IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

R.I.L.R., *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

Jeh JOHNSON, Secretary of the Department of Homeland Security, in his official capacity, *et al.*

Defendants.

Civil Action No. 1:15-cv-00011 (JEB)

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION OF THE COURT'S PRELIMINARY INJUNCTION ORDER

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INTRODUCTION

The Department of Homeland Security ("DHS") seeks a second bite at the apple to defend its unlawful policy of detaining asylum-seeking mothers and children for deterrence purposes. It fails either to establish a valid basis for such a second bite, or to justify its illegal policy on the merits.

Contrary to DHS's claim, Plaintiffs were clear in their preliminary injunction papers about the policy under challenge. It was DHS's policy of using deterrence of others as a basis for civil detention of bond-eligible asylum-seekers. Whether deemed a policy that categorically mandates detention in every case, or one that results in detention in all but a handful of instances, the issue is the same: civil detention of these asylum-seeking families cannot be justified on deterrence grounds. DHS had a full opportunity to argue otherwise in its opposition papers, and it did so. DHS may not now present new arguments and evidence to support its position. DHS's reconsideration motion should be denied on that basis alone.

Even if DHS's new arguments and evidence were to be considered, they still would not warrant reversing the Court's decision granting a preliminary injunction. DHS still has cited no authority beyond Attorney General Ashcroft's misguided and non-controlling decision in *Matter of D-J-*, 23 I. & N. Dec. 572 (2003), to support its contention that the asylum-seeking mothers and children in this case may be deprived of their liberty to deter other migrants. And while DHS continues to incant "the magic words 'national security'" (PI Op. at 37), its arguments boil down to mere resource-allocation concerns — not the sort of imminent security threat that could even arguably justify locking up these asylum-seeking families.

DHS's assertion that its detention policy actually deters asylum-seekers also remains irredeemably flawed. DHS's position is not just inconsistent with a consensus of experts; it also

flies in the face of its own Secretary's testimony that conditions in their home countries, not perceptions of U.S. enforcement policies, drive Central American families to embark on the perilous journey north.

Finally, DHS's efforts to throw procedural roadblocks in the way of this Court's review of DHS's unlawful policy fare no better than they did the first time around. As the Court correctly ruled in granting a preliminary injunction, neither 8 U.S.C. § 1226(e) nor any other provision of law precludes Plaintiffs' Administrative Procedure Act ("APA") challenge to DHS's nationwide detention policy, and 8 U.S.C. § 1252(f)(1) does not bar the Court from enjoining that illegal policy. Certainly, the Court's ruling to that effect was not "clear error" that would warrant reconsideration.

For these reasons, the Court should reject DHS's effort to resume its illegal detention policy while this case is being litigated. DHS's reconsideration motion should be denied and the preliminary injunction should remain in effect.

ARGUMENT

I. DHS Has Not Met Its Heavy Burden of Demonstrating a Basis for Reconsideration.

DHS's motion for reconsideration is easily disposed of under the standard DHS itself cites. As DHS acknowledges, a Rule 59(e) motion should be denied "unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Recon. Mot. at 6 (quoting *Fox v. Am. Airlines, Inc.*, 389 F.3d 1291, 1296 (D.C. Cir. 2004)). "A Rule 59(e) motion is not 'simply an opportunity to reargue facts and theories upon which a court has already ruled.'" *Id.* (quoting *New York v. United States*, 880 F. Supp. 37, 38 (D.D.C. 1995)). Nor is it an avenue for "a losing party . . . to raise new issues that could have been raised previously." *Kattan v. Dist. of Columbia*, 995 F.2d 274, 276 (D.C. Cir. 1993) (internal quotation marks omitted); *see also*

Oceana, Inc. v. Evans, 389 F. Supp. 2d 4, 8 (D.D.C. 2005) ("Rule 59 was not intended to allow a second bite at the apple."). "Even if evidence is 'newly raised,' it is not considered 'new' evidence if it was 'previously available.'" *Olson v. Clinton*, 630 F. Supp. 2d 61, 63 (D.D.C. 2009) (quoting *Schoenbohm v. FCC*, 204 F.3d 243, 250 (D.C. Cir. 2000)), *aff'd*, 409 F. App'x 359 (D.C. Cir. 2011).

Accordingly, motions for reconsideration are "disfavored," *Niedermeier v. Office of Max S. Baucus*, 153 F. Supp. 2d 23, 28 (D.D.C. 2001), and may be granted only "in extraordinary circumstances." *Kittner v. Gates*, 783 F. Supp. 2d 170, 172 (D.D.C. 2011); *see also People for Ethical Treatment of Animals, Inc. v. U.S. Dep't of Agric.*, 2014 WL 4548732, at *2 (D.D.C. May 27, 2014) (courts "must apply a 'stringent' standard when evaluating Rule 59(e) motions"). Revisiting a preliminary injunction is a particularly unusual form of relief, because a "preliminary injunction expressly envisions" a "subsequent . . . consideration of the merits." *S. Air Crew Grp. v. S. Air, Inc.*, 2009 WL 1795045, at *1 (D. Conn. June 24, 2009) (internal quotation marks omitted).

DHS fails to establish the "extraordinary circumstances" necessary for reconsidering the Court's preliminary injunction here.

A. DHS Had a Full and Fair Opportunity to Address Its Purported Interest in Using Deterrence as a Factor Supporting Detention.

The essential premise of DHS's motion is that it purportedly was ambushed because the Court issued a preliminary injunction based on an argument that Plaintiffs did not present, *i.e.*, the argument that general deterrence is an impermissible factor for DHS to consider in making detention decisions. This claim is the only basis DHS offers to justify raising new arguments and presenting new evidence. Unfortunately for DHS, its ambush claim is flatly at odds with the record.

The Court correctly noted in its ruling that "Plaintiffs sketch two variants of the policy they seek to enjoin." PI Op. at 8. One is a "categorical policy . . . of denying release to all asylum-seeking Central American families in order to deter further immigration." *Id.* The other is a "slightly narrower formulation," in which Plaintiffs "maintain that DHS policy directs ICE officers to consider deterrence of mass migration as a factor in their custody determinations, and that this policy has played a significant role in the recent increased detention of Central American mothers and children." *Id.* at 8-9.

The Court did not make this up. Plaintiffs' Amended Complaint specifically alleged that detention "for purposes of general deterrence" is unlawful. Am. Comp. at 3. Plaintiffs' preliminary injunction motion, in turn, argued that "deterrence" is "not among" the "'special justifications'" required to support "deprivation[s] of liberty," and that the requirement of an individualized determination is "*in addition*" to this principle. PI Br. at 16 (emphasis added). Additionally, Plaintiffs argued in their reply that "[q]uite apart from the fact that the weight of Plaintiffs' evidence points to a blanket policy, rather than individualized determinations, DHS admits that its agenda is deterrence-driven. This in itself is unlawful." Reply Br. at 12.

DHS also misreads the record when it contends that Plaintiffs "did not argue that *Matter of D-J-* violated 8 U.S.C. § 1226(a)," but only "distinguished" that decision. Recon. Mot. at 3. To the contrary, Plaintiffs argued that *D-J-* was *both* distinguishable *and* "otherwise incorrect." PI Br. at 4 n.4; *see also id.* at 21 n.19 (arguing that *D-J-* "*incorrectly*" held that "the government's generalized deterrence and national security concerns were *factors* to be considered in an officer's exercise of discretion" (emphasis added)). In their reply brief, Plaintiffs similarly argued that *D-J-*'s "endorse[ment] [of] the use of deterrence in making

custody determinations" is "erroneous." Reply Br. at 12; *see also id.* at 16 (again arguing that *D-J-* is "erroneous" and that detention for purposes of deterrence "cannot be justified").

Plaintiffs stated their position yet again at oral argument. The Court asked: "is it that you are saying you are not getting individualized custody determinations by ICE or that you are getting them and they're using [an] impermissible factor?" Tr. at 17:21-24. Plaintiffs' counsel responded unequivocally: "We're saying both. But . . . the critical issue is using an impermissible factor." *Id.* at 17:25-18:1. Counsel went on to explain that "*[M]atter of D.J.*" – the "only thing that the government can cite" in support of the permissibility of general deterrence as a factor – "is wrong." *Id.* at 18:11-16.

DHS had the opportunity to respond to this argument. In fact it did so. DHS specifically argued in its PI opposition brief — citing *Matter of D-J-* — that it may lawfully consider deterrence as a factor in making detention decisions. *See, e.g.*, PI Opp. & Mot. to Dismiss at 14-17. Moreover, in its post-argument brief, DHS expressly recognized that "Plaintiffs . . . claim that Defendants are prohibited as a matter of law from applying *Matter of D-J-* as *one factor* when making individualized custodial determinations." Mot. to Dismiss Reply at 4 (emphasis added). DHS then proceeded to respond to that argument. *See, e.g., id.* at 4-8. Although DHS now feigns surprise at how the Court characterized Plaintiffs' position, its own briefs show that it well understood Plaintiffs' argument. DHS is not now entitled to a second bite at the apple.[1]

[1] Contrary to what DHS says, "the parties" do not "agree that each member of the provisional class receives an individualized hearing." Recon. Mot. at 28. While the Court did not find that a categorical policy was established at this preliminary stage, Plaintiffs believe the evidence at trial will refute DHS's contention that it based detention decisions on the facts of each specific case.

B. DHS's New Arguments Have Nothing to Do with Its Purported Misunderstanding of Plaintiffs' Position.

Even if DHS genuinely did not understand Plaintiffs' position, DHS's new arguments have nothing to do with that purported misunderstanding. Those new arguments do not depend on which "variant" of the policy Plaintiffs challenged, and thus plainly could have been made earlier.

DHS's two lead arguments merely elaborate on its earlier contentions that (1) habeas corpus provides an "other adequate remedy" to Plaintiffs that precludes suit under the APA, and (2) the injunction in this case violates 8 U.S.C. § 1252(f)(1). DHS already made versions of these arguments in its opposition to Plaintiffs' motion for a preliminary injunction and motion to dismiss, and in its reply brief in support of the motion to dismiss. PI Opp. & Mot. to Dismiss at 25-28; Mot. to Dismiss Reply at 16-20. This Court rejected both arguments. PI Op. at 25-26, 28-29.

DHS asserts that the Court's conclusions on these issues were "clear error." However, "'clear error' should conform to a very exacting standard." *Lightfoot v. Dist. of Columbia*, 355 F. Supp. 2d 414, 422 (D.D.C. 2005) (internal citations and quotation marks omitted). "[A] final judgment must be 'dead wrong' to constitute clear error." *Id.* As explained more fully below, the Court's decision was nothing of the sort. And even if the Court somehow did commit "clear error," a party arguing clear error *still* "may not rely on arguments that could have been made at an earlier stage in the proceeding." *See Oceana, Inc.*, 389 F. Supp. at 8.

DHS had a full opportunity to present its APA and Section 1252(f)(1) arguments at an earlier stage, and did in fact present such arguments. DHS does not and cannot explain why its purported misunderstanding of Plaintiffs' position caused it to refrain from presenting its arguments in a fulsome way.

Moreover, even on the *merits* of its deterrence policy, DHS never explains why its alleged confusion prevented it from presenting all pertinent evidence. As the Court recognized, the two "variants" of the policy Plaintiffs challenge are only "slightly" different. Under the first formulation, DHS "categorical[ly]" detains for deterrence purposes. In the other, deterrence plays a "significant role" in the detention of all but a "handful" of asylum-seekers. PI Op. at 8-9. Plaintiffs argued that both variants are unlawful for the same reason: deterrence is not a valid justification for deprivations of liberty.

In response, DHS could have – and did – argue that deterrence of mass migration is a putative "national security" imperative that can outweigh constitutional liberty interests. *See, e.g.,* Mot. to Dismiss Reply at 2-3, 8-11; *see also* PI Opp. & Mot. to Dismiss at 16-17. It further argued that detaining mothers and children with bona fide asylum claims is a meaningful deterrent. *See, e.g.,* Mot. to Dismiss Reply at 8 n.3 (citing Immigration Court Declaration of Philip T. Miller, ICE Assistant Director of Field Operations for Enforcement and Removal Operations ("Miller Decl.") (Aug. 7, 2014) (Exhibit A to Declaration of Barbara Hines [PI Br. Exhibit 4]); and Immigration Court Declaration of Traci A. Lembke, ICE Assistant Director over Investigation Programs for HSI and ICE ("Lembke Decl.") (Aug. 7, 2014) (Exhibit A to Declaration of Barbara Hines [PI Br. Exhibit 4]).

DHS's new declarations merely elaborate (albeit still in conclusory fashion) on arguments DHS has already made. Even if the declarations offered a credible basis for defending DHS's policy, *but see infra* Part II.C, this previously-available evidence has no place in a reconsideration motion. *See Olson*, 630 F. Supp. 2d at 63.[2]

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[2] DHS similarly has no justification for why it could not have presented earlier its "new evidence" putatively casting its family detention centers in a better light. Recon. Mot. at 23; *see* (continued…)

II. Even if Considered on Their Merits, DHS's Belated Arguments Fail.

A. The Court Correctly Concluded that This Case Need Not Be Brought in Habeas.

As explained above, DHS had every opportunity to argue that the APA does not permit Plaintiffs' suit, and it did so argue. That alone precludes reconsideration. But even if reconsideration were appropriate, DHS has not demonstrated that this Court's ruling was wrong, much less "dead wrong," as the law requires. *See Lightfoot*, 355 F. Supp. 2d at 422. As the Court held, Congress has "never . . . require[d] those challenging an unlawful, nationwide detention policy to seek relief through habeas rather than the APA." PI Op. at 28-29. Rather, "APA and habeas review may coexist." *Id.* at 29. Accordingly, the Court may review DHS's nationwide policy of detaining asylum-seekers for deterrence purposes pursuant to the APA. *Id.*; *see also* PI Br. at 26-28; Reply Br. at 21-22; Pls.' Sur-Reply Br. in Opp. to Mot. to Dismiss at 1-4.

Rather than point to any authority contradicting this Court's analysis, DHS offers an irrelevant history lesson. It spends pages instructing the Court on how Congress has restricted APA (and also habeas) review of *deportation and exclusion* orders. Recon. Mot. at 6-9 (citing, *inter alia, Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999), *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998), and *Richardson v. Reno*, 162 F.3d 1338 (11th Cir. 1998)). But this case does not involve deportation and exclusion orders – it is a challenge to a nationwide *detention* policy. As the Court explained, "although Congress has expressly limited APA review over individual deportation and exclusion orders, it has never manifested an intent to require those challenging an unlawful, nationwide detention policy to seek relief through habeas rather than the APA." PI

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also infra Part III (explaining that DHS's belated declarations do not refute the irreparable harm faced by vulnerable mothers and children in detention).

Op. at 29 (emphasis added) (citations omitted). DHS's contrary position is flatly at odds with the "strong presumption that Congress intends judicial review of administrative action," and the rule that there must be "clear and convincing evidence" that Congress intended to limit APA review. PI Br. at 26, 28 (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670, 671 (1986), and *El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. U.S. Dep't of Health & Human Servs.*, 396 F.3d 1265, 1270 (D.C. Cir. 2005)).

After completing its digression on deportation and exclusion orders, DHS argues that 8 U.S.C. § 1226(e) precludes challenges to detention, except through habeas. Recon. Mot. at 10. But DHS's new theory of Section 1226(e) as a habeas-channeling statute finds no support in either the text of the statute or case law. In fact, Section 1226(e) *does not even mention habeas*. Other provisions of the INA, on the other hand, do explicitly provide that habeas or other forms of judicial review are exclusive judicial remedies. *See* 8 U.S.C. § 1226a(b)(1) (providing that "[j]udicial review of any action or decision relating to [the detention of suspected terrorists] is available exclusively in habeas corpus proceedings"); 8 U.S.C. § 1252(a)(5) (petition for review is the "sole and exclusive means" for judicial review of removal orders, notwithstanding "any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision"). Congress knows how to draft statutes channeling review to one type of action, such as habeas. Section 1226(e), by its terms, is not such a statute.

DHS's reading of Section 1226(e) is especially odd in that it fails to account for the statute's limited application to "*discretionary*" custody determinations. As the Court found in rejecting DHS's earlier argument that Section 1226(e) deprived it of jurisdiction, "Plaintiffs do not seek review of DHS's exercise of discretion," but instead "challenge DHS policy as *outside* the bounds of its delegated discretion." PI Op. at 12. DHS cannot explain how Congress could

have meant Section 1226(e) to channel review of this case to habeas when Section 1226(e) does not even address the kind of challenge at issue here.

DHS also wrongly contends that *Zadvydas v. Davis*, 533 U.S. 687 (2001), *Demore v. Kim*, 538 U.S. 510 (2003), and *Oyelude v. Chertoff*, 125 F. App'x 543 (5th Cir. 2005), "instruct that federal *habeas* jurisdiction is the only vehicle for Plaintiffs' claims." Recon. Mot. 10. They instruct no such thing. These cases were brought in habeas and hold only that Section 1226(e) does not *bar* habeas review of statutory or constitutional violations. The cases do not state, or even imply, that such violations may be challenged *solely* through a habeas action.[3]

Finally, even if a fully *adequate* habeas remedy could preclude APA relief, that is not the case here. While DHS asserts that Plaintiffs could "re-file their complaint as a *habeas* claim in the Western District of Texas" (Recon. Mot. at 14), it forgets that Plaintiffs represent a *nationwide* class of detained families. At present, class members are located in both Pennsylvania and Texas and, as recently as a few months ago, New Mexico as well. DHS may move detainees at will,[4] and re-detain families whom it has released. 8 C.F.R. 1236.1(c)(9). It is doubtful that a court in the Western District of Texas would find that it has authority to offer nationwide habeas relief to such a class. *See, e.g.*, *Lee v. Wetzel*, 244 F.3d 370, 373-74 (5th Cir. 2001) ("[W]e have firmly stated that the district of incarceration is the only district that has jurisdiction to entertain a [petitioner's] § 2241 petition."); *King v. Lynaugh*, 729 F. Supp. 57, 59

[3] DHS also argues that no court has found APA jurisdiction over how officers make custody determinations under the INA. Recon. Mot. at 12. But neither has it identified any court finding that it lacks jurisdiction to review immigration detention policies under the APA, simply because habeas is also available.

[4] *See, e.g.*, *Calla-Collado v. Attorney Gen. of U.S.*, 663 F.3d 680, 685 (3d Cir. 2011) (recognizing ICE's broad authority to transfer detainees from one detention facility to another); *Gandarillas-Zambrana v. Bd. of Immigration Appeals*, 44 F.3d 1251, 1256 (4th Cir. 1995) (same).

(W.D. Tex. 1990) ("To entertain such a petition, the district court must have jurisdiction over either the prisoner or his custodian."). For this reason alone, habeas cannot be an adequate alternative remedy. *See Cohen v. United States*, 650 F.3d 717, 732 (D.C. Cir. 2011) (en banc) (alternative remedy is inadequate under the APA if relief would be, *inter alia*, piecemeal and uncertain); *see also* PI Br. at 27-28 & n.20 (presenting additional reasons why habeas is inadequate); Reply Br. at 21-22 & n.12 (same).

B. The Court Correctly Concluded that the Preliminary Injunction Is Consistent with 8 U.S.C. § 1252(f)(1).

DHS also reasserts its argument that 8 U.S.C. § 1252(f)(1) bars injunctions against violations of the INA. But as the Court correctly held, "this dog doesn't hunt either." PI Op. at 25. Rather, the plain language of Section 1252(f)(1) "'prohibits only injunction of 'the operation of' the detention statutes, not injunction of a *violation* of the statutes.'" *Id*. at 25-26 (quoting *Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010)); *accord Gordon v. Johnson*, 300 F.R.D. 31, 40 (D. Mass. 2014); *Tefel v. Reno*, 972 F. Supp. 608, 618 (S.D. Fla. 1997), *rev'd on other grounds*, 180 F.3d 1286 (11th Cir. 1999).[5]

DHS does not cite any case holding otherwise, much less offer any basis to show "clear error" under Rule 59(e). Instead, it asserts that this Court – and every other court to consider the question – has adopted an "illogical" interpretation that gives it no meaning. Recon. Mot. at 15.

It is DHS's logic, not the Court's, that is faulty. There may be circumstances where an injunction would arguably enjoin "the operation of the statute" (*e.g.*, by striking down provisions

[5] This conclusion is supported by a longstanding canon of construction: "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co*., 328 U.S. 395, 398 (1946). "It is hardly a 'necessary and inescapable inference' from the language of Section 1252(f) that a district court is prohibited from enjoining a violation or misapplication of the detention statutes." *Rodriguez*, 591 F.3d at 1120.

of the statute itself as unconstitutional) and thus be incompatible with Section 1252(f)(1). This case is just not one of them. As noted, Plaintiffs seek to enjoin DHS's *violation* of Section 1226(a), not to enjoin the statute's valid operation. Section 1252(f)(1) thus does not apply.[6]

C. The Court Correctly Concluded that Plaintiffs Are Likely to Succeed on the Merits.

DHS's substantive defense of its deterrence policy fails for three independent reasons. *First*, DHS cannot legitimately deprive the asylum-seekers in this case of their liberty in order to send a message of deterrence to potential future migrants. *Second*, even if their detention for deterrence purposes could be justified in special circumstances presenting a truly grave national security threat, there is no such justification here, notwithstanding DHS's "incantation of the magic words 'national security.'" PI Op. at 37. *Third*, even if DHS's asserted resource-allocation interests were sufficient to justify locking up these children and their mothers for deterrence purposes, DHS has not adequately established that this significant burden on liberty meaningfully advances its stated aims of deterring future migrants.

The Court correctly found DHS's arguments unpersuasive on each of these points. Even if DHS were entitled to a second bite at the apple, nothing in its motion should cause the Court to revise its conclusion that Plaintiffs are likely to succeed on the merits.

As an initial matter, it is noteworthy that DHS frames its entire argument by re-asserting its claim that *Matter of D-J-* is "owe[d] deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)." Recon. Mot. at 17. Yet DHS neglects to mention

[6] Section 1252(f)(1) is inapplicable for an additional reason. The provision does not bar injunctions on behalf of an individual "against whom [removal] proceedings . . . have been initiated." 8 U.S.C. § 1252(f)(1); *see also Am. Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1559-60 (D.C. Cir. 2000) (finding that Congress meant to limit "litigation challenging the new system" – *i.e.*, the statute – to "aliens against whom the new procedures had been applied"). Based on the class definition, every class member is an individual "against whom removal proceedings have been initiated."

the binding rule in this Circuit that the "canon of constitutional avoidance trumps *Chevron*" as long as the constitutional issue is "serious." *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008); *see* PI Op. at 30-32. To defend its policy, DHS would have to show that its detention of asylum-seekers as an instrument of general deterrence does not raise serious constitutional concerns – which for multiple reasons it cannot do.

1. General Deterrence Is Not a Lawful Basis for Depriving Asylum-Seekers of Their Liberty.

DHS insists that "sending a message of deterrence to other Central American individuals who may be considering immigration" is a permissible justification for detention. PI Op. at 35. This "altogether novel" defense is flatly at odds with "[t]he justifications for detention previously contemplated by the [Supreme] Court" in immigration cases – preventing flight and protecting the community from dangerous individuals – which "relate wholly to characteristics inherent in the alien himself or in the category of aliens *being detained*." *Id.* at 33-34 (discussing *Zadvydas*, 533 U.S. 687, and *Demore*, 538 U.S. 510); *see also id.* at 38 (DHS policy of using immigration detention as a deterrent tool "does not comport with the traditional purposes of such detention"). DHS's argument is also "out of line with analogous Supreme Court decisions," in which "the Court has declared such 'general deterrence' justifications impermissible." *Id.* at 35 (discussing *Kansas v. Crane*, 534 U.S. 407 (2002), and *Kansas v. Hendricks*, 521 U.S. 346 (1997)).

Plaintiffs' PI briefs addressed each of the cases ultimately relied on by the Court. *See* PI Br. at 13-18; Reply Br. at 11-16. DHS elected largely to ignore them. Now, however, DHS alleges that the Court misinterpreted "binding precedent." Recon. Mot. at 27. That argument is as misplaced as it is untimely.

DHS first charges the Court with "clear error" for "seem[ing] to conflate" immigration detention with "criminal civil commitment." Recon. Mot. at 27.[7] DHS suggests that the Supreme Court rejected detention for deterrence purposes only where such detention "would have violated the Constitution's double jeopardy prohibition." Recon. Mot. at 27. DHS cannot point to where the Supreme Court said this in its decisions, because it did not. Indeed, the words "double jeopardy" do not appear anywhere in *Crane*. What the Supreme Court did say is that civil detention may not "become a 'mechanism for retribution or *general deterrence*.'" *Crane*, 534 U.S. at 412 (quoting *Hendricks*, 521 U.S. at 372-73 (Kennedy, J., concurring)) (emphasis added).

DHS also insists that it was "clear error" for the Court to consider these Supreme Court cases at all, because they arose in a "substantively different" context. Recon. Mot. at 27. That is a quarrel not with this Court but with the Supreme Court. In *Zadvydas*, the Supreme Court found non-immigration "civil commitment" cases quite relevant to considering the validity of immigration detention. *See* 533 U.S. at 690.

DHS therefore turns to yet another artificial distinction, arguing that "any discussion by the *Zadvydas* court regarding *Hendricks* is simply inapplicable" outside the context of *indefinite* detention. Recon. Mot. at 28. Not so. In *Zadvydas*, the Supreme Court relied on *Hendricks* for the much more general proposition that civil "detention violates [the Due Process] Clause"

[7] DHS's invented term "criminal civil commitment" is of course an oxymoron – the Supreme Court rejected deterrence in *Kansas v. Crane* because "the confinement at issue [is] civil, *not* criminal." 534 U.S. at 409 (emphasis added). If DHS means to suggest that the limits on civil detention are more pronounced for individuals who have previously served a criminal conviction, that position would make little sense; as this Court explained, "a general-deterrence rationale seems *less* applicable where . . . neither those being detained nor those being deterred are certain wrongdoers, but rather individuals who may have legitimate claims to asylum in this country." PI Op. at 36 (emphasis added).

absent a "special justification" that "outweighs" the individual's liberty interest. 533 U.S. at 690. There is nothing "inapplicable" about this principle to the very real and very harmful deprivation of liberty DHS has inflicted on the asylum-seekers in this case.

Contrary to DHS's assertion, what *is* inapplicable is the *Zadvydas* court's determination that "a period of detention of six-months of *post-removal order* detention is presumptively reasonable." Recon. Mot. at 29 (citing *Zadvydas*, 533 U.S. at 701 (emphasis added)). By definition, class members are not subject to a removal order, and the language DHS cites is thus irrelevant here. Moreover, *Zadvydas* found a six-month period of detention for an individual subject to a removal order to be presumptively reasonable because such detention served the legitimate purpose of effectuating such person's removal. 533 U.S. at 699-701. The Supreme Court certainly did not give the Government *carte blanche* to detain aliens for *illegitimate* reasons, so long as they are released after six months.[8]

Finally, DHS suggests that the Court's decision conflicts with "the instructive holding of the [Supreme] Court in *Demore*." Recon. Mot. at 26, 28. It does not. As the Court correctly noted, *Demore* upheld mandatory detention for a group of criminal aliens who, as a class, "demonstrated risk of flight and danger to the community." PI Op. at 34. *Demore* does not

[8] DHS likewise is not aided by *Jeanty v. Bulger*, 204 F. Supp. 2d 1366 (S.D. Fla. 2002), which it cites for the first time in its motion for reconsideration for the proposition that deterrence of mass migration is a "facially legitimate and bona fide reason[]" for detaining asylum-seekers. Recon. Mot. at 25 (quoting *Jeanty*, 204 F. Supp. 2d at 1381-82). Even putting aside the inappropriateness of citing this case for the first time on reconsideration, *Jeanty* is wholly inapposite. The asylum-seekers there were "excludable aliens" who had not made an entry and thus were deemed to have "no constitutional rights with regard to their [parole] application[s]." *See Jeanty*, 204 F. Supp. 2d at 1375. Here, class members *do* have due process rights and the Government must thus meet a substantially higher burden to justify any deprivation of liberty. PI Op. at 32-33 (citing numerous cases). DHS cannot meet that higher burden.

support detaining asylum-seeking mothers and children for the illegitimate purpose of general deterrence.[9]

In short, it is DHS – not the Court – that misreads the relevant case law. There is no merit to DHS's newfound arguments for using deterrence of others as a basis for depriving asylum-seekers of their liberty.

2. DHS's Asserted Interests Remain "Particularly Insubstantial."

The Court also found that "[e]ven assuming that general deterrence could, under certain circumstances, constitute a permissible justification for such detention," DHS's proffered interests are "particularly insubstantial." PI Op. at 35. Specifically, the Court rejected DHS's arguments that the diversion of resources and relocation of ICE employees in response to mass migration warrants the detention of mothers and children. That decision was correct. When liberty is at stake, it is not enough for the Government to point to some generally valid objective; it must point to a "special justification" that "outweighs" the interest in freedom that is at the "heart" of the Due Process Clause. *Zadvydas*, 533 U.S. at 690.

DHS nonetheless doubles down on essentially the same argument, pointing to the temporary transfer of 800 (out of 7,000) ICE personnel. Recon. Mot. at 22-23 (citing Declaration of Thomas Homan ("Homan Decl.") (Mar. 20, 2015) (Exhibit C to Recon. Mot.)). We do not doubt that DHS faces resource constraints – ones that are by no means limited to this

[9] *Reno v. Flores*, 507 U.S. 292 (1993), also does not support DHS's position. *Flores* approved of "reasonable presumptions" in determining who is a "responsible adult" capable of taking custody of a juvenile alien, but only as part of an "exercise of discretion . . . requir[ing] 'some level of individualized determination.'" *Id.* at 313. The use of presumptions in determining what is in the best interest of an individual child is not remotely similar to *subjecting* children to harm in order to deter others.

particular context.[10] But "[t]he simple fact that increased immigration takes up government resources cannot necessarily make its deterrence a matter of national security." PI Op. at 36. In fact, even on DHS's own account, resources are not being diverted from, *e.g.*, counter-terrorism priorities, but only from ordinary immigration enforcement. *See* Homan Decl. ¶ 4 (defining ICE's "national security" priorities as including "apprehending criminals and serious immigration violators" and "effecting removals").

DHS also repeats its contention, previously made in the Miller declaration, that mass migration aids smugglers. *Compare* Miller Decl. ¶ 15 *with* Recon. Mot. at 22. In support, it re-asserts the wholly conclusory statement that some amount of money that flows to smugglers eventually funds unspecified "dangerous" activities. Recon. Mot. at 22. Once again, we do not doubt the Government's interest in cracking down on smuggling networks and harmful cartels. *See* Homan Decl. ¶ 3 (noting the Government's "increasing efforts to dismantle criminal smuggling networks" – a far more direct response to smuggling than detaining mothers and children). But the unexplained and conjectural relationship between migration and an incremental increase in funding for unsavory groups is far too attenuated to justify the strong medicine of detaining individual asylum-seeking women and children.

Tellingly, DHS has not taken the Court up on its suggestion that it establish a surge that is "overwhelming the country's borders or wreaking havoc in southwestern cities." PI Op. at 36. Instead it raises the real but workaday challenges of administering an immigration system. Those policy challenges may justify an array of "other means at [the Government's] disposal to

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[10] *See generally* Mem. from Jeh Charles Johnson to Thomas S. Winkoswki et al. re: Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014) (noting the need for "smart enforcement priorities" because of DHS's "limited resources").

deter mass immigration," but they do not rise to the level of a special justification for "significant deprivation[s] of liberty." PI Op. at 38.[11]

3. There Is No Credible Evidence that Detaining Mothers and Children for Weeks or Months Has a Meaningful Impact on Migration Patterns.

Even if deterrence could in some instances be a valid basis for detention, *but see supra* Part II.C.1, and even if DHS had established a sufficiently compelling "national security" interest in deterring migration, *but see supra* Part II.C.2, DHS's untimely new evidence still fails to show that its use of detention actually has a deterrent effect on Central American asylum-seekers.

Prior to entry of the preliminary injunction, DHS relied on conclusory statements by ICE officials as the factual basis for its claim that detention operates as a meaningful deterrent. The Court correctly dismissed these declarations, holding that DHS had presented "little empirical evidence . . . that [its] detention policy even achieves its only desired effect – *i.e.*, that it actually deters potential immigrants from Central America." PI Op. at 36. Moreover, the Court found that the theoretical basis for DHS's view was rebutted by the very scholar on whose work DHS had relied. PI Op. at 36. As Professor Jonathan Hiskey found, DHS has "ignore[d] . . . the critical role that crime victimization in Central America plays in causing citizens of these countries to consider emigration as a viable, albeit extremely dangerous, life choice." PI Op. at 36-37 (quoting Declaration of Jonathan Hiskey ("Hiskey Decl.") ¶¶ 11, 13 (Dec. 12, 2014)

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[11] DHS also argues that detention is justified to enable it to "assess any public safety risk of releas[ing]" a particular individual, and to "ensure[] that migrants will attend judicial proceedings." Recon. Mot. at 23-25. These arguments have nothing to do with the Court's preliminary injunction, which is limited to DHS's use of deterrence as a basis for detention. If DHS can justify the detention of individual asylum-seekers based on the traditional grounds of flight risk or danger to the community, the preliminary injunction does not prevent it from doing so. Indeed, Plaintiffs have never argued that DHS should not "fully vet[]" (Recon. Mot. at 23) asylum-seekers for possible security risks.

(Exhibit 13 to PI Br.)); *see also id.* at 37 (quoting Professor Hiskey's judgment that "DHS's assertions are 'not empirically supported'").

In response to the Court's rejection of the conclusory statements of ICE officials, DHS responds with *more* conclusory statements of ICE officials. Indeed, the new "evidence" is largely the same as the old. *Compare* Miller Decl. ¶ 9 (citing "debriefings" of Central American migrants to demonstrate that "high probability of a prompt release, coupled with the likelihood of low or no bond, is among the reasons they are coming to the United States"), *and* Lembke Decl. ¶ 19 (same), *with* Declaration of Ronald Vitiello ("Vitiello Decl.") ¶¶ 9, 10, 11 (Mar. 10, 2015) (Exhibit B to Recon. Mot.) (relying on interviews with migrants allegedly expressing similar motivations), *and* Declaration of Tae D. Johnson ("Johnson Decl.") ¶ 7 (Mar. 20, 2015) (Exhibit A to Recon. Mot.). DHS's flawed theory is not bolstered simply because additional officials have repeated it. *Cf. Parhat v. Gates*, 532 F.3d 834, 848 (D.C. Cir. 2008) ("[T]he fact that the government has 'said it thrice' does not make an allegation true." (quoting Lewis Carroll, *The Hunting of the Snark* 3 (1876))).

The most glaring flaw in DHS's position remains unaddressed: its failure to consider "the critical role that crime victimization in Central America plays." PI Op. at 36 (quoting Hiskey Decl. ¶ 13). Professor Hiskey's conclusions are supported by another distinguished sociologist, Professor Cecilia Menjívar, who has conducted "hundreds of interviews with migrants and potential migrants from Central America," as well as long-term studies of migration decisions. Declaration of Cecilia Menjívar ("Menjívar Decl.") ¶ 11 (Apr. 15, 2015) (attached as Exhibit 1). Based on this extensive research, Professor Menjívar concludes that "the primary reason individuals and family units migrate from Central America is because of the conditions in their home countries." *Id.* ¶ 16. Asylum-seekers "expect and are prepared for apprehension,

detention, and deportation," as well as even graver risks on their journey – "robberies, kidnapping, and rape." *Id.* ¶ 19. Families "choose to travel because the conditions considerably outweigh these risks." *Id.* ¶ 18; *see also* Declaration of Laurie Cook Heffron ("Heffron Decl.") ¶ 29 (Apr. 13, 2015) (attached as Exhibit 2) (explaining that migration decisions are often made "in the context of life-threatening experiences . . . and are often made in a state of urgency and desperation," and are not impacted by the risks associated with migration).[12]

DHS's position is also inconsistent with statements by its own Secretary, Defendant Jeh Johnson. Secretary Johnson has strongly resisted the notion that perception of DHS enforcement policies "is the motivator for people coming in," testifying instead that "it is primarily the conditions in the countries that they are leaving from" that motivates people from Central America to migrate. CQ Congressional Transcripts, *Senate Judiciary Committee Holds Hearing on Oversight of the Homeland Security Department* 33-35 (June 11, 2014) (Testimony of Jeh Johnson); *see also id.* at 39 ("I do believe, Senator, that what is principally motivating this migration are . . . the conditions in the Central American countries."); *id.* at 53 ("I believe, Senator, that the primary motivator for the reason – for this spike in migration . . . is the situations . . . in these countries.").

In addition to ignoring the consensus of experts (and its own Secretary) on what drives Central American migration, DHS makes serious methodological errors in claiming that its use of detention has lowered migration rates. "[I]t is extremely difficult to establish a causal effect between detention and deterrence," and "[w]hile there are scientifically valid methods capable of

[12] Professor Menjívar also explains that traumatized asylum-seekers have a justifiable "fear of authorities," and so may well "respond[] affirmatively to a question about 'permisos' in order to please the officer." Menjívar Decl. ¶ 24. Given the "inherently unreliable" nature of such statements, *id.*, DHS offers no reason to credit the double-hearsay of some unidentified number of migrants under interrogation by some unidentified border agents. *See, e.g.*, Vitiello Decl. ¶ 9.

isolating such causal effects, [DHS's] declarations employ none of these." Menjívar Decl. ¶ 26; *see also* Supplemental Declaration of Jonathan Hiskey ("Suppl. Hiskey Decl.") ¶¶ 6-8 (Apr. 15, 2015) ("As a matter of simple social science methodology, the claim falls short, as it does not test any alternative causes for the short decline."); Supplemental Declaration of Nestor Rodriguez ¶¶ 8-9 (Apr. 13, 2015) (attached as Exhibit 4) (same). For example, DHS's claim of a 63% reduction in apprehensions between the December 2013 to July 2014 period and July 2014 to March 2015, Vitiello Decl. ¶ 14; Recon. Mot. 21, ignores multiple factors that could be responsible for such a change, including substantial "seasonal changes" in migration patterns. Menjívar Decl. ¶ 26; Suppl. Hiskey Decl. ¶ 8; *see also* Recon. Mot. at 23 (recognizing that it is now "the beginning of the time of year that traditionally has the highest numbers of migration on the Southwest border"). Neither does DHS attempt to separate out the effects of other parts of the "multi-faceted U.S. Government strategy" to address increased migration from Central America – including a "public awareness campaign" to "counter misperceptions," and "increasing efforts to dismantle" "criminal smuggling networks" – which DHS itself suggests are contributing to the decrease. Homan Decl. ¶¶ 3, 6.

Perhaps even more strikingly, DHS ignores the fact that Mexico more than *doubled* its deportation of Central American migrants between January 2014 and January 2015. Menjívar Decl. ¶ 28. "Without looking more specifically at the effect of Mexico's efforts, it is simply impossible to assess whether an expansion of family detention is having any deterrent effect on migration." *Id.* ¶ 29; *see also* Suppl. Hiskey Decl. ¶ 9.

All of these gaps reflect the sort of methodological sloppiness that courts reject, even under deferential "arbitrary and capricious" review. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency acts arbitrarily and

capriciously when it "fail[s] to consider an important aspect of the problem"); *Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 241 (D.C. Cir. 2008) ("conclusory" assertions provide no "assurance" that the agency "considered the relevant factors"). DHS's failure to consider facts that are obviously relevant to its causal claims certainly does not befit an agency attempting to justify significant deprivations of liberty.

Finally, even if all the flaws and omissions of DHS's declarations were discounted, DHS still has not presented evidence connecting its rationale for detention with *the particular class* before the Court. Suppose it were true – notwithstanding the expert consensus that DHS is wrong – that "some families" decide not to migrate because of the prospect of detention. Recon. Mot. at 22. DHS has not attempted to identify *which* families are staying in their countries of origin. Mothers and children who have passed a credible fear screening and demonstrated a significant possibility that they will qualify for asylum are the *least* likely to be deterred. By definition, members of this provisional class have established bona fide claims of persecution in their home country. As harmful and traumatic as detention is, it is sadly an improvement for those living in fear of rape or murder. Menjívar Decl. ¶ 24; Heffron Decl. ¶ 29. At most, DHS's evidence might suggest that those considering migration for, *e.g.*, economic reasons, might be deterred by the threat of detention. It does not follow that a policy of detaining *asylum-seekers* – whom ICE itself has determined have a credible fear of persecution – will deter other *asylum-seekers*. Rather, the class before the Court reflects the subset of migrants who have the most to lose by staying in their countries of origin (violence, rape, and even death), and the most to gain by leaving (a permanent place of refuge in the country that thankfully has been a refuge for so many before them). There is simply no basis for concluding that DHS's detention policy has a meaningful deterrent effect on such individuals.

III. The Equities Continue to Favor the Preliminary Injunction.

This Court has already recognized that there is no public interest in DHS breaking the law in service of an illegitimate detention policy. PI Op. at 39. It has also found, based on the unrebutted declarations of Plaintiffs and their experts, that "detention harms putative class members in myriad ways, and as various mental health experts have testified, it is particularly harmful to minor children." *Id.* at 38. These conclusions remain correct.

DHS belatedly seeks to portray the detention of children and their mothers in a better light, but its story is incomplete at best. DHS cannot seriously dispute that its detention facilities are overcrowded and understaffed, and lack many basic services. Declaration of Barbara Hines ("Hines Decl.") ¶¶ 23, 26 (Dec. 15, 2014) (Exhibit 4 to PI Br.); *see generally* Wil S. Hylton, *The Shame of America's Family Detention Camps*, N.Y. Times Magazine (February 8, 2015), *available at* http://www.nytimes.com/2015/02/08/ magazine/the-shame-of-americas-family-detention-camps.html?_r=0. While ICE officials claim that "medical, dental and social services are available for all residents" (Declaration of Stephen M. Antkowiak ("Antkowiak Decl.") ¶ 13 (Mar. 20, 2015) (Exhibit D to Recon. Mot.)), in fact individual detainees who would benefit from access to trained mental health workers have not had access to such services. Heffron Decl. ¶ 26.

More fundamentally, however, this is all beside the point. Detention is still detention. As mental health experts have explained, "regardless of conditions, the detention of mothers and children, particularly those with trauma in their past, exacerbates previous trauma and prevents appropriate care and treatment." Heffron Decl. ¶ 22; *see also* Supplemental Declaration of Luis H. Zayas ¶¶ 7, 9-10 (Apr. 13, 2015) (attached as Exhibit 5) (explaining that the conditions described by DHS "do not alter" his conclusions that detention of mothers and children "has serious and long-lasting detrimental effects" on their psychological health, "compromises children's intellectual and cognitive development and contributes to the development of chronic

illnesses that may be irreversible"). DHS's effort to trivialize the real harms that its policy inflicts on vulnerable mothers and children should not be taken seriously.[13]

CONCLUSION

For the foregoing reasons, DHS's motion for reconsideration should be denied.

[13] There is also no merit to DHS's complaint that the preliminary injunction is "indefinite[]" and "provides ICE with no outlet for redress should mass migration and threats to national security change in the future." Recon. Mot. at 16. A *preliminary* injunction is not indefinite; it lasts only as long as necessary to enable full litigation on the merits. Plaintiffs expect that a permanent injunction will ultimately be warranted, but even then Rule 60(b) will guarantee an ample "outlet" for DHS to seek whatever relief it thinks is justified by any changed circumstances. *See Horne v. Flores*, 557 U.S. 433, 447 (2009) ("Rule 60(b)(5) . . . provides a means by which a party can ask a court to modify or vacate a judgment or order if 'a significant change either in factual conditions or in law' renders continued enforcement 'detrimental to the public interest.'" (quoting *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992))).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2015, I electronically transmitted the attached motion and exhibits using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants for this case.

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