No. 12-56734

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TIMOTHY ROBBINS, et al.,
Respondents-Appellants,

v.

ALEJANDRO RODRIGUEZ, et al.,
Petitioners-Appellees.

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

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CORPORATE DISCLOSURE STATEMENT

There are no corporations involved in this case.

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INTRODUCTION

Respondents attack a preliminary injunction order that requires them to comply with federal immigration statutes. The order directs them to provide bond hearings identical to those authorized by this Court in prior cases involving prolonged immigration detention. It does not require the release of anyone; it solely protects the right to be heard for people subject to prolonged immigration detention.

This appeal concerns two subclasses of individuals – those detained pursuant to 8 U.S.C. §§ 1226(c) and 1225(b) (the "PI Subclasses"). The government has construed these statutes to bar the PI Subclass members from even asking Immigration Judges to consider their eligibility for release on bond, regardless of the length of their detention. Applying this Court's precedent, the district court rightly rejected that reading of Sections 1226(c) and 1225(b). As this Court has unambiguously held, "prolonged detention without adequate procedural protections would raise serious constitutional concerns," *Casas-Castrillon v. DHS*, 535 F.3d 942, 950 (9th Cir. 2008), and the statutes at issue here can easily be construed to avoid those concerns.

The government's contrary argument rests primarily on two flawed premises. *First*, Respondents treat the district court's order as resting solely on constitutional grounds. But this Court has published five opinions in the last seven years that recognize limits on prolonged detention, and all but one of them were

based on principles of statutory interpretation, including the doctrine of constitutional avoidance.

Second, the government construes *Demore v. Kim*, 538 U.S. 510 (2003), to require the detention of "criminal aliens" in removal proceedings regardless of whether they have conceded their deportability and *regardless of how long they have been detained*. But this argument also ignores this Court's authority, which has repeatedly limited *Demore*'s approval of mandatory detention to "brief" detentions. By definition, the PI Subclass members have not been detained for a brief period, and the vast majority of them do not concede that they have lost the right to remain in the United States.

Finally, the government's argument is weaker still with respect to the equitable factors – irreparable harm, balance of hardships and public interest. The government cannot dispute that hundreds of detainees whom *its own Immigration Judges* would order released on bond will remain incarcerated without process if this Court nullifies the injunction. Similarly, its public safety arguments ignore the fact that the district court's order does not order the *release* of anyone, let alone their admission to the United States. It simply allows class members subject to prolonged detention to *ask* an Immigration Judge for release on bond. Since the order has gone into effect, Immigration Judges have granted some bond requests, while denying others. The government points to virtually no hardship created by an order requiring its own Immigration Judges to conduct bond hearings. Given

the substantial liberty interest that class members have in being free from prolonged detention, particularly when they present no danger or flight risk, the equities strongly favor Petitioners.[1]

ISSUES PRESENTED

1. Whether prolonged mandatory detention without a rigorous bond hearing under Section 1226(c) presents serious constitutional problems.

2. Whether, in order to avoid the serious constitutional problems created by prolonged mandatory detention, Section 1226(c) can be construed to apply only to expeditious removal proceedings – i.e., proceedings that take no more than six months – after which point a rigorous bond hearing is required.[2]

3. Whether prolonged detention without a rigorous bond hearing under Section 1225(b) presents serious constitutional problems.

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[1] Petitioners brought the PI on behalf of the two Subclasses that the government apparently believes can be detained without bond hearings of any kind. The class itself includes two other subclasses – individuals detained under Section 1226(a), who are eligible for release on bond pursuant to existing regulations, and members detained under Section 1231(a), who are now eligible for release on bond pursuant to *Diouf II*. Petitioners will shortly move for summary judgment to seek complete relief on behalf of all class members, including greater procedural protections at bond hearings for those who already receive them. That motion will include extensive data concerning the class that is not yet in the record.

[2] Petitioners use "rigorous bond hearing" as shorthand for the hearings required under existing Ninth Circuit law for those subject to prolonged detention. Under existing law, such hearings must take place before an Immigration Judge, must be recorded for transcription, and must place the burden of proof on the government by clear and convincing evidence. *See generally V. Singh v. Holder*, 638 F.3d 1196, 1203, 1209 (9th Cir. 2011). The district court order mirrors the requirements set forth in *V. Singh*.

4. Whether, in order to avoid the serious constitutional problems created by prolonged detention without rigorous bond hearings, Section 1225(b) can be construed to apply only to expeditious removal proceedings – i.e., proceedings that do not exceed 6 months – after which point a rigorous bond hearing is required.

STATEMENT OF FACTS AND STATUTORY BACKGROUND

This appeal concerns class members detained under 8 U.S.C. 1226(c) and 1225(b), provisions which, in the government's view, do not permit an Immigration Judge to hold a bond hearing of any kind to determine whether further detention is warranted, regardless of the length of detention.

A. Mandatory Detention Under Section 1226(c)

1. Procedures under Section 1226(c)

A detainee becomes subject to Section 1226(c) if U.S. Immigration and Customs Enforcement (ICE) officials believe he has been convicted of any one of a broad range of crimes, including simple drug possession offenses and certain misdemeanors, as well as more serious crimes. As interpreted by the government, the statute forecloses any avenue for detainees to seek release on the grounds that they pose no danger to the community or flight risk, regardless of how long their detention extends. For example, Respondents detained Petitioner Jose Farias Cornejo – a class representative for the Section 1226(c) Subclass – for more than 15 months without a bond hearing, even though he is a long-time lawful permanent

resident with strong family ties and a successful school and work history. He ultimately won discretionary relief from removal based on the Immigration Judge's decision that Mr. Cornejo's strong equities outweighed his relatively minor criminal record – a decision that DHS itself declined to appeal. *See* Petitioners-Appelees' Supplemental Exerpts of Record (SER) 51-53. *See also* SER 58-61 (observing Farias was released after he won his case and DHS declined to appeal).

Individuals become subject to mandatory detention without the possibility of release based solely on an ICE officer's review of their criminal history. If an ICE officer (not an attorney) determines that a non-citizen has been convicted of a triggering offense, the individual is classified as a mandatory detainee and told that they are ineligible for release on bond. *See* SER 20 (excerpts of deposition transcript of Eric Saldana (Saldana Tr.) 37:12-20). Triggering convictions include nearly all controlled substance offenses, *see* 8 U.S.C. 1182(a)(2)(C), crimes involving moral turpitude, *see* 8 U.S.C. 1182(a)(2)(A)(i)(I), and "aggravated felon[ies]," *see* 8 U.S.C. 1227(a)(2)(A)(iii).[3] *See* 8 U.S.C. 1226(c)(1). If the ICE officer is unsure about how to classify the detainee's criminal history, he or she may consult with one of the attorneys employed by ICE – the same attorneys who prosecute immigration cases for DHS – and base the decision to detain on the ICE

[3] Despite its plain terms, an "aggravated felony" need not be "aggravated" or a "felony;" many relatively minor convictions are classified as aggravated felonies. *See* Richard A. Boswell, Essentials of Immigration Law 49 (2006).

attorney's opinion. *See* SER 21-22 (Saldana Tr. 52:10 – 53:16).[4]

Under agency regulations and Board of Immigration Appeals (BIA) caselaw, a detainee subject to mandatory detention has the right to ask the Immigration Judge to reconsider his or her classification as a mandatory detainee. *See* 8 C.F.R. § 1003.19(h)(2)(ii) (providing for Immigration Judge hearing over whether detainee is "properly included" under the detention statute); *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999); *see also Demore v. Kim*, 538 U.S. 510, 514 n.3 (2003) (describing "*Joseph*" hearings). However, Respondents do not inform detainees of their right to seek *Joseph* hearings, *see* SER 15-16 (excerpts of deposition transcript of Wesley Lee (Lee Tr.) 207:19 - 208:6). In fact, the form supplied to detainees held under Section 1226(c) states that there is *no* opportunity to challenge ICE's mandatory detention determination. *See* SER 16-17 (Lee Tr. 208:18-209:4) (if [ICE] determines a detainee is subject to mandatory detention under 1226(c), the Notice of Custody Determination form specifically "says [a

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[4] Respondents assert that national security detainees, or what they call "terrorist aliens," are eligible for relief under the district court's order. Dkt. 9 (Opening Brief of Respondents-Appellants) at 1. However, the class definition explicitly exempts individuals detained under either of the two national security detention statutes that explicitly permit prolonged detention. *See* 8 U.S.C. §§ 1226a, 1537; SER 24(class definition). While, by its terms, Section 1226(c)(1)(D) also includes authority to detain individuals charged with removability based on certain national security grounds, read in context it requires that such individuals be arrested for an offense, as they must be "released" from some other custody in order to fall under Section 1226(c), and in that respect is narrower than the authority available under the national security detention statutes. In any event, Petitioners are unaware of the government ever having utilized the authority under Section 1226(c)(1)(D) to detain any class member, including any member of the PI Subclasses.

detainee] *cannot* have a bond hearing.") (emphasis added)); *see also* SER 18 (Lee Tr. 243:16-22).

Even if a Section 1226(c) detainee learns of the right to a *Joseph* hearing, in practice the detainee has virtually no ability to challenge ICE's view that detention is mandatory. To obtain a bond hearing, the detainee must show the Immigration Judge that the government is "substantially unlikely to prevail" on its claim regarding the classification of the conviction as one triggering mandatory detention. *Joseph*, 22 I&N Dec. at 799. As one judge of this Court has observed, this burden is "all but insurmountable." *Tijani v. Willis*, 430 F.3d 1241, 1246 (9th Cir. 2005) (Tashima, J., concurring); *see also Matter of Carlos Alberto Flores-Lopez*, 2008 WL 762690 (BIA Mar 05, 2008) (finding for DHS in *Joseph* challenge despite unpublished decision from governing Circuit Court finding conviction was not a removable offense); Julie Dona, *Making Sense of "Substantially Unlikely": An Empirical Analysis of the Joseph Standard in Mandatory Detention Custody Hearings* 5 (June 1, 2011) (forthcoming in Georgetown Immigration Law Journal), *available at* http:// ssrn.com/abstract=1856758 (reviewing *Joseph* decisions between November 2006 through October 2010 and finding that the BIA construes the "substantially unlikely" standard "to require that nearly all legal and evidentiary uncertainties be resolved in favor of the DHS").

In practice, the BIA currently interprets the *Joseph* standard to permit a

detainee to avoid mandatory detention only where the government's legal position is shown to be frivolous. A detainee cannot challenge mandatory detention by showing no danger or flight risk, or, relatedly, likelihood of securing relief from removal. *See* SER 27-28 (excerpts of deposition transcript of Chief Immigration Judge Ivan Fong (Fong Tr.), 88:23-89:21)(explaining his "understanding" that a detainee's eligibility for relief "would not be a basis" for finding him or her not subject to mandatory detention)]]. Moreover, under the *Joseph* regime those and other factors regarding the circumstances of individual detainees remain irrelevant regardless of the length of detention. SER 26 (Fong Tr 46:6-9). Indeed, even if a detainee wins before an Immigration Judge and remains detained only because the government has appealed the IJ's decision to the BIA, the mandatory detention regime continues to apply. *See Joseph*, 22 I&N Dec. at 801.

2. Characteristics of Section 1226(c) Class Members

Respondents did not present any evidence in the district court regarding danger to the community or flight risk for the Section 1226(c) Subclass. Rather, as they do here, Respondents made a number of factual assertions concerning the Section 1226(c) Subclass based on excerpts from the Congressional record describing conditions that existed twenty years ago, as well as statistics cited in the Supreme Court's decision in *Demore v. Kim*, 538 U.S. 510 (2003), which pertain to appearance and recidivism rates for a different group of noncitizens, whose cases were analyzed before Section 1226(c) was enacted. *See* Dkt. 9 at 25 (citing

Demore, 538 U.S. 518-19).

Those statistics do not provide useful information about the individuals at issue in this case, for several reasons. First, flight risk data from that time period has no relevance today because at that time ICE released a number of individuals who would have been subject to mandatory detention based purely on the availability of bed space. *See, e.g.*, GAO, No. GAO/GGD-92-85, Immigration Control: Immigration Policies Affect INS Detention Efforts 41 (1992) ("GAO 1992") (noting that due to limited detention space, INS "did not detain all criminal aliens").[5]

Since that time, Congress and the immigration authorities have massively increased detention bed space, adopted regulations targeted to improve appearance rates, and taken measures designed to address the problem of immigrants who fail to appear for removal. *See* Congressional Research Service, Immigration Related Detention (January 12, 2012), p. 12, available at http://www.fas.org/irp/crs/RL32369.pdf (from FY 2001 - 2012 "the number of funded beds increased from 19,702 to 34,000"); 67 Fed. Reg. 31,157 (proposed May 9, 2002) (to be codified at

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[5] *See* Criminal Aliens in the United States: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs, 103d Cong. 21 (1993) ("The lack of INS detention space in many of its districts puts pressure on the INS to release, rather than detain, criminal aliens."); Congressional Task Force on Immigration Reform, Report to the Speaker 44-45 (1995) (noting that INS "does not have adequate resources for holding facilities" and recommending "that Congress appropriate sufficient funds to expand INS detention facilities to at least 9,000 beds").

8 C.F.R. pts. 3, 236, 240, 241) (imposing new penalties on aliens who fail to comply with surrender orders).[6]

In addition, ICE has begun to use the Intensive Supervision Appearance Program (ISAP II) as an alternative to detention. According to testimony from the government's own "person most knowledgeable" witness in this case, ISAP II has had remarkable success rates in the Central District of California. *See* SER 23-24 (Saldana Tr. 111:4-112:24) (DHS is "at, if not close to, [a] 100 percent compliance rate" for noncitizens enrolled in the ISAP II program in San Bernardino, and at around a 90 percent compliance rate for those in the Los Angeles area).

The government's statistics also do not accurately describe the members of the Section 1226(c) Subclass because the statistics pertain to all "removable" criminal aliens, Dkt. 9 at 20, whereas the class members include only that small

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[6] Respondents claim that problems regarding appearance rates have not "lessened with time," Dkt. 9 at 27, citing a statement from a 2006 report by the DHS Office of the Inspector General. But the report states only that "historical trends indicate that 62 percent of the aliens released will eventually be issued final orders of removal . . . and later fail to surrender for removal or abscond." *Id.* Respondents provide no underlying evidence for this statement about "historical" data, and therefore no proof that the source is recent enough to account for the recent significant changes designed to improve appearance rates. Indeed, the report also observes that "the percentage of released aliens who failed to appear at their respective hearings has declined in recent years." Respondents-Appellants' Excerpts of Record (ER) 103. Likewise, the government's citation to figures regarding the number of "fugitive aliens" is unavailing because, as Respondents concede, these statistics are "not limited to criminal aliens," Dkt. 9 at 27-28, let alone to "criminal aliens" who are detained for prolonged periods. Moreover, they provide no information as to whether these individuals failed to appear for removal prior or subsequent to the recent significant changes that have markedly increased appearance rates.

subset of detainees detained for a prolonged period of time, many of whom are *not* removable, either because they are not deportable for the reasons alleged by the government or because they are eligible for some form of discretionary relief that will ultimately allow them to retain the right to reside in the United States. For example, Mr. Rodriguez himself was not removable for the reasons alleged in the charging documents against him, *see Rodriguez v. Mukasey*, No. 04-76720 (9th Cir. Jan. 1, 2009) Dkt. 77, while Mr. Farias was eligible for discretionary relief that he ultimately won. *See supra* Part A.1.[7]

B. Detention Without Bond Hearings under Section 1225(b)

The other subclass of detainees who now obtain hearings under the district court's order are those apprehended at a port of entry – typically a border crossing or international airport – and detained under Section 1225(b) as "alien[s] seeking admission." 8 U.S.C. 1225(b)(2)(A). The statute is silent as to what procedures govern the release of such detainees. However, regulations classify those stopped at the border as "arriving aliens," *see* 8 C.F.R. § 1.2 (defining term "arriving alien"), and additional regulations purport to deprive Immigration Judges of

[7] The preliminary injunction was briefed prior to the disclosure of Petitioner's expert report, which analyzes data concerning approximately 1,000 class members detained over the course of one year, and reveals that many class members win their removal cases. Indeed, class members prevail at substantially higher rates than the general detention population. The expert analysis reports such findings for both of the PI Subclasses as well for the class as a whole. While expert discovery remains ongoing, Petitioners expect that the evidence will ultimately demonstrate that substantial numbers of class members are detained while pursuing claims that are ultimately meritorious.

jurisdiction to review the custody status of "arriving aliens." *See* 8 C.F.R. § 1003.19(h)(2)(i)(B). Thus, under the government's interpretation of the statutory and regulatory scheme, non-citizens arrested at a port of entry – who are deemed to be "arriving aliens," – may be released only by ICE officials, without any possibility for review by an Immigration Judge. *See* SER 12, 13-14 (Lee Tr. 18:12-16; 118:23-119:9).

Four features of this statutory and regulatory scheme bear particular emphasis. *First*, the applicable statute itself – Section 1225(b) – authorizes the detention of all "aliens seeking admission" to the United States, including both returning lawful residents stopped at the border after travel abroad and those who have entered the United States without inspection (EWIs) and reside within the United States at the time of their arrest. Because the latter class of individuals are not apprehended at the border, they are not classified as "arriving aliens," and there is no prohibition on an immigration judge reviewing their custody. *See Matter of X-K-*, 23 I&N Dec. 731, 734-35 (BIA 2005).

Second, while the Government states that "Section 1225(b)(2)(A) provides for the mandatory detention of arriving aliens generally," Dkt. 9 at 31, this cannot possibly be correct because the BIA has already read that particular statute to permit bond hearings for individuals who entered without inspection and are placed into removal proceedings after being arrested within the United States. *Matter of X-K-*, 23 I&N Dec. 731 at 734-35.

Third, the government interprets both Section 1225(b) and the regulation that purports to strip immigration judges of authority to review the custody status of "arriving aliens" as applying not just to individuals who are arriving in the United States for the first time, but even to individuals who have previously resided in the United States as lawful permanent residents. Thus, long-time lawful permanent residents returning from brief trips abroad are ineligible for bond hearings, on the government's view, so long as they are deemed to be "seeking admission" and hence subject to detention under Section 1225(b). *See* 8 U.S.C. 1101(a)(13)(C) (treating certain returning lawful permanent residents as "seeking admission" if, *inter alia*, they have certain prior criminal convictions); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1077 (9th Cir. 2006) (recognizing that lawfully-admitted non-citizens are detained under Section 1225(b)); *Camins v. Gonzales*, 500 F.3d 872, 875 (9th Cir. 2007) (petition for review filed by returning lawful permanent resident who was treated as an "alien seeking admission").

Fourth, the Section 1225(b) Subclass includes a large number of asylum seekers who have fled their home countries because of persecution, have no criminal history of any kind in the United States, and will ultimately win the right to reside here under the asylum laws. Critically, these class members have already demonstrated a "credible fear" of persecution, because asylum seekers who fail to demonstrate a credible claim are subject to virtually immediate deportation. *See* 8 U.S.C. 1225(b)(1)(B)(iii)(I)("if the officer determines that an alien does not have a

credible fear of persecution, the officer shall order the alien removed from the United States without further hearing or review"). Nonetheless, under the government's view, these class members – all who have been detained at least six months, despite having demonstrated a credible fear of persecution – also have no right to a bond hearing. Instead, the government leaves the decision to detain members of the Section 1225(b) Subclass, even for prolonged periods, entirely in the hands of the DHS officers who made the decision to detain them in the first instance.[8]

The government inaccurately describes Section 1225(b) detentions as "mandatory," *see* Dkt. 9 at 8, 11, but also acknowledges that detainees can qualify for "parole" under 8 U.S.C. 1182(d)(5)(A). That section permits discretionary release where doing so satisfies an "urgent humanitarian reason" or creates a "significant public benefit." *Id.* Under the current system, DHS officers decide whether to grant parole either based solely on a review of the detainee's file or an informal discretionary interview; no hearing occurs before an Immigration Judge. Nor is there a right to appeal parole denials. *See* ER 156-157 (Lee Tr. 97:15 –

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[8] The subsections of Section 1225(b) under which class members are detained are Section 1225(b)(2)(A), which applies to returning lawful permanent residents and all others who have facially valid documents, and Section 1225(b)(1)(B)(ii), which applies to individuals with no documents (or fraudulent documents) who express a fear of persecution *and* are determined to have a credible fear of persecution. To the extent that Respondents suggest that individuals who fail their credible fear interviews would nonetheless get bond hearings under the district court's order, *see* Dkt. 9 at 31-32, that suggestion is incorrect because such individuals would be deported long before six months.

98:15); SER 12 (Lee Tr. 18:12-16).

Parole decisions are not made based on a rigorous determination regarding danger and flight risk. On the contrary, and despite Respondents' protestations, Dkt. 9 at 7-8, their "person most knowledgeable" deponent testified, unambiguously, that bed space is a critical factor in determining whether to release individuals on parole. *See* ER 153 (Lee Tr. 40:17-19). Indeed, according to the government, the officer who decides to detain an individual pursuant to this "process" need only check a box on a form; the decision to detain an individual for months or years can be made without any explanation. *See* ER 162-163 (Lee Tr.106:18-107:23).

As with the Section 1226(c) Subclass, Respondents did not present any evidence in the district court regarding danger to the community or flight risk for the Section 1225(b) Subclass. Rather, Respondents cited national statistics concerning the rate at which individuals are released from parole, which Respondents assert is higher than the rate at which asylum applications are granted. Dkt. 9 at 10. It is unclear what the relevance of that information is, as it obviously does not prove anything about whether such individuals are a danger or a flight risk, but in any event the statistics do not specifically concern prolonged detainees, let alone class members detained in the Central District. Based on discovery that was ongoing at the time the time of the preliminary injunction briefing, it is clear that significant numbers of Section 1225(b) Subclass members ultimately win

asylum, yet none of them are granted parole in the first six months of their detention, and many remain detained for far longer even though they present no danger or flight risk.[9]

STANDARD OF REVIEW

To obtain a preliminary injunction from the district court, Petitioners had to demonstrate that (1) they were likely to succeed on the merits, (2) they were likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tipped in their favor, and (4) an injunction was in the public interest. *Winter v. NRDC, Inc.*, 129 S. Ct. 365, 374 (2008). Where the balance of hardships tips sharply in Plaintiffs' favor, a court may issue a preliminary injunction as long as Plaintiffs raise "serious questions" on the merits. *Alliance for the Wild Rockies v. Cottrell*, 622 F.3d 1045, 1052 (9th Cir. 2010) ("A preliminary injunction is appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor" and meets the other *Winter* factors).

This Court reviews the district court's decision granting the preliminary injunction for abuse of discretion. *See GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 199, 1204 (9th Cir. 2000). The Court may affirm on any ground supported by

[9] Respondents also represent that national guidelines concerning parole procedures generally require release in cases where asylum seekers have sponsors, Dkt. 9 at 38, but as Petitioners will show on summary judgment, a review of the actual parole documents in class members' cases shows that DHS officers have denied parole despite the presence of sponsors.

the record. *Harper v. Poway Unified School District*, 445 F.3d 1166, 1174 (9th Cir. 2006). While district courts ordinarily should issue findings of facts and conclusions of law, Federal Rule of Civil Procedure 52(a), the absence of detailed findings and conclusions does not constitute reversible error where, as here, the record contains "sufficient allegations or sufficient evidence" to support the issuance of injunctive relief. *See Sampson v. Murray*, 415 U.S. 61, 86 n.58 (1974); *Ocean Garden, Inc. v. Marktrade Co., Inc.*, 953 F.2d 500, 509 (9th Cir. 1991) (holding reversal for lack of findings not warranted "unless a full understanding of the question is not possible without the aid of separate findings.").

This is not a case that turns on disputed questions of fact upon which further guidance from the district court is essential for appellate review. *See F.T.C. v. Enforma Natural Products, Inc.*, 362 F.3d 1204, 1215 (9th Cir. 2002) (holding factual findings insufficient where "evidence provided by Enforma raises a genuine dispute as to whether the FTC would prevail on the merits"); *Lumbermen's Underwriting Alliance v. Can-Car, Inc.*, 645 F.2d 17, 18-19 (9th Cir. 1980) (holding factual findings insufficient where case turned on factual issues of negligence and causation). Rather, the validity of the district court's preliminary injunction order turns largely on uncontested facts and questions of law, as the government concedes. Dkt. 9 at 7. Indeed, the government's brief contains virtually no discussion of the record and never claims to have negated a fact material to Petitioners' motion. Therefore, the Court should decide this appeal on

the merits, as further findings by the district court are unnecessary to determine the proper construction of statutes and whether those statutes implicate important liberty interests. *See, e.g., Magna Weld Sales Co., Inc. v. Magna Alloys and Research Pty. Ltd.*, 545 F.2d 668, 671-72 (9th Cir. 1976) (finding remand unnecessary for further findings where the relevant factual issues were largely undisputed).[10]

SUMMARY OF ARGUMENT

Respondents' opposition shows a remarkable disregard for this Court's precedent governing prolonged detention. The core premise of Respondents' constitutional argument – that prolonged detention without a bond hearing is always permissible so long as a detainee's immigration case remains pending and his ultimate removal will be possible in the event that he loses, Dkt. 9 at 11-12 – was unambiguously rejected in *Casas-Castrillon v. DHS*, 535 F.3d 942, 949 (9th Cir. 2008). *Casas* held that even if a statute permits detention as a general matter, prolonged detention must be accompanied by constitutionally adequate procedures to ensure that it serves a valid purpose in any individual case.

Similarly, this Court has already rejected the core statutory premises of

[10] Although the government implies that the district court did not adequately consider its arguments, in fact the district court gave ample consideration to both sides. The court permitted the parties to file oversize briefs, SER 9-10, and then entertained a lengthy oral argument, stopping only once for a short break as the hearing extended into the lunch hour. Additionally, the court issued a reasoned opinion denying the Respondents' Rule 12(c) motion, which involved issues substantially similar to those in the preliminary injunction motion. *See* SER 54-57.

Respondents' arguments – that Congress expressly authorized prolonged mandatory detention in Sections 1226(c) and 1225(b) – in *Casas* and in *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006), respectively. Indeed, virtually every argument that Respondents advance has been rejected by this Court in *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005), *Casas*, *Nadarajah*, *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011) ("*Diouf II*"), or *V. Singh v. Holder*, 638 F.3d 1196, 1203, 1209 (9th Cir. 2011). Three basic principles derived from those precedents dictate the result here.

First, this Court *already* has construed Section 1226(c) to apply only to expeditious proceedings, and has applied that rule to an individual whose case was pending before the immigration courts – that is, a detainee in removal proceedings. *Casas*, 535 F.3d at 948. Respondents' claim that Congress "unambiguously" mandated the *prolonged* detention of all "criminal aliens", *see* Dkt. 9 at 2,16, 53, cannot be reconciled with the fact that this Court ordered bond hearings for detainees allegedly convicted of aggravated felonies in not only *Casas*, but also in *Tijani* and *V. Singh*. Under those cases, there can be no question that prolonged detention requires rigorous individualized process even for non-citizens identified as "criminal aliens" and otherwise subject to mandatory detention under 1226(c). The *only* question left open by *Tijani*, *Casas*, and *V. Singh* concerned *when* detention becomes prolonged and triggers the right to a bond hearing.

Second, *Diouf II* resolved that question, holding that detention becomes

prolonged at six months. Remarkably, Respondents do not even mention *Diouf II* until page 41 of their brief. There they attempt to cabin *Diouf II* to its facts, but ignore its broad language and its reliance on cases addressing detention under a variety of immigration statutes. Most important, they never explain how *Diouf II*'s holding requiring a bond hearing at six months for Mr. Diouf does not require the same result here for individuals with liberty interests equal to or stronger than those Mr. Diouf possessed. Dkt. 9 at 41.

Third, *Nadarajah* already held that Section 1225(b) must be construed in light of the fact that it authorizes the detention not only of arriving asylum seekers, but also of lawful permanent residents and others who indisputably have due process rights. *See Nadarajah*, 443 F.3d at 1077. The parole process that the government defends is plainly inadequate to protect the constitutional rights of lawful permanent residents subject to prolonged detention. Respondents argue that bond hearings for individuals stopped at the border somehow contravene the government's plenary power to control the border, but this argument manifests a deep confusion: the Immigration Judges ordered to hold bond hearings under the district court's order *work for the Attorney General*. Indeed, the district court's order does not dictate that any class member even be released into the United States, let alone admitted to this country, it simply mandates an opportunity to be heard in a meaningful manner. While Respondents' argument concerning Section 1225(b) suffers several other fatal flaws, these alone suffice to refute the claim that

the district court erred with respect to its construction of Section 1225(b).

Finally, Respondents make virtually no showing concerning the equitable factors. They argue that the order creates hardship by enjoining the enforcement of immigration statutes, but that argument presupposes that they are correct on the merits. If in fact the district court's order serves to effectuate Congress's intent, then this factor weighs in Petitioners' favor. The government also complains about the time period required for conducting bond hearings, but that deadline (November 12, 2012) has already passed. The only harm the government can point to on an on-going basis is the resources it must expend to keep track of how long it detains individuals without hearings so as to comply with the court's order. That minimal hardship cannot outweigh the harm caused by prolonged detention without hearings of individuals who present no danger to the community or risk of flight, but are nonetheless incarcerated, separated from their families and communities, pursuant to a draconian and misguided interpretation of the immigration laws.

Because the district court's order does not require the release of anyone, but instead simply allows class members subject to prolonged detention to *ask* an Immigration Judge for release on bond, the equities strongly favor maintenance of the injunction.

ARGUMENT

I. PETITIONERS ARE SUBSTANTIALLY LIKELY TO PREVAIL ON THEIR CLAIM THAT THE IMMIGRATION DETENTION STATUTES MUST BE CONSTRUED TO REQUIRE RIGOROUS BOND HEARINGS FOR MEMBERS OF THE PI SUBCLASSES.

A. Detention Beyond Six Months Without Rigorous Bond Hearings Presents Serious Constitutional Problems.

1. This Court's Precedent Establishes that Prolonged Detention Without Rigorous Bond Hearings Likely Violates the Due Process Clause.

This Court has repeatedly and unequivocally held, in five published cases decided over the course of seven years, that prolonged detention raises serious constitutional concerns. As a result, it has repeatedly construed the immigration detention statutes to require rigorous process whenever prolonged detention is at issue. *See Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005) ("we interpret the authority conferred by § 1226(c) as applying to expedited removal of criminal aliens"); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1079, 1084 (9th Cir. 2006) (construing Section 1225(b) to authorize detention only for "brief and reasonable" period and ordering detainee's immediate release); *Casas-Castrillon v. DHS*, 535 F.3d 942, 951 (9th Cir. 2008) (holding that "prolonged detention of an alien without an individualized determination of his dangerousness or flight risk would be 'constitutionally doubtful,'" and therefore construing detention statute "as *requiring* the Attorney General to provide the alien with such a hearing"); *V. Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011) (holding that government must bear

burden of proof by clear and convincing evidence at *Casas* hearing); *Diouf v. Napolitano*, 634 F.3d 1081, 1086 (9th Cir. 2011) (*Diouf II*) (holding that "prolonged detention under § 1231(a)(6), without adequate procedural protections, would raise 'serious constitutional concerns,'" and therefore construing statute as "requiring an individualized bond hearing, before an immigration judge, for aliens facing prolonged detention under that provision.").

The constitutional problems presented by the prolonged mandatory detention of the Section 1226(c) and Section 1225(b) Subclass members are at least as serious as the problems identified in *Tijani*, *Nadarajah*, *Casas*, *Diouf II*, and *V. Singh*. Indeed, the petitioners in *Tijani*, *Casas*, and *V. Singh* were all convicted of offenses that the government had classified as aggravated felonies, but this Court nonetheless held that they were entitled to rigorous bond hearings due to prolonged detentions.

Virtually all of the government's arguments against the district court's order were considered and rejected by this Court in those prior decisions. The government first advances a broad argument, based on a reading of *Demore* and *Zadvydas* that is irreconcilable with this Court's caselaw, that "the detention of criminal aliens during the course of removal proceedings [is] constitutional" under Congress's broad immigration power, and that such detention is permissible regardless of its length so long as the detention has a "definite termination point." Dkt. 9 at 25-26. Petitioners respond to that reading of the Supreme Court cases

infra, Section I.A.B., but for present purposes the key issue is that this Court has consistently rejected the government's reading of *Demore* and *Zadvydas*. *See, e.g.*, *Casas*, 535 F.3d at 949 ("References to the brevity of mandatory detention under § 1226(c) run throughout *Demore*."); *Tijani*, 430 F.3d at 1242 (distinguishing *Demore* for detainee whose proceedings were not "expeditious" and who contested deportability); *Nadarajah*, 443 F.3d at 1079-80 (holding that all the "general detention statutes" only authorize detention pending completion of removal proceedings for a "brief and reasonable" period, and concluding that such a period is presumptively six months, based on *Zadvdyas*, *Clark*, and *Demore*, as well as Congress' express authorization of detention beyond six months in the national security detention statutes).

Respondents make no attempt to distinguish any of these cases until late in their brief, and the distinctions they advance are unpersuasive. First, the government argues that *Casas* and, implicitly, *Tijani* and *V. Singh*, are distinguishable because they did not involve individuals with removal cases pending before immigration courts. *See* Dkt. 9 at 43-44. But by the time this Court issued its opinion in *Casas*, the petitioner's immigration case *was* before the immigration courts. *See Casas*, 535 F.3d at 945 ("As of the time that this opinion is filed, Casas is now back before the BIA after this court granted his petition for review of his final order of removal."). Thus, Mr. Casas was *in removal proceedings* at the time this Court recognized his right to a bond hearing. In fact,

this Court specifically rejected the government's argument that Mr. Casas had again become subject to mandatory detention under Section 1226(c) after his case returned to the immigration courts. *See id.* at 949. Thus, this Court has *already held* that an individual with a case pending before the immigration courts is entitled to a bond hearing when a detention becomes prolonged, even if that individual is removable due to a mandatory detention offense.[11]

Second, the government implicitly suggests that individuals who are detained pursuant to final administrative removal orders, such as the petitioners in *Tijani*, *Casas*, *V. Singh*, and *Diouf II*, somehow have a greater due process interest in receiving bond hearings than those individuals in removal proceedings who have *not* been ordered removed, but this is obviously illogical. As recognized in *Diouf II*, detainees subject to final orders of removal, if anything, may "at the margin . . . have a *lesser* liberty interest in freedom from detention" than individuals who have not received final orders, 634 F.3d at 1086-87. Indeed, the government itself took that position in *Diouf II*. *See* Answering Brief for Respondents-Appellees at 33, *Diouf II*, 2010 WL1219031 at *33 (asserting post-final order detainees have a "decreased interest in remaining free in the United States"). For this reason, the Section 1226(c) Subclass members have a stronger claim for a bond hearing than did the petitioners in *Tijani*, *Casas*, *V. Singh*, and *Diouf II* because, unlike the

[11] Nor is there any textual basis for applying Section 1226(c) only in "removal proceedings," insofar as the statute never uses that term.

petitioners in those cases, they have not lost their immigration cases at the administrative level, but rather are still challenging their removal before the immigration courts, and may well defeat the charges against them or win relief from removal and retain their immigration status. Thus, there is no reason to deny them even the opportunity to show that they should be released when the law already affords that opportunity to people in a weaker position, who have already lost before the immigration courts.

Third, Respondents' argument that *Casas* only construed Section 1226(a), and therefore has no applicability to detention under Section 1226(c), *see* Dkt. 9 at 42, ignores the fact that *Casas* construed Section 1226(c) to not apply to the detention in that case *because it was prolonged*, and therefore raised serious constitutional problems. "We reject the government's suggestion that § 1226(c) mandates Casas' detention for the duration of his now seven-year confinement. . . . § 1226(c)'s mandatory detention provision applies only to 'expedited removal of criminal aliens.'" *Casas*, 535 F.3d at 947-48. Dkt. 9 at 42. Thus, contrary to the government's claim, this Court has already decided that Section 1226(c) applies only to expeditious proceedings, in order to avoid serious constitutional problems identical to those at issue in this case.

Finally, the holdings of *Tijani*, *Nadarajah*, *Casas*, *V. Singh*, and *Diouf II* rest on bedrock constitutional principles that are applicable to any detention scheme in which the government detains people for lengthy periods. Because "freedom from

imprisonment . . . lies at the heart of the liberty that [the Due Process] Clause protects," *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001), "even where detention is permissible . . . 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.'" *Casas*, 535 F.3d at 950 (quoting *Zadvydas*, 533 U.S. at 690).

That fundamental principle applies to the PI Subclass members, just as it did to the petitioners in *Tijani*, *Nadarajah*, *Casas*, *V. Singh*, and *Diouf II*. Indeed, nowhere in our legal system does the law permit detention of the lengths at issue here without an in-person hearing where the government bears the burden of proof. Pre-trial detainees, people who are dangerous due to mental illness, and even child sexual predators all receive far greater procedural protections with respect to their detention than do members of the Sections 1226(c) and 1225(b) Subclasses under the government's system. *See Zadvydas*, 533 U.S. at 690 (collecting civil detention cases).[12]

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[12] The justification for an in-person hearing in the prolonged detention context is particularly strong given that the hearing may well call for determinations concerning a non-citizen's credibility, as it relates to his or her willingness to appear for removal should the government ultimately prevail in the immigration case. *See, e.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 697 (1979) (paper review failed to satisfy due process because determination at issue "usually requires an assessment of the recipient's credibility"). *Cf.* 18 U.S.C. § 3142(g)(3)(A) (treating "character" of defendant as relevant criteria in assessing bail eligibility); *Manimbao v. Ashcroft*, 329 F.3d 655, 661 (9th Cir. 2003) (holding, in the asylum context, that immigration judges are in a "superior position" to assess credibility).

2. Detention Becomes Prolonged at Six Months.

While it has been well-established for years in this Court's caselaw that "prolonged" immigration detention without a bond hearing raises serious constitutional concerns, this Court definitively resolved any dispute as to *when* detention becomes "prolonged" in *Diouf II*, which held that an immigration custody determination system that does not provide for rigorous bond hearings *at six months* "raise[es] serious constitutional concerns." 634 F.3d at 1091. *Diouf II* therefore construed Section 1231(a)(6) – the detention statute that governs for a different subclass of the detainees in this case – to require rigorous bond hearings at six months. *Id*. at 1091-92.

While *Diouf II* did not involve a detainee held under Section 1226(c), the Court relied heavily on the time periods described in *Demore* and *Casas*, both of which did involve Section 1226(c). *Id*. at 1091 (noting that *Demore* "upheld a six month detention with the specific understanding that § 1226(c) authorized mandatory detention only for the 'limited period of [the detainee's] removal proceedings,' which the Court estimated 'lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal' his removal order to the BIA") (citing *Casas*). Moreover, even prior to *Diouf II*, this Court in *Nadarajah* had relied on *Demore* and *Zadvydas* to construe all the "general detention statutes" – those that do not involve national security detainees and do not specifically

mention detention beyond six months – to authorize detention only for a "brief and reasonable" period of, presumptively, six months. *Nadarajah*, 443 F.3d at 1079-80.

Thus, clear Ninth Circuit authority establishes that detention becomes "prolonged" at six months, such that more rigorous procedural protections, including a bond hearing where the government bears the burden of proof, must be provided to continue detention beyond that point.

Respondents argue that the time period at issue in *Diouf II* was potentially far longer because it involved detention pending adjudication of a petition for review in this Court, Dkt. 9 at 41-42. But individuals may be detained under Section 1231(a)(6) even without a pending petition for review, such as when they are detained pending review of a motion to reopen by the Immigration Judge or the BIA, and nothing in *Diouf II* limited its holding to detainees held pending resolution of a petition for review. *Diouf II*, 634 F.3d at 1086 ("we apply the canon of constitutional avoidance and construe § 1231(a)(6) as requiring an individualized bond hearing, before an immigration judge, for aliens facing prolonged detention under that provision.").[13]

Respondents also cite decisions by the Sixth and Third Circuits that reject a bright-line rule for when a detention becomes prolonged, but those cases do not

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[13] Notably, *Diouf II* urged the government to "afford an alien a hearing before an immigration judge *before* the [six-month mark] if it is practical to do so and it has already become clear that the alien is facing [future] prolonged detention." *Diouf II*, 634 F.3d at 1092 n.13 (emphasis added).

support the government's position. Dkt. 9 at 45 (citing *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003); *Diop v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011)). *Ly* and *Diop* both reject the government's primary argument here – that Section 1226(c) imposes *no* limit on the length of mandatory detentions – and both construe Section 1226(c) to require either release or a bond hearing when removal proceedings become unreasonably prolonged. *See Ly*, 351 F.3d at 270 (finding no authority for detention under 1226(c) beyond the period reasonably necessary to conclude removal proceedings); *Diop*, 656 F.3d at 235 (requiring bond hearing when detention exceeded reasonable period of time). Moreover, although the Third Circuit declined to adopt a bright line six-month rule as a constitutional matter, *see id.* at 234, it did not expressly preclude such a rule as a matter of statutory interpretation. Rather, it merely held that, to avoid serious constitutional problems, Section 1226(c) needed to be construed to authorize detention only for a "reasonable" period of time, leaving open for future resolution what is "reasonable." *See id.* at 235.

In any event, this Court rejected such a case-by-case approach in *Diouf II*, and for good reason. Under the Third Circuit's approach as the government has interpreted it, ICE makes no effort to assess whether a given detention is reasonable, instead leaving that determination to be made by district courts when detainees file individual habeas petitions. This Court ordered certification of the class in this case expressly to avoid that result, deciding instead to "facilitate

development of a uniform framework for analyzing detainee claims to a bond hearing," *Rodriguez v. Hayes*, 591 F.3d 1105, 1123 (9th Cir. 2010); such uniformity would be undermined were the Court to now require detainees to file habeas petitions to vindicate that same right. In contrast, a six-month rule will provide greater consistency in decision-making and minimize the burden on district courts and detainees, the overwhelming majority of whom are *pro se* and face significant obstacles in challenging unlawfully prolonged detentions on habeas. *Zadvydas* itself cited practical considerations such as "uniform administration" as support for establishing a six-month rule for release in the post-final-order detention context. 533 U.S. at 701.[14]

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[14] The case-by-case approach in *Diop*, which district courts were essentially applying prior to the Third Circuit's decision, has resulted in inconsistent decisions on a range of issues. These include the relevance of (a) requests for continuances by detainees; *compare Nivar v. Weber*, CIV.A. 10-825 FLW, 2010 WL 4 024771, *7 (D.N.J. Oct. 13, 2010) (denying bond hearing where detainee requested a continuance) *with Madrane v. Hogan*, 520 F. Supp. 2d 654 (M.D. Pa. 2007) (granting habeas petition where detainee had requested several continuances); (b) likely length of future detention; *compare Alli v. Decker*, 644 F. Supp. 2d 535, 543 (M.D. Pa. 2009) (considering "probable extent of future removal proceedings"), *with Pierre v. Sabol*, No. 1:10-cv-2634, 2011 WL 4498822, at *1 (M.D. Pa. Sept. 27, 2011) (detention pending future proceedings of "no relevance"); and (c) success in removal proceedings; *compare Bete v. Holder*, CIV. 11-6405 SRC, 2012 WL 1067747, *8 (D.N.J. Mar. 29, 2012) (finding detention reasonable because the period of detention beyond six months did not result from the petitioner's successful appeals) *with Occelin v. Dist. Dir. for Immigration Custom Enforcement,* C.A. No. 1:09–CV–164, 2009 WL 1743742 (M.D. Pa. June 17, 2009) (ordering a bond hearing where most of the detention beyond six months occurred while adjudicating claims the detainee lost). *See also* Anello, Farrin, *Toward Temporal Limits on Mandatory Immigration Detention*, *available at* http://papers.ssrn.com/ sol3/papers.cfm?abstract_id=2176008, at 33, 34 (noting

In addition, an approach requiring detainees to file habeas petitions as the only mechanism to ensure that their detention is authorized by statute runs contrary to the basic rule that "[t]he bare existence of optional habeas corpus review does not, of itself, alleviate due process concerns." *Doe v. Gallinot*, 657 F.2d 1017, 1023 (9th Cir. 1981); *cf. Boumediene v. Bush*, 553 U.S. 723, 785 (2008) (holding that the Due Process Clause and the Suspension Clause impose distinct procedural requirements). Because "it is the state, after all, which must ultimately justify depriving a person of a protected liberty interest by determining that good cause exists for the deprivation," *Doe*, 657 F.2d at 1023, the government must designate *some agent* (other than a habeas court) whose function it is to determine that detention remains reasonable, and *some time period* by which that agent must act. The district court correctly concluded that, under this Court's precedents, that individual should be an Immigration Judge, and that determination should take place at six months.

Respondents also assert that a six-month rule will encourage dilatory conduct by detainees to secure bond hearings, *see* Dkt. 9 at 46-47, 47 n.6, but the government's own examples prove exactly the opposite – i.e., that individuals seek continuances for reasons *other than* to obtain a bond hearing. The individuals the government points to were barred from obtaining a bond hearing under the existing

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"widespread . . . uncertainty" around application of *Diop* standard and examining how reasonableness standard has been "applied . . . to interpret similar facts in vastly different ways"); 33-38 (reviewing Third Circuit case law).

system, yet they sought continuances – most commonly either to find an attorney or prepare an application for relief. Dkt. 9 at 47 n.6. *Cf. Leslie v. Attorney General*, 678 F.3d 265, 271 (3d Cir. 2012) (declining to fault detainee for five-week continuance for medical reasons). And Respondents ignore that many individuals experience delays due to requests for continuances made by the government, or requests for continuances that result in delays far longer than the detainee sought. *See, e.g.*, SER 2-3 at ¶¶ 3-6 (reporting that immigration judges in the Central District have continued cases for upwards of four months at a time). In short, the evidence on continuances shows that courts grant them for diverse and case-specific reasons. Yet Respondents prefer to adopt an irrebuttable presumption that all detainees subjected to prolonged detentions are for that reason flight risks, rather than permitting immigration judges to determine, on a case-by-case basis, whether continuances reflect dilatory conduct.

3. Neither *Demore* nor *Zadvydas* Authorize the Prolonged Mandatory Detention of PI Subclass Members.

Even were this Court writing on a clean slate – i.e., ignoring its prior precedents, as the government appears to want it to do – it could not find that the district court's order contravenes either *Demore* or *Zadvydas*. Respondents argue that Petitioners seek relief inconsistent with *Demore* itself for several reasons, all of which are meritless. Dkt. 9 at 24-28.

First, the government points to the evidence of flight risk for "criminal

aliens" cited in *Demore*, which it claims reflects Congress's intent to detain such individuals. *See* Dkt. 9 at 25 (citing *Demore*, 538 U.S. 518-19). Leaving aside that this Court already ordered rigorous bond hearings for the petitioners in *Tijani*, *Casas*, and *V. Singh*, notwithstanding the government's reliance on the same evidence, the evidence on which the government relies has no applicability to this case. As an initial matter, the evidence does not reflect the dramatic changes that have occurred since Congress' enactment of 1226(c) and the Supreme Court's decision upholding it in limited circumstances. In particular, the data does not account for the new systems that ICE uses to identify, detain, and track non-citizens convicted of crimes, including most importantly the advent of the Intensive Supervision Assistance Program (ISAP II). The government's own witness has testified that ISAP II ensures appearance rates at or near 100% in cases in the Central District. *See* SER 23-24 (Saldana Tr. 111:4-112:24) (DHS is "at, if not close to, [a] 100 percent compliance rate" for noncitizens enrolled in the ISAP II program in San Bernardino, and at around a 90 percent compliance rate for those in the Los Angeles area)]]. Moreover, the data is far too old and general for purposes of making factual conclusions about these class members. *See supra* Part A.2.

Additionally, the data on which the government relies concerns "deportable aliens," whereas the overwhelming majority of class members have challenged their removal. This difference matters. Whereas the typical mandatory detainee

mounts no defense to removal and is therefore quickly deported, class members are detained for prolonged periods of time while they pursue challenges to removal, many of which succeed. Thus, while the detentions at issue in *Demore* typically lasted for approximately 45 days, *Demore*, 538 U.S. at 529, the detentions at issue here by definition are prolonged, ranging from six months, at a minimum, to several years.

Second, Respondents argue that the particular detainee in *Demore* was detained for six months, but the Supreme Court decided his case on constitutional grounds alone; the Court did not consider a statutory challenge to mandatory detention because the petitioner in that case had conceded he was subject to the mandatory detention statute. *See Demore*, 538 U.S. at 513-14. Therefore, the Court did not address the statutory argument Petitioners raise here, which is based on the doctrine of constitutional avoidance. Under this doctrine, even if a six-month mandatory detention is not per se unconstitutional in all circumstances, as long as it would raise serious constitutional problems in some cases, the statute must be read to avoid these constitutional problems, so long as such a construction is fairly possible. *See Clark v. Martinez*, 543 U.S. 371, 381 (2005). Because mandatory detentions of more than six months would raise serious constitutional problems in many cases – particularly where detainees raise substantial challenges to their removal – Section 1226(c) must be read to avoid these constitutional problems. Indeed, *Demore* can reasonably be read to authorize an even briefer

period of mandatory detention. *See Ly v. Hansen*, 351 F.3d 263, 275 (6th Cir. 2003) (Haynes, J., concurring in part and dissenting in part) (concluding that *Demore* authorizes only 47 days of mandatory detention before the immigration judge and 120 days of mandatory detention where the detainee contests his deportation).[15]

Third, Respondents make a distinct argument that the district court's order is inconsistent with *Zadvydas* because *Zadvydas* contemplated some detention beyond six months. Dkt. 9 at 40-41. However, this argument conflates a *right to release*, which the detainees in *Zadvydas* sought (and won), with the *right to a hearing* to determine eligibility for release, which Petitioners seek here. This distinction underscores the minimal nature of the relief that Petitioners seek. *Zadvydas* did not rule on the question whether the procedures at issue here are sufficient to authorize prolonged detention, although it strongly suggested they

[15] The government's briefing in *Demore* itself emphasized that the length of detention was critical to distinguishing *Demore* from *Zadvydas*. *See* Brief for the Petitioner at 48, *Demore* (No. 01-1491) ("*Zadvydas* illustrates that the duration of detention in aid of removal is another factor bearing upon its constitutionality, *because prolonged detention imposes a greater burden upon the alien* and (depending upon the circumstances) may at some point not serve the underlying governmental purpose. . . .") (emphasis added). In contrast to the "prolonged detention" at issue in *Zadvydas,* the government maintained that "detention under Section 1226(c) generally lasts approximately one month or less, which distinguishes *Zadvydas* and strongly supports the statute's constitutionality." *Id.*; *see also* Reply Brief for the Petitioners at 15, *Demore* (No. 01-1491) ("[I]f there are exceptional cases in which the duration of detention would present special due process concerns, such cases would appropriately be addressed on their own facts.").

would not be sufficient. *Zadvydas*, 533 U.S. at 692-93; *see also Diouf II*, 634 F.3d at 1091 (citing *Zadvydas* to find custody review process insufficient because it did not allow for hearing where government bore burden of proof before immigration judge with possibility of appeal).

B. The Court Should Construe Section 1226(c) to Avoid the Constitutional Problems Raised by Prolonged Mandatory Detention.

Section 1226(c) should be construed to avoid the same constitutional problems recognized in *Casas*, *Tijani*, *V. Singh*, and *Diouf*. While not every detainee held under Section 1226(c) has precisely the same immigration status, the government's misapplication of the statute plainly results in the detention of lawfully-admitted individuals, including long-time lawful permanent residents like Named Plaintiffs Rodriguez and Farias Cornejo. *See, e.g.*, SER 69 ¶ 3; SER 74 ¶ 4. Therefore, it undoubtedly raises the same serious constitutional problems that the Ninth Circuit has repeatedly recognized in similar contexts.

Given the serious due process concerns presented by prolonged detention without individualized hearings, the district court did not err in construing the immigration detention statutes so as to avoid those serious constitutional problems, given that such a construction is fairly possible. As the Supreme Court explained in *Clark*, the canon of constitutional avoidance "is not a method of adjudicating constitutional questions" but rather one of statutory interpretation – "a tool for choosing between competing plausible interpretations of a statutory text, resting on

the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Under the canon, a court must reject any interpretation of a statute that raises serious constitutional problems so long as an alternative construction is "fairly possible." *Nadarajah*, 443 F.3d at 1076. Because it follows from *Tijani*, *Nadarajah*, *Casas*, *V. Singh*, and *Diouf II* that the prolonged detention without hearings of PI Subclass members raises serious constitutional problems, those statutes can and should be construed to require rigorous bond hearings for people subject to prolonged detention, i.e., hearings where the government bears the burden of justifying their continued imprisonment.

As in those cases, this Court must adopt any "fairly possible" construction of Section 1226(c) that reads it to govern only in cases involving brief (i.e., non-prolonged) detention. The Court can accomplish this by simply applying the construction already adopted in *Casas*, which held that Section 1226(c) only applies in cases of "expeditious" proceedings, *Casas*, 535 F.3d at 951, and that in cases of prolonged detention the government's authority "shifts" to Section 1226(a), which in turn must be construed as "requiring" a bond hearing in such cases. *Casas*, 535 F.3d at 951. Importantly, in *Casas* this Court adopted that construction not only for people whose removal cases were pending before the Ninth Circuit on petitions for review, but also for those whose cases had been remanded and were once again before the immigration courts. *Id.* at 948. Such a

construction follows logically from the fact that Section 1226(c) is silent with respect to the procedures required when detention is *prolonged*. This contrasts directly with the immigration detention statutes involving national security, which specifically authorize detention for longer than six months in a narrow set of cases. *Compare* 8 U.S.C. 1226a *and* 8 U.S.C. 1531-1537. The Supreme Court has previously found that such silence is not a basis for assuming that Congress intended to authorize unlimited detention. *Zadvydas*, 533 U.S. at 698-99; *cf. Nadarajah*, 433 F.3d at 1076 ("Congress cannot authorize indefinite detention in the absence of a clear statement"). That same rationale requires a limiting construction of Section 1226(c) here.[16]

[16] Because most Section 1226(c) Subclass members are pursuing substantial challenges to removal, even if this Court declined to construe Section 1226(c) to require a bond hearing at six months in all cases, it should still grant relief from prolonged mandatory detention to those subclass members who have substantial challenges to removal by construing 1226(c) as requiring mandatory detention only where the government shows that a detainee lacks a substantial defense to removal. *See* SER 66-67 (Prayer For Relief) (requesting any other appropriate relief). *See generally Demore*, 538 U.S. at 514 n.3 (declining to address the BIA's standard for applying mandatory detention in *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999)); *Demore,* 538 U.S. at 578 (Breyer, J., dissenting) (advocating "substantial question" standard, in part because "the relevant statutes literally say nothing about an individual who, armed with a strong argument against deportability, might, or might not, fall within their terms"); *Tijani*, 430 F.3d at 1246 (Tashima, J., concurring) (same, in light of "egregiously" unconstitutional *Joseph* standard); *Gonzalez v. O'Connell*, 355 F.3d 1010, 1020-21 (7th Cir. 2004) (noting that this "important issue" was left open in *Demore*).

C. The Court Should Construe Section 1225(b) to Authorize Rigorous Bond Hearings at Six Months to Avoid the Constitutional Problems Raised by Prolonged Detention Without Rigorous Bond Hearings.

For largely the same reasons applicable to the Section 1226(c) Subclass, the detention of Section 1225(b) Subclass members without affording them rigorous bond hearings also presents serious constitutional problems that this Court can avoid by construing it to require rigorous bond hearings.

1. Detainees Held under Section 1225(b) are Protected by the Due Process Clause.

The government argues that the detention scheme for Section 1225(b) Subclass members is constitutional because it applies only to "arriving aliens" who have a "unique constitutional position" that bars them from challenging their detention regardless of its length. Dkt. 9 at 33. There are three fatal flaws in this argument.

First, in *Nadarajah* this Court held that Section 1225(b) must be construed in light of the fact that it applies not only to asylum seekers and other first-time entrants, but also to returning lawful permanent residents and non-citizens arrested within the United States. 443 F.3d at 1076-78. Such individuals are subject to prolonged detention under Section 1225(b) because they are classified as "seeking admission." *Id.*at 1076; *see also Camins v. Gonzales*, 500 F.3d 872, 875 (9th Cir. 2007) (petition for review filed by returning lawful permanent resident who was treated as arriving alien). Thus, the statute must be construed with those

individuals in mind – regardless of whether it would raise constitutional problems with respect to "arriving aliens" who are first-time entrants. In reaching this conclusion *Nadarajah* relied heavily on the Supreme Court's decision in *Clark v. Martinez*, which had already construed a similar detention statute to avoid constitutional problems arising from its applicability to lawfully-admitted non-citizens. *See Clark*, 543 U.S. at 378 ("The operative language of Section 1231(a)(6) . . . applies without differentiation to all . . . categories of aliens that are its subject.").

Second, given that Section 1225(b) applies to at least some lawfully-admitted individuals, and because this Court has already held that the immigration detention statutes must be construed to provide rigorous bond hearings for lawfully-admitted non-citizens subject to prolonged detention, *see, e.g.*, *Casas*, 535 F.3d at 950; *Diouf II*, 634 F.3d at 1088-89, it follows that this Court must construe Section 1225(b) to authorize the same protections found necessary in *Casas* and *Diouf II*, so long as the statute can reasonably be construed in such a manner.[17]

Third, even as applied to first-time entrants to the United States who are stopped at the border and then subjected to prolonged detention, Petitioners do not

[17] The government argued below that the lawful permanent residents subject to detention under Section 1225(b) did not have due process rights because they had been stopped at the border, *see* ER 68 n.9, but the Supreme Court held over thirty years ago that returning lawful permanent residents were entitled to due process, and the statute must therefore be construed with such individuals in mind. *Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982).

concede that the Due Process Clause permits their prolonged detention without meaningful process. *See generally Kwai Fun Wong v. United States*, 373 F.3d 952, 974-75 (9th Cir. 2004) (holding that "excludable" aliens retain Fifth Amendment rights)); *Rosales-Garcia v. Holland*, 322 F.3d 386, 408 (6th Cir. 2003) (en banc) (finding serious constitutional problems with indefinite detention of excludable aliens); *cf. Ngo v. INS*, 192 F.3d 390, 398 (3d Cir. 1999) (requiring meaningful release procedures even for excludable aliens who had lost their cases, prior to *Zadvydas*).

Respondents cite a long history of cases establishing the limited rights of arriving non-citizens with respect to the procedures governing *their admission* to the United States, *see* Dkt. 9 at 29-30, but Petitioners do not seek to alter the law governing the admission of arriving non-citizens. Respondents' cases do not establish a comparable limitation on challenges to *detention* procedures. They rely heavily on *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir. 1995) (en banc) and *Alvarez-Garcia v. Ashcroft*, 378 F.3d 1094 (9th Cir. 2004), but *Barrera* is no longer good law insofar as the Supreme Court struck down the indefinite detention of excludable non-citizens in *Clark*, 543 U.S. at 380. *See Xi v. INS*, 298 F.3d 832, 837-38 (9th Cir. 2001) (acknowledging that *Barrera* no longer controls). In addition, it construed a predecessor statute, not Section 1225(b), and applied only to excludable aliens who had lost their cases, not to people like the Subclass members here, many of whom will win their cases and none of whom have lost as

of yet. *Alvarez-Garcia* also provides little support for the government's claim, as it involved a limited challenge to admissions procedures, not substantive constitutional rights, *see* 378 F.3d at 1096-97. Moreover, it acknowledged that "'the entry doctrine does not categorically exclude non-admitted aliens from all constitutional coverage, including coverage by equal protection guarantees,'" but rather "'appears determinative of the *procedural* rights of aliens *with respect to their applications for admission*.'" *Id*. at 1098 (quoting *Kwai Fun Wong v. United States*, INS, 373 F.3d 952, 971-73 (9th Cir. 2004)) (emphasis added). Of course, Petitioners here seek no change to the procedures governing their admission, only their detention.

In any event, the Court need not decide difficult questions concerning the precise contours of the constitutional protections available to arriving non-citizens given *Nadarajah*'s recognition that the government also detains lawful permanent residents under Section 1225(b).

2. The Parole Process Fails to Meet Minimum Due Process Standards.

While the "parole determination" procedures implemented by the government under Section 1225(b) are better than the procedures under Section 1226(c) – which prohibit release entirely – they fall far short of constitutional requirements and therefore cannot save the government's interpretation of the statute. The mere possibility of discretionary release by ICE officials is plainly

insufficient to eliminate the serious constitutional problems presented by prolonged detention under this Court's precedent. The petitioners in both *Casas* and *Diouf II* had *some* possibility for release during at least a portion of their detention under the post-order custody review process (which constituted the only release procedures available to Section 1231 Subclass members prior to *Diouf II*), but this Court found those release procedures deficient. This Court found that procedure insufficient in the face of prolonged detention. *See Casas*, 535 F.3d at 951-52 (holding post-order custody review procedure insufficient because it provided for no in-person hearing before a neutral decisionmaker, allowed no administrative appeal, and placed the burden of proof on the detainee); *Diouf II*, 634 F.3d at 1091 (same).

All of the same deficiencies exist with respect to the parole process.[18] In contrast to the procedure required by the Due Process Clause – an in-person hearing before an Immigration Judge where the government bears the burden of proof, by clear and convincing evidence, to show that the detainee presents a danger or flight risk, *see V. Singh*, 638 F.3d at 1203 – the parole process provides only a paper review by an ICE official (with the possibility of a discretionary interview), where the detainee bears the burden to show that his release is in the

[18] Respondents wrongly suggest that Petitioners' challenge to the deficiency of the parole process was limited to a single comment made by the Government's 30(b)(6) witness, Assistant Field Office Director Lee. Dkt. 9 at 7. In fact, Petitioners raised a number of procedural deficiencies in the parole process, all of which they also have set forth here. *See* ER 15-16, 26-27.

public's interest or necessitated by urgent humanitarian reasons. *See* 8 U.S.C. 1182(d)(5)(A); *see also* 8 C.F.R. § 212.5. There is no appeal of that decision.[19]

Testimony from the government's 30(b)(6) witness confirms that the structural defects in the parole process have practical consequences. As Assistant Field Office Director Lee candidly admitted, "the custody decision" has always "really just been about how much bed space [ICE has]." *See* ER 153 (Lee Tr. 40:17-19). Unsurprisingly, the Ninth Circuit has already recognized that a review system that leaves an individual's liberty to the unreviewable decisions of ICE officers fails to adequately protect against the risk of unwarranted prolonged detention, and therefore cannot satisfy minimal due process standards. *See Casas*, 535 F.3d at 951-52; *Diouf II*, 634 F.3d at 1091.

3. Section 1225(b) Must be Construed to Afford Bond Hearings for Prolonged Detentions.

Given the serious constitutional problems described above, this Court should construe Section 1225(b) to authorize rigorous bond hearings before Immigration Judges whenever detention becomes prolonged, because such a construction is "fairly possible." *Nadarajah*, 443 F.3d at 1076. It can do so in one of two ways.

First, the Court could construe Section 1225(b) itself to require rigorous

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[19] Respondents argue that the district court's order renders the parole process a nullity, but this is obviously wrong. Dkt. 9 at 37. Parole remains the sole means available for the release of arriving aliens held for less than six months, and also remains the first procedure available by which ICE can consider whether to release prolonged detainees detained under Section 1225(b).

bond hearings. The Ninth Circuit adopted that approach in *Diouf II* with respect to Section 1231(a)(6). 634 F.3d at 1092. Nothing in the statute precludes such an interpretation, as the statute itself is silent as to both the length of detention authorized and the procedures that should govern detention decisions. Indeed, the BIA has already interpreted Section 1225(b) to allow bond hearings for noncitizens who were arrested and placed in removal proceedings after their entry, even when their detention is not prolonged. *Matter of X-K-*, 23 I&N Dec. 731, 731-32, 734-35 (BIA 2005). In doing so, the BIA explained that the prohibition on bond hearings for individuals detained under Section 1225(b) was purely regulatory and applied only to those individuals classified as "arriving aliens." *See id*. at 735 (citing 8 C.F.R. §§ 1003.19(h)(2)(i)(B), 1235.3(c)). The BIA made clear that *the statute* itself in no way forecloses bond hearings before an Immigration Judge. *X-K-*, 23 I&N Dec. at 734.

To the extent that the regulations preclude bond hearings for "arriving aliens," this Court should hold them inapplicable to cases involving prolonged detention, just as *Casas* and *Diouf II* construed Section 1226(a) and 1231(a)(6), respectively, to require rigorous bond hearings whenever detention becomes prolonged, notwithstanding a regulation prohibiting bond hearings for people with administratively final removal orders. *Compare* 8 C.F.R. § 1003.19 *with Diouf II*, 634 F.3d at 1090 ("We may not defer to DHS regulations . . . if they raise grave constitutional doubts."). Similarly, here the Court should construe Section 1225(b)

to require bond hearings in prolonged detention cases to avoid significant constitutional problems. To the extent that the regulations do bar Immigration Judge review even in cases of prolonged detention, they are *ultra vires* and therefore not dispositive. *See Kwong Hai Chew v. Colding*, 344 U.S. 590, 599 (1953) (construing regulation to avoid constitutional problems).

Alternatively, if the Court concludes that Section 1225(b) cannot be construed to require bond hearings whenever detention becomes prolonged, it could instead construe Section 1225(b) to not apply to cases involving prolonged detention, such that detention "shifts" to Section 1226(a) in such cases, under which the detainees are indisputably eligible for bond hearings. *See* 8 U.S.C. § 1226(a) (authorizing detention "pending a decision" on removal). The Ninth Circuit used that approach in *Casas* with respect to Section 1226(c). 535 F.3d at 951. Given that Section 1225(b), like Section 1226(c), makes no explicit reference to prolonged detention, its text can easily be read simply not to apply in such cases.

As either construction would be "fairly possible," the Court should construe Section 1225(b) so as to require bond hearings for subclass members.[20]

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[20] International law further requires that this Court construe the statute to require bond hearings for subclass members. Arbitrary detention is expressly prohibited under international law. *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, Article 9 (3d sess. 1948); International Covenant on Civil and Political Rights ("ICCPR") art. 9(1), 999 U.N.T.S. 171. Article 9(4) of the ICCPR specifically provides that all detainees are entitled "to take proceedings before a court" on the lawfulness of detention, and international law extends similar protections to refugees and asylum seekers in particular. *See, e.g.*,

II. PETITIONERS WILL CONTINUE TO SUFFER IRREPARABLE HARM AS A RESULT OF THEIR PROLONGED DETENTION, THE BALANCE OF HARDSHIPS TIPS SHARPLY IN THEIR FAVOR, AND AN INJUNCTION IS IN THE PUBLIC INTEREST.

The district court committed no error in concluding that the equitable factors weighed in favor of preliminary injunctive relief. Indeed, the balance of harms overwhelmingly favors Petitioners.

Tellingly, the government dismisses the harm inflicted by its draconian detention policies in a single line, asserting that "the mandatory detention of criminal aliens and arriving aliens beyond six months is constitutionally sound." Dkt. 9 at 48. But this begs the question; the purpose of irreparable harm analysis at the preliminary injunction stage is to assess the equities in the face of uncertainty over the merits, and the government has no answer to the fact that hundreds of detainees who present no danger or flight risk, some of whom have already won release on bond as a result of the district court's order, will remain unnecessarily detained if this Court dissolves the injunction. *See Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984) ("[a]n alleged constitutional infringement will often alone constitute irreparable harm"); *United States v. Bogle*,

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UNHCR's Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers, Guideline 5 (February 1999). The Supreme Court has long held that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *accord Ma v. Ashcroft*, 257 F.3d 1095, 1114 n.30, 1115 (9th Cir. 2001). Thus, this Court should construe the statute to require bond hearings for PI Subclass members.

855 F.2d 707, 710-11 (11th Cir. 1998) (the "unnecessary deprivation of liberty clearly constitutes irreparable harm"); *see also* Federal Practice & Procedure, § 2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.").

The harm inflicted by unlawful detention without adequate process is particularly severe for the subclass members who are the subject of this preliminary injunction. Although a comprehensive presentation of data and other information concerning these individuals must await summary judgment, it is readily apparent from the discovery already completed that a large number of individuals detained in these two subclasses have substantial defenses to removal, including in some cases clear eligibility for relief from removal. Both Mr. Rodriguez and Mr. Farias, for example, ultimately won their cases (after three years and 15 months, respectively) of detention without a hearing. Indeed, it is delay created by the need to litigate their substantial claims for relief that often results in their lengthy detention, such that those with stronger immigration cases end up subject to more prolonged detention. *See* SER 29-30 (Fong Tr. 130:17-131:11) (Chief Immigration Judge stating, in context of data showing greater detention lengths for those who win relief from removal, that it is "not surprising" and that he "would expect nothing less" than for a case where a noncitizen is granted relief to take longer than a case where a detainee is ordered removed); *id.*,

SER 31-48 (Fong Tr. Exhibits 5, 6, 7), containing data on detention length). Such unnecessary detention obviously constitutes irreparable harm.

In contrast to the harm suffered by Petitioners, the government will not suffer irreparable harm should this Court affirm the injunction. As an initial matter, because the government's detention of these class members is almost certainly illegal under controlling statutory and constitutional authority, it "cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from [statutory and] constitutional violations." *Nat'l Ctr. For Immigrants Rights, Inc. v. INS*, 743 F.2d 1365, 1369 (9th Cir. 1984) (holding that district court did not err in enjoining INS practices that probably violated plaintiffs' constitutional rights).

The government makes a distinct argument that the district court's order enjoined a federal statute, which thereby irreparably harmed the government. Dkt. 9 at 48. But, as noted above, the district court almost certainly rested its decision on constitutional avoidance, as this Court has done in its prior prolonged detention cases, and therefore acted to effectuate Congress's intent rather than to abrogate it. *Cf. Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010) ("Petitioner here does not seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct it asserts is not authorized by the statutes."). Respondents next assert that Petitioners unreasonably delayed in bringing this motion, and that this tilts the balance of hardships in Respondents' favor. Dkt. 9 at 50 n.7. But Respondents

ignore the procedural history of this case. Petitioners spent two years pursing an appeal in order to obtain class certification, and then had to wait for termination of a stay the government won to litigate its unsuccessful 12(c) motion, *see* SER 62-64. Even after defeating the 12(c) motion, Petitioners had to file multiple discovery motions to compel responses and overcome numerous other obstacles raised by Respondents in order to arrive here. Most important, Petitioners filed this motion promptly in light of *Diouf II*. *Diouf II* held that detentions beyond six months are "prolonged," and therefore trigger a right to a rigorous bond hearing, thus validating the position Petitioners have taken from the outset of this litigation. After the decision, Respondents sought and obtained two extensions of time to decide whether to seek *certiorari* in *Diouf II*, and ultimately declined to do so only on February 24, 2012. *See* SER 4-5. The parties then engaged in settlement negotiations, including an in-person meeting on March 13, 2012. *See* SER 7-8 ¶¶ 4-6. Once it became clear that the parties could not reach agreement, Petitioners commenced preparing this motion for preliminary injunctive relief. It was entirely appropriate for Petitioners to move for a preliminary injunction with respect to those subclasses who still do not receive such hearings in light of *Diouf II* (and the government's unwillingness to settle this portion of the litigation in light of that decision).

In any event, even if this were an ordinary commercial dispute, which it most definitely is not, the passage of three months between the end of the

settlement negotiations and the filing of this motion would not justify denying Petitioners injunctive relief. *See, e.g.*, *Ocean Garden, Inc. v. Marktrade Co.*, 953 F.2d 500, 508 (9th Cir. 1991) (rejecting defendants claim that laches barred a preliminary injunction where plaintiff delayed 6 months from filing complaint to moving for preliminary injunction); *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1209 (9th Cir. 2000), *rev'd on other grounds* (5 months); *see also Wetzel's Pretzels, LLC v. Johnson*, 797 F.Supp.2d 1020, 1029 n.4 (C.D. Cal. 2011) (one year delay during which plaintiff attempted to negotiate a settlement did not justify denial of injunction). Given that this case concerns the most basic liberty interests, no amount of delay could justify denial of a preliminary injunction. *See Legal Aid Soc'y of Hawaii v. Legal Servs. Corp.*, 961 F. Supp. 1402, 1418 (D. Hawaii 1997) ("The Court finds that the delay does not undermine Plaintiffs' ability to establish irreparable harm. None of the cases cited by the LSC concerning delay involved a situation where First Amendment freedoms were violated.").

Respondents also assert that all harm to the government is, by definition, harm to the public interest. Dkt. 9 at 50 (citing *Nken v. Holder*, 556 U.S. 418, 420 (2009)). However, *Nken* created no such blanket rule. *Nken* simply found that with respect to the specific issue in that case –whether a stay is warranted pending a petition for review – the "public interest" and "harm to the opposing party" "merge when the Government is the opposing party" because "[t]here is always a public interest in prompt execution of removal orders." *Nken*, 556 U.S. at 420. Respondents cannot

identify any similar public interest favoring continued detention without bond hearings, especially because the relief Petitioners seek is merely the right to hearings, not release. In any event, the public interest supports the vindication of constitutional rights, so this factor cuts in favor of Petitioners. *See Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) ("Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution."); *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) ("[I]t is always in the public interest to protect constitutional rights.").

The government also makes a set of arguments specific to the relief awarded in this case – rigorous bond hearings conducted by Immigration Judges. Dkt. 9 at 50-51. The government complains about the November 12 deadline for clearing the backlog of hearings for prolonged detainees, but that argument is moot. Id. Respondents also complain that they will have difficulty tracking the detention lengths of individuals detained for six months under these statutes. Dkt. 9 at 51. Unsurprisingly, however, they cite nothing to support this argument. Respondents use electronic records systems, and already have similar obligations under prior rulings by this Court. In light of this, the unsupported suggestion that the record-keeping required to ensure compliance with the district court's order could justify depriving class members of concrete liberty interests is untenable.

Finally, it bears notice that the government makes no mention of cost in its

discussion of the public interest, and for good reason. The public stands to realize substantial financial savings from the release of individuals in this case. The average cost of detention per day, not including payroll costs, is approximately $122, while the cost of intensive supervision under programs such as ISAP II is no greater than $14 per day.21

Ultimately, Respondents cannot prevail on the equitable factors for injunctive relief because the district court's order simply leaves to the government's own immigration judges the task of determining which detainees should be released. Moreover, for those individuals ordered released, ICE can utilize sophisticated alternatives to detention, including the ISAP II program, which ensures extremely high appearance rates. In contrast, the system the government defends either bars release categorically, without allowing for any such consideration (for Section 1226(c) detainees), or leaves the release decision in the hands of ICE officers whose job is to detain and deport the class members they are deciding whether or not to release. The public has no interest in such an obviously unfair system.

[21] *See* Dora Schriro, U.S. Dep't of Homeland Sec., Immigration Detention Overview and Recommendations 10, 15 (2009), *available at* http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf. The government also has stipulated that the cost of bond hearings cannot justify their denial. *See* SER 49-50.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's preliminary injunction order.

Respectfully submitted

ACLU OF SOUTHERN CALIFORNIA

Dated: November 16, 2012

s/ Ahilan T. Arulanantham
AHILAN T. ARULANANTHAM

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Petitioners-Appellees hereby state that they know of no other action previously filed or currently pending in this Court which is related to the herein action.

Dated: November 28, 2012

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

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a)(7)(C), and Ninth Circuit Rule 32-1, I certify that the attached answering brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,952 words.

Dated: November 16, 2012

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

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2012, I caused to be electronically filed the foregoing PETITIONERS-APPELLEES' ANSWERING BRIEF, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Ahilan T. Arulanantham
AHILAN T. ARULANANTHAM
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