) & (b) (setting out, respectively, the power of the court of appeals to enjoin and temporarily restrain an agency order); Fed. R. Civ. P. 65 (providing for "injunctions and restraining orders"); *see also Rodriguez*, 591 F. 3d at 1119

[2] The codified version of § 1252(f)(1) in the U.S. Code also mentions § 1232. However, § 1252(f)(1) does not in fact cover § 1232 for reasons not relevant here. *See Moreno Galvez v. Jaddou*, 52 F.4th 821, 829–31 (9th Cir. 2022).

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(observing that "restrain" is "best read to refer to temporary injunctive relief," while "enjoin" refers to permanent injunctions).

The absence of any reference to declaratory relief in § 1252(f)(1) is particularly notable, given that Congress expressly barred declaratory relief elsewhere in § 1252. *See Rodriguez*, 591 F.3d at 1119. In the contemporaneously enacted § 1252(e),[3] Congress prohibited courts from "enter[ing] *declaratory*, injunctive, or other equitable relief" with respect to expedited removal orders. 8 U.S.C. § 1252(e)(1)(A) (emphasis added). By contrast, the adjacent § 1252(f)(1) uses only the terms "enjoin or restrain" and makes no mention of declaratory relief. *Id.* § 1252(f)(1). This decision to "include[] particular language in one section of a statute but omit[] it in another section of the same Act" demonstrates that Congress "act[ed] intentionally and purposely in the disparate inclusion or exclusion." *Nken v. Holder*, 556 U.S. 418, 430 (2009) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430 (1987)). This is "particularly true here, where [the] subsections . . . were enacted as part of a unified overhaul of judicial review procedures." *Id.* at 430–31.

The subsection's title further reinforces the narrow scope of § 1252(f)(1). Congress entitled § 1252(f) to describe it as a "[l]imit on injunctive relief"—and notably, not a limit on anything else. 8 U.S.C. § 1252(f). Here too, the language contrasts with that of § 1252(e)(1), which is more broadly titled "Limitations on relief." *Id.* § 1252(e)(1). The title "makes clear the narrowness of [§ 1252(f)(1)'s] scope" and resolves any lingering ambiguity regarding the limits that Congress intended when it passed § 1252(f)(1). *Texas*, 597 U.S. at 798.

In short, whether or not declaratory relief contains an element of coercion, it is not relief

[3] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 306, 110 Stat. 3009-546, 3009-610 to 3009-612 (1996).

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foreclosed by § 1252(f)(1). Defendants are also wrong to conflate declaratory relief with injunctions. Declaratory relief is a distinct remedy made available by Congress through the Declaratory Judgment Act, 28 U.S.C. § 2201, which the Supreme Court has recognized "is not ultimately coercive," *Steffel v. Thompson*, 415 U.S. 452, 471 (1974); *see also id.* at 466–67 (emphasizing differences between injunctive and declaratory relief). Indeed, contrary to Defendants' claims, declaratory relief does *not* "interdict[] . . . the operation at large of the statute." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 155 (1963).

Congress's decision to make classwide injunctive relief unavailable under § 1252(f)(1) has practical consequences, but it does not preclude declaratory relief. For example, some courts have held that preliminary declaratory relief is unavailable, *see, e.g.*, *Vazquez Perez v. Decker*, No. 18-CV-10683 (AJN), 2019 WL 4784950, at *10–11 (S.D.N.Y. Sept. 30, 2019), meaning that to obtain preliminary relief, class members must seek individual preliminary injunctions. In addition, so long as there is "[p]ending review," like an appeal, "the Government [is] free to continue to apply the statute" according to its view (absent an injunction). *Mendoza-Martinez*, 372 U.S. at 155. The government can therefore either "comply with [the] declaratory judgment[]," *United Aeronautical Corp. v. U.S. Air Force*, 80 F.4th 1017, 1031 (9th Cir. 2023), or seek appellate and later Supreme Court review. Finally, "declaratory relief is a much milder form of relief because it is not backed by the power of contempt." *Id.* (citation modified); *cf. Nken*, 556 U.S. at 429 (explaining that § 1252(f)(2) does not bar stays of removal, as opposed to injunctions, because injunctions "direct[] the conduct of a party, and do[] so with the backing of [the court's] full coercive powers," while a stay simply "temporarily divest[s] an order of enforceability"). These practical implications underscore why "Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction" in cases like

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this one. *Steffel*, 415 U.S. at 466.[4]

2. Declaratory Relief Would Not Violate Rule 23(b)(2).

Defendants also reprise their argument that declaratory relief is barred because "Rule 23(b)(2) allows only declaratory relief that has the same practical effect as an injunction." Dkt. 49 at 24; *see also* Dkt. 23 at 17–18 (raising this same argument). As a threshold matter, Defendants' argument is really one about the propriety of class certification under Rule 23(b)(2)—an argument the Court has already considered and rejected. Dkt. 32 at 41–43. In any event, Defendants offer no new basis for their claim, as the Rule's plain text, the Rule Committee's notes, and caselaw all demonstrate declaratory relief on a classwide basis is proper.

As Plaintiffs previously explained, *see* Dkt. 24 at 11–12, the word "corresponding" in Rule 23(b)(2) does not mean that Plaintiffs must seek relief that acts the same as an injunction, as Defendants claim, *see* Dkt. 49 at 24. "Corresponding" simply means "to be similar, analogous or equal (*to* something)." *Maury Microwave. Inc. v. Focus Microwaves, Inc.*, No. CV 10-03902 MMM (JCGx), 2012 WL 9161988, at *23 (C.D. Cal. July 30, 2012) (citation omitted). Moreover, Defendants' reading, which requires declaratory relief to mimic injunctive relief, reads the word "or" out of the rule. Rule 23(b)(2) permits a class action where "final injunctive relief *or* corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2) (emphasis added). The "word 'or' . . . is 'almost always disjunctive." *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 87 (2018) (citation omitted). Accordingly, as the leading federal practice treatise states, Rule 23(b)(2) "does not require that both forms of relief be sought and a class action seeking solely declaratory relief may be certified." 7AA *Wright &*

[4] Defendants also briefly contend that the Bond Denial Class lacks standing because the Court cannot issue declaratory relief under § 1252(f)(1). Dkt. 49 at 26–27. This assertion is entirely derivative of Defendants' argument regarding declaratory relief and similarly lacks any merit.

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Miller's Federal Practice & Procedure § 1775 (3d ed. 2025); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) ("Rule 23(b)(2) applies only when a single injunction *or* declaratory judgment would provide relief to each member of the class." (emphasis added)). The rule thus does not require a party to seek injunctive relief, but rather merely recognizes that declaratory relief can be an adequate or appropriate form of classwide relief.[5]

The authorities Defendants cite actually support Plaintiff, overlook the rationale above, or are really about § 1252(f)(1). First, the Advisory Committee Note Defendants rely on does not support their position. Dkt. 49 at 23. As the note itself states, "[d]eclaratory relief 'corresponds' to injunctive relief when as a practical matter it . . . serves as a basis for later injunctive relief." Fed. R. Civ. P. 23 advisory committee's note to 1996 amendment. Typically, "compl[iance] with declaratory judgments" is expected "in suits against government officials and departments." *United Aeronautical Corp.*, 80 F.4th at 1031. But if Defendants fail to comply, then that "declaratory judgment might serve as the basis for issuance of a later injunction to give effect to the declaratory judgment," *Steffel*, 415 U.S. at 461 n.11. That understanding is entirely consistent with the purpose of Rule 23(b)(2). Indeed, courts have understood the interaction between § 1252(f)(1) and Rule 23(b)(2) to permit "class members [to] pursue individual injunctions after issuance of a classwide declaration," *Alli v. Decker*, 650 F.3d 1007, 1015 (3d Cir. 2011); *see also id.* at 1020 n.2 (Fuentes, J., dissenting) ("[E]very single member of the class can, and will,

[5] Notably, this Court has previously issued only declaratory relief in a class action that similarly sought to enforce the rights of persons detained under § 1226. *See Khoury v. Asher*, 3 F. Supp. 3d 877, 892 (W.D. Wash. 2014) (explaining that it was not "necessary to impose a permanent injunction in addition to the classwide declaratory relief that the court has already awarded"), *aff'd*, 667 F. App'x 966 (9th Cir. 2016), *rev'd and remanded on other grounds sub nom. Nielsen v. Preap*, 586 U.S. 392 (2019). Other courts have similarly provided only declaratory relief in this context. *See, e.g.*, *Al Otro Lado, Inc. v. Mayorkas*, 619 F. Supp. 3d 1029, 1049 (S.D. Cal. 2022), *aff'd in part, vacated in part sub nom. Al Otro Lado v. Exec. Off. for Immigr. Rev.*, 138 F.4th 1102 (9th Cir. 2025).

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immediately seek an injunction grounded on the authority of the declaratory judgment."); *J.E.F.M. v. Holder*, 107 F. Supp. 3d 1119, 1143–44 (W.D. Wash. 2015) ("[A]fter securing a declaratory judgment, each individual class member would have to separately invoke it as a ground for individual injunctive relief, which 'is expressly permitted under § 1252(f)(1).'" (quoting *Alli*, 650 F.3d at 1015)), *aff'd in part, rev'd in part on other grounds sub nom. J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016).

Jennings also provides Defendants no support. *See* Dkt. 49 at 24. There, the Court simply observed without analysis that the lower court should decide whether a class action may proceed where the plaintiffs seek only declaratory relief, emphasizing that the relief must be "corresponding." 583 U.S. at 313. For all the reasons above, the Rule's text, notes, and caselaw demonstrate why declaratory relief alone is appropriate.

Finally, Defendants rely heavily on *Onosamba-Ohindo v. Searls*, 678 F. Supp. 3d 364 (W.D.N.Y. 2023), an out-of-circuit district court decision decertifying a class challenging procedures used in § 1226(a) bond hearings. While acknowledging that declaratory relief remained available after *Aleman*, the court concluded that any such relief would not "affect[] the behavior of the defendant towards the plaintiff." 678 F. Supp. 3d at 372 (emphasis omitted) (quoting *Hewitt v. Helms*, 482 U.S. 755, 761 (1987)). In the court's view, "the requested declaration would instead be relied upon by individual class members in hypothetical future litigation, in which those individual class members would be asking different courts to compel the government to conduct bond hearings in a particular manner based on issue preclusion." *Id.*

Plaintiffs respectfully disagree with this reasoning, for it would render virtually *any* declaratory judgment an impermissible "advisory opinion." *Id.* (citation omitted). Notably, the *Onosamba-Ohindo* court's reliance on *Hewitt* is particularly mistaken. *Hewitt* concerns whether

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a plaintiff who failed to obtain any relief, including declaratory relief, could nonetheless qualify as a "prevailing party" for purposes of attorney's fees based on favorable language in the court's opinion. 482 U.S. at 759–60. The Supreme Court explained that a "judicial pronouncement" in a decision does not constitute relief if it does not "affect[] the behavior of the defendant towards the plaintiff," *id.* at 761 (emphasis omitted), and therefore "a favorable judicial statement of law in the course of litigation that results in judgment against the plaintiff does not suffice to render him a 'prevailing party,'" *id.* at 763.

But far from equating declaratory judgments with statements of law, the Court expressly *contrasted* them. As the Court explained, "[r]edress is sought *through* the court, but *from* the defendant. This is no less true of a declaratory judgment suit than of any other action." *Id.* at 761. In making this statement, the Court's point was that declaratory judgments *are* in fact expected to alter a defendant's behavior. *See id.* at 761–62. Moreover, as the Court later noted, declaratory judgments do not issue in every case where the plaintiff is correct on the law. *Id.* at 762–63. Instead, parties opposing such a judgment can "contest its entry not only on the ground that the case was moot but also on equitable grounds." *Id.* at 762. But if a court does issue such relief, then the "declaratory judgment would . . . definitively 'settle the controversy between the parties.'" *Id.* (quoting 10A *Wright & Miller's Federal Practice & Procedure* § 2759 (2d ed. 1983)).

Onosamba-Ohindo also misread § 1252(f)(1). As the Supreme Court explained in *Texas*, it would make little sense to read the statute to preclude class actions that seek relief other than injunctive relief. 597 U.S. at 799. This is because the statute *does* empower the Supreme Court to enter classwide injunctions, *see* 8 U.S.C. § 1252(f)(1), and if § 1252(f)(1) simply barred all class claims, then "no such claims could ever arrive at th[e] [Supreme] Court," 597 U.S. at 799.

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Indeed, this is also how the Court understood and applied the statute in *Preap*. As noted above, there, the Court held that it could consider the merits because the lower courts had authority to enter classwide declaratory relief. 586 U.S. at 402 (plurality opinion).

Finally, *Onosamba-Ohindo*'s rejection of declaratory relief was also informed by its view of the merits in that particular case. The case presented a due process challenge, and recent circuit caselaw had explained that the due process-based procedures the plaintiffs sought might differ from one person to another, thus undermining the viability of classwide relief. 678 F. Supp. 3d at 373–74. No such concern applies here: the claim is statutory, and the class challenge targets a uniform, categorical policy applied by the Tacoma Immigration Court.

In sum, neither § 1252(f)(1) nor Rule 23(b)(2) prohibits declaratory relief in this case. To the contrary, caselaw and statutory text demonstrate such relief is not only available, but also appropriate.

III. The Bond Denial Class Has Stated a Claim for Relief.

Dismissal of the Bond Denial Class claims under Rule 12(b)(6) is inappropriate because the class has both asserted "a cognizable legal theory" and alleged "sufficient facts" to a state a claim to relief under that theory. *Woods v. U.S. Bank N.A.*, 831 F.3d 1159, 1162 (9th Cir. 2016). Defendants do not dispute the sufficiency of the facts alleged with respect to the Tacoma Immigration Court's bond policy, and challenge only the substance of those claims on the merits. *See* Dkt. 49 at 27–30. Notably, their arguments reaffirm that the Bond Denial Class's claims can be resolved on summary judgment. *See* Dkt. 53 at 4 (denying stay of Plaintiffs' motion for partial summary judgment, Dkt. 41, in light of Defendants' motion to dismiss because both "present overlapping questions of law" as to the bond denial policy).

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Critically, this Court already concluded that the Bond Denial Class is likely to succeed on the merits of its claim, having granted Mr. Rodriguez's motion for a preliminary injunction. *See* Dkt. 29 at 22–32. Because the challenge to the bond denial policy has already met "the more burdensome likelihood-of-success standard," it necessarily follows that the Bond Denial Class states a plausible claim. *Tohono O'odham Nation v. U.S. Dep't of the Interior*, 138 F.4th 1189, 1202 (9th Cir. 2025) (finding that the district court erred in applying the preliminary injunction standard in adjudicating a motion to dismiss under Rule 12(b)(6)); *see also, e.g.*, *Diemert v. Seattle*, 689 F. Supp. 3d 956, 960 (W.D. Wash. 2023) (explaining that "[t]he bar is low for [the plaintiff] to avoid dismissal" under Rule 12(b)(6), as compared to the standard for demonstrating a likelihood of success on the merits).

As this Court has already found, "the text of Section 1226, canons of interpretation, legislative history, and longstanding agency practice indicate" that the Bond Denial Class is "unlawfully detained under Section 1225(b)(2)'s mandatory detention provision." Dkt. 29 at 32; *see also* Dkt. 41 at 12–19.

Turning first to the statutory text, the plain language of § 1226(a) demonstrates that it applies to anyone who is detained "pending a decision on whether the [noncitizen] is to be removed from the United States." 8 U.S.C. § 1226(a). Subsection 1226(c) carves out only certain noncitizens, including those who have entered without inspection where they have been arrested for, charged with, or convicted of certain crimes, *See, e.g., id*. § 1226(c)(1)(E). That Congress chose to exclude only a subset of people who entered without inspection in subparagraph (c)(1)(E) strongly supports the class's interpretation of the statute. As the Court observed in its PI decision, "when Congress creates 'specific exceptions' to a statute's applicability, it 'proves' that

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absent those exceptions, the statute generally applies." Dkt. 29 at 24 (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 400 (2010)).

The language and structure of § 1225(b)(2) likewise support Plaintiffs' interpretation. This statute is one that "applies "at the Nation's borders and ports of entry, where the Government must determine whether a[] [noncitizen] seeking to enter the country is admissible." *Jennings*, 583 U.S. at 287. Several textual indicators underscore this scope, including the statute's focus on recent arrivals, inspecting those arrivals, and requirement that those subject to detention under § 1225(b)(2)(A) be "seeking admission." *See generally* 8 U.S.C. § 1225(a)–(b). Similarly, Defendants' reliance on *Matter of Q. Li* overlooks that the BIA's analysis closely tracks Plaintiffs' reading, as that decision explained § 1226(a) "applies to [noncitizens] already present in the United States," while § 1225(b) "applies primarily to [noncitizens] seeking entry into the United States and authorizes DHS to detain a[] [noncitizen] without a warrant at the border." 29 I. & N. Dec. 66, 70 (BIA 2025) (citation modified).

Second, several canons of interpretation reinforce that Bond Denial Class members are detained under § 1226(a). As Defendants recognize, the Tacoma Immigration Court's interpretation subjects all inadmissible noncitizens to § 1225 and its mandatory detention provisions. *See, e.g.*, Dkt. 49 at 27–28. But such a reading renders superfluous significant portions of § 1226(c) that reference inadmissible noncitizens, including the specific amendments that Congress enacted just months ago by passing the Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3 (2025). This violates the well-established rule that courts "must interpret the statute as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Shulman v. Kaplan*, 58 F.4th 404, 410–11 (9th Cir. 2023) (citation omitted).

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Related canons further support this view. Courts must also "presume" that statutory amendments "have real and substantial effect," *Stone v. INS*, 514 U.S. 386, 397 (1995), and that "a new law [enacted] against the backdrop of a longstanding administrative construction . . . work[s] in harmony with what has come before," *Monsalvo v. Bondi*, 145 S. Ct. 1232, 1242 (2025) (citation modified).

Third, the legislative history confirms the structural distinction between § 1226 and § 1225, thus demonstrating that § 1226(a) affords a bond hearing to Bond Denial Class members. Congress made clear in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) that § 1226(a) carried forward the government's traditional bond authority for noncitizens apprehended inside the United States. H.R. Rep. No. 104-469, pt. 1, at 229 (1996) (explaining § 1226(a) "restates" the existing discretionary detention framework under § 1252(a)). At the same time, it enacted § 1225(b) to create distinct procedures for recent arrivals at the border. *Id.* at 228 (explaining it "establishes new procedures for the inspection and in some cases removal of [noncitizens] arriving in the United States").

Fourth, and finally, longstanding agency practice has afforded bond hearings to those similarly situated to Bond Denial Class members. In promulgating regulations to implement the INA, the agency explicitly explained that such individuals were covered by § 1226(a). *See* Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997). The BIA has also issued unpublished decisions reversing the Tacoma IJs' application of the bond denial policy. Dkt. 1 ¶ 47; *see also Matter of R-A-V-P-*, 27 I. & N. Dec. 803–04 (BIA 2020) (referencing § 1226(a) as detention authority for a noncitizen who unlawfully entered the United States the prior year and who was detained soon thereafter).

In sum, the Complaint alleges a coherent and well-supported theory that Defendants are

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unlawfully denying bond hearings by misapplying § 1225(b)(2). Accordingly, the Bond Denial Class's claims are sufficient to survive dismissal under Rule 12(b)(6).

IV. The Court Has Jurisdiction Over the Bond Appeal Class's Claims.

Defendants reprise their jurisdictional argument under § 1252(g) to also attack the Bond Appeal Class's claims. According to them, § 1252(g) bars this claim because it is a challenge to adjudicating cases. Dkt. 49 at 31. This argument fails for three reasons.

First, as described above, § 1252(g) was "designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations." *AADC*, 525 U.S. at 485. As the Supreme Court explained, with respect to each of the three actions identified in § 1252(g), "the Executive has discretion to abandon the endeavor," *id.* at 483, and § 1252(g) simply "protect[s] the Executive's discretion from the courts" to take (or not take) these actions, *id.* at 486; *see also id.* at 485 n.9. Accordingly, in *Barahona-Gomez v. Reno*, the Ninth Circuit found that § 1252(g) bars review of "discretionary, quasi-prosecutorial decisions" such as those by asylum officers to adjudicate asylum applications or to refer them to IJs for removal proceedings. 236 F.3d 1115, 1120 (9th Cir. 2001). In so holding, the court reasoned that "the meaning of a discretionary decision to 'adjudicate' is readily apparent": it refers to the "very decision to either 'abandon the endeavor' or to adjudicate." *Id.* (quoting *AADC*, 525 U.S. at 484). That decision, the court of appeals explained, is what "Congress wished to preserve from judicial review." *Id.*; *see also id.* at 1119 ("Section 1252(g) was aimed at preserving prosecutorial discretion."). By contrast, "decisions or actions that occur during the formal adjudicatory process are not rendered unreviewable because of § 1252(g)." *Id.* at 1121. This includes, for example, claims that the agency "denie[s] . . . due process rights by failing to timely" take action on a case. *Id.* (citing *Singh v. Reno*, 182 F.3d 504, 510 (7th Cir.1999)). Here, the Bond Appeals Class's claims do not

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seek to force Defendants to use discretion to release them or to abandon their removal cases, and thus § 1252(g) does not apply.[6]

Second, and relatedly, § 1252(g) does not apply where constitutional mandates limit the agency's discretion. "Congress did not intend Section 1252(g) to 'deny any judicial forum for a colorable constitutional claim' . . . ." *NWDC Resistance v. Immigr. & Customs Enf't*, 493 F. Supp. 3d 1003, 1010 (W.D. Wash. 2020) (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988)). Accordingly, the subsection does not prohibit actions—like the one here—that "constitute general collateral challenges to unconstitutional practices and policies used by the agency." *Barahona-Gomez*, 236 F.3d at 1118 (citation modified); *see also id.* (noting that *AADC* "confirm[s] [this] interpretation").

Finally, the actions specified in § 1252(g) demonstrate that the provision concerns the government's exercise of discretion in the *removal* process, not in detention decisions. A word in a list is "known by the company it keeps." *Yates v. United States*, 574 U.S. 528, 543 (2015). Here the words in this list are all directed at specific actions during removal proceedings, not custody proceedings. Agency regulations recognize this separation. As noted above, "custody or bond [cases] . . . shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding." 8 C.F.R. § 1003.19(d). More broadly, § 1252 is aimed at regulating the judicial review of removal orders. Accordingly, the Court should not read § 1252(g) to encompass cases related to detention.

Defendants also briefly suggest that § 1252(b)(9) applies to the Bond Appeals Class's claims. For reasons identical to those above, that is incorrect. *Supra* Sec. II.B. The class's claims

[6] Notably, Defendants never address this binding caselaw which interprets the precise term on which they are relying. *See* Dkt. 49 at 31.

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are "collateral to the removal process," *J.E.F.M.*, 837 F.3d at 1032, and delaying review until a petition for review of a final order would deprive them of all meaningful review, *see Jennings*, 583 U.S. at 293. As a result, this jurisdictional bar also does not apply.

V. The Bond Appeal Class Has Stated a Claim for Relief.

The Bond Appeals Class has stated a claim for relief. As the complaint explains, Defendants' own data show that, on average, the BIA takes 204 days to adjudicate a custody appeal. Dkt. 1 ¶ 57. The Due Process Clause demands a speedier process, regardless of a person's status.

Defendants first assert, inexplicably, that the complaint does not state a claim because it fails to identify a protected liberty or property interest. Dkt. 49 at 33. The complaint plainly alleges that the delays class members face in "custody appeals . . . involv[e] a person's core right to liberty under the Due Process Clause." Dkt. 1 ¶ 8; *see also id.* ¶¶ 66–71 (explaining the harms class members experience due to physical confinement). This right to liberty is, of course, exactly what the Due Process Clause was intended to protect. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690; *see also, e.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." (citation omitted)). This principle applies "[i]n the context of immigration detention," just as in other civil detention settings. *Hernandez v. Sessions*, 872 F.3d 976, 990 (9th Cir. 2017). Indeed, in that context, "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." *Id.* (citation modified).

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Defendants never address this binding caselaw, which is "beyond dispute" and which forecloses their argument that no liberty interest is at stake here. *Id.* at 993.

Defendants next assert that the Bond Appeals Class does not have a plausible claim that custody appeals for detained persons must be completed within 60 days. Dkt. 49 at 33–36. In support, Defendants argue that (1) lengthy detention is permissible, (2) the rights of criminal defendants facing pretrial detention are irrelevant, and (3) the EOIR data the class cites is "unpersuasive." Dkt. 49 at 36. These arguments do not warrant dismissing the complaint at the pleading stage.

The Supreme Court and Ninth Circuit have explained that meaningful appellate review is a necessary component of a constitutional civil detention scheme. For example, in *Schall v. Martin*, the Supreme Court upheld a state civil detention scheme in part because the "[p]retrial detention orders" of juveniles by family court judges could be "reviewed by writ of habeas corpus," and even then, a court's decision denying habeas relief was "appealable as of right and may be taken directly to the [highest state court] if a constitutional question is presented." 467 U.S. 253, 280 (1984). Similarly, the Supreme Court upheld the federal pretrial detention scheme under the Bail Reform Act in part because the statute "provide[s] for immediate appellate review of the detention decision." *United States v. Salerno*, 481 U.S. 739, 752 (1987). The Ninth Circuit echoed this principle in *Singh v. Holder*, holding that, as a constitutional matter, EOIR must record or transcribe bond hearings to make available for appeal "a contemporaneous record." 638 F.3d 1196, 1209 (9th Cir. 2011).[7] By explaining what *procedures* appeals require, the Ninth Circuit made clear the necessity of adequate appeals in the first place.

[7] *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1202 (9th Cir. 2022), subsequently overruled the statutory basis for the bond hearing in *Singh*, but did not disturb its constitutional holding regarding the necessity of certain procedures.

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Critically, this right to adequate review of civil detention is deeply rooted in this country's legal tradition. Shortly after constitutional ratification, Congress passed the Judiciary Act of 1789. That Act guaranteed that higher courts, including the Supreme Court, could evaluate the legality of pretrial detention via a petition for a writ of habeas corpus. *See* Judiciary Act of 1789, § 14, 1 Stat. 73, 81–82; *see also Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 77–78 (1807). That the First Congress enshrined the right to appeal pretrial detention orders says much about what the founders thought regarding the rights the Due Process Clause protects. After all, an "act passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, is contemporaneous and weighty evidence of its true meaning." *Marsh v. Chambers*, 463 U.S. 783, (1983) (citation modified); *see also, e.g.*, *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 432 (2024) (looking to "[t]he practice of the First Congress" to interpret constitutional clause); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 214 (2020) (similar).

The Supreme Court has also made clear that *timely* appellate review is a key feature of any civil detention scheme. This right too is historically grounded, as the Court has long explained that "[r]elief [when seeking review of detention] must be speedy if it is to be effective." *Stack v. Boyle*, 342 U.S. 1, 4 (1951). Indeed, as noted above, when upholding the Bail Reform Act, the Court did so in part because it provides for "immediate" appellate review. *Salerno*, 481 U.S. at 752; *see also* 18 U.S.C. § 3145(b)–(c) (requiring district judges and courts of appeals to adjudicate appeals of pretrial detention orders "promptly"); Fed. R. App. P. 9 advisory committee's note to 1967 amendment (explaining that the rule "insure[s] [sic] the expeditious determination of appeals respecting release orders, an expedition commanded by [statute] and by the Court in *Stack v. Boyle*"). Such speedy review is necessary to make review

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meaningful. As the Ninth Circuit later elaborated, "[e]ffective review of pretrial detention orders necessarily entails a speedy review in order to prevent unnecessary and lengthy periods of incarceration on the basis of an incorrect magistrate's decision." *United States v. Fernandez-Alfonso*, 813 F.2d 1571, 1572 (9th Cir. 1987); *see also Stack*, 342 U.S. at 4 ("[F]reedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction.").

The complaint's request for declaratory relief that would clarify class members have a right to have their appeals decided in 60 days is grounded not only in these principles, but also other sources. For example, in *Fernandez-Alfonso*, the Ninth Circuit held that a district judge's failure to consider an appeal of a magistrate judge detention order for thirty days violated the Bail Reform Act's promptness requirement. 813 F.2d at 1572–73. In doing so, the court of appeals observed that "the district court's informal practice of holding pretrial hearings within two or three days illustrates the priority usually afforded these hearings and underscores the position that effectiveness demands timeliness." *Id.* at 1572. It is similarly instructive that the Supreme Court issued its decision in *Stack*, *see* 342 U.S. at 1, only one month after the Ninth Circuit's own decision, *see* 192 F.2d 56 (9th Cir. 1951), exemplifying how such cases must be treated.

Moreover, caselaw regarding the need for timely initial hearings reflects the need for timely decisions on bond appeals. In the pretrial and civil detention context, the Supreme Court and Ninth Circuit have held that such initial hearings must occur swiftly. *See Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (48 hours for probable cause hearing); *Doe v. Gallinot*, 657 F.2d 1017, 1025 (9th Cir. 1981) (affirming injunction requiring hearing within seven days for persons confined for mental health reasons). Immigration detention is no exception: in that

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context, the Ninth Circuit recently clarified that the Fourth Amendment's requirement of a prompt hearing (within 48 hours) "to justify detention" applies to the arrests of noncitizens based on immigration detainers. *Gonzalez*, 975 F.3d at 824. And in *Saravia v. Sessions*, the court of appeals affirmed a district court's decision to impose a seven-day deadline to hold hearings for immigrant minors whom DHS re-arrests following their previous release. 905 F.3d 1137, 1143 (9th Cir. 2018). While these cases regard *initial* hearings, they underscore a broader constitutional principle: due process requires timely action to justify civil detention. A 60-day deadline for adjudicating custody appeals is much longer than anything endorsed in these cases, or in the appellate decisions involving the timeliness of detention decisions discussed above. It therefore represents a reasonable outer boundary for what the Due Process Clause permits for civil detention.

Defendants' arguments to the contrary are unavailing. Defendants first obfuscate the issue at stake, stating that "immigration detention, including pre-order detention, has survived Due Process review and detention periods of 180 days or longer have been upheld as constitutional." Dkt. 49 at 33. Plaintiffs are not challenging the constitutionality of immigration detention, or even requesting a right to release after six months of detention.[8] Instead, they are simply asking the Court to clarify that they have the right to a timely appeal of a custody decision. Dkt. 1 at 21. That requested relief does not mandate release, or even require Defendants to provide review beyond what they already provide. The cases Defendants cite are inapposite, as

[8] Even if they were, Defendants misstate the law. *Jennings* was a statutory holding and remanded for consideration of the constitutional issue of whether the Constitution requires a hearing after six months of detention. *See* 583 U.S. at 312. *Demore* upheld mandatory detention under § 1226(c) for certain noncitizens with criminal convictions, but only for the "brief" period of detention at issue, which the Court understood to be "a month and a half in the vast majority of cases." 538 U.S. at 513, 530.

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they either address the constitutionality of mandatory detention, *see, e.g.*, *Demore*, 538 U.S. 510 (noncitizens convicted of certain statutorily-specified crimes); *cf. Shaughnessy v. United States ex rel. Mezei*, 345 U. S. 206 (1953) (addressing exclusion of person stopped at port of entry who presented national security risk), or address the right to a bond hearing under the INA, *see, e.g.*, *Jennings*, 583 U.S. 281. By contrast, everyone in this case already has the right to a bond hearing either by statute, *see* 8 U.S.C. § 1226(a), or because they were found to have such a right after filing a petition for a writ of habeas corpus, *see, e.g.*, *Banda v. McAleenan*, 385 F. Supp. 3d 1099 (W.D. Wash. 2019). For such persons "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*, 872 F.3d at 990 (citation modified).

Defendants next point to the lack of a timeline in the INA or regulations for adjudicating appeals to argue that the complaint does not state a claim for relief. Dkt. 49 at 34. That is irrelevant. The gravamen of the Bond Appeals Class's claim is that the Due Process Clause demands more than what Defendants' policies currently require. If anything, Defendants' observation that the "Board strives to decide appeals within 180 days" supports the Bond Appeals Class's claims, rather than suggesting they have failed to state a claim. Dkt. 49 at 35.

Additionally, Defendants allege that the various criminal pretrial detention authorities that Plaintiffs cite provide the Bond Appeals Class with no support. Dkt. 49 at 35. This too is incorrect; indeed, the law flatly forecloses that argument. In explaining the liberty rights of immigrant detainees, *Zadvydas* relied heavily on cases from the pretrial criminal context and other civil detention settings. *See* 533 U.S. at 690–91 (repeatedly citing, inter alia, *Salerno*). This should come as no surprise, because "civil detainees retain greater liberty protections than

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individuals detained under criminal process." *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004). It thus "stands to reason that an individual detained awaiting civil commitment proceedings is entitled to protections at least as great as those afforded to a civilly committed individual and at least as great as those afforded to an individual accused but not convicted of a crime." *Id.*; *see also Ortega v. Bonnar*, 415 F. Supp. 3d 963, 970 (N.D. Cal. 2019) (similar). This caselaw leaves little doubt that the Bond Appeals Class's reliance on protections from the pre-trial criminal context provide important context for what due process requires.

Finally, Defendants claim that the Bond Appeal Class's reliance on EOIR's FY 2024 data—showing an average appeal time of 204 days—is "unpersuasive" because it "fails to attach[] the full data set" and "includes the processing times for those individuals who have been released from detention." Dkt. 49 at 35–36. But at the pleading stage, the Court must "must presume all factual allegations of the complaint to be true." *Usher*, 828 F.2d at 561. This is especially appropriate where an allegation relies on official government data, which render that allegation "plausible on its face," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Indeed, Defendants do not contest the veracity or accuracy of the data (which is, after all, their own). Dkt. 49 at 35–36. In any event, Plaintiffs include the full FY 2024 data set with their response to this motion. *See* Korthuis Decl. Ex. A.

Moreover, while Defendants attempt to use Mr. Rodriguez's case as an example of a prompt decision, his case actually undercuts their position. As noted, Defendants argue that the average appeal time is inflated because it includes people "released from detention," suggesting that such cases take longer to decide and therefore do not reflect the reality of the Bond Appeals Class. Dkt. 49 at 36. But Mr. Rodriguez *is* a person "released from detention" because he was issued a voluntary departure order prior to the issuance of the Board's custody decision in his

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case. The quick decision in his case actually lowers the overall average for all custody appeals—a fact that weakens, rather than supports, Defendants' arguments with respect to the data. Unfortunately, most detained people wait months longer for a decision. In any case, Mr. Rodriguez's isolated example does not negate official EOIR data or the complaint's well-pleaded allegations.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion to dismiss.

Respectfully submitted this 27th day of June, 2025.

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WORD COUNT CERTIFICATION

I certify that this memorandum contains 9,880 words, in compliance with the Local Civil Rules and the Court's order extending the page limit. *See* Dkt. 47.

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