PETER J. ELIASBERG (SBN 189110)
Email: peliasberg@aclu-sc.org
AHILAN T. ARULANANTHAM (SBN 237841)
Email: aarulanantham@aclu-sc.org
MICHAEL KAUFMAN (SBN 254575)
Email: mkaufman@aclu-sc.org
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1313 West Eighth Street
Los Angeles, California 90017
Tel: (213) 977-5211
Fax: (213) 977-5297

Attorneys for Petitioners
(Additional counsel listed on following page)

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ALEJANDRO RODRIGUEZ, et al.,	Case No. CV 07- 3239-TJH (RNBx)
Petitioners,	**PETITIONERS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**
vs.	**REDACTED**
TIMOTHY ROBBINS, et al.,	Honorable Terry J. Hatter, Jr.
Respondents.	Hearing Date: August 13, 2012
	Hearing Time: UNDER SUBMISSION

TABLE OF CONTENTS

I. INTRODUCTION 1

II. LEGAL BACKGROUND 1

A. Mandatory Detention Under Section 1226(c) 3

B. Detention Without Bond Hearings under Section 1225(b) 5

III. ARGUMENT 7

A. PETITIONERS ARE SUBSTANTIALLY LIKELY TO PREVAIL ON THEIR CLAIM THAT THE IMMIGRATION DETENTION STATUTES MUST BE CONSTRUED TO REQUIRE RIGOROUS BOND HEARINGS FOR THE PI SUBCLASSES MEMBERS 7

1. All Applicable Immigration Detention Statutes Must Be Construed to Require Rigorous Bond Hearings for Detention Beyond Six Months 7

i. Prolonged Detention Without Rigorous Bond Hearings is Unconstitutional 7

ii. Detention Becomes Prolonged at Six Months 10

B. The Court Should Construe Section 1226(c) to Avoid the Constitutional Problem Raised by Prolonged Mandatory Detention 12

C. The Court Should construe Section 1225(b) to Authorize Rigorous Bond Hearings at Six Months 15

IV. PETITIONERS WILL CONTINUE TO SUFFER IRREPARABLE HARM AS A RESULT OF THEIR PROLONGED DETENTION, AND THE BALANCE OF HARDSHIPS TIPS SHARPLY IN THEIR FAVOR 20

V. AN INJUNCTION IS IN THE PUBLIC INTEREST 24

VI. CONCLUSION 24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

CASES

Alliance for the Wild Rockies v. Cottrell,
622 F.3d 1045 (9th Cir. 2010) 7, 23

Associated General Contractors of Calif., Inc. v. Coalition for Economic Equity,
950 F.2d 1401 (9th Cir. 1991) 20

Califano v. Yamasaki,
442 U.S. 682 (1979) 9, 10

Camins v. Gonzales,
500 F.3d 872 (9th Cir. 2007) 6, 16

Casas-Castrillon v. DHS,
535 F.3d 942 (9th Cir. 2008) .... *passim*

Centeno-Ortiz v. Culley,
2012 WL 170123 (S.D. Cal. Jan. 19, 2012) 20

Clark v. Martinez,
543 U.S. 371 (2005) 10, 11, 16, 17

Crespo v. Baker,
2012 WL 1132961 (S.D. Cal. Apr. 3, 2012) 20

Demore v. Kim,
538 U.S. 510 (2003) 4, 11, 14, 15

Diouf v. Napolitano,
634 F.3d 1081 (9th Cir. 2011) .... *passim*

Foucha v. Louisiana,
504 U.S. 71 (1992) 9

Franco-Gonzales v. Holder,
2011 WL 5966657 (C.D. Cal. Aug 2, 2011) 14

Franco-Gonzales v. Holder,
767 F.Supp.2d 1034 (C.D. Cal. 2010) 13

Franco-Gonzales v. Holder,
828 F.Supp.2d 1133 (C.D. Cal. 2011) 13

Goldberg v. Kelly,
397 U.S. 254 (1970) 9

Golden Gate Rest. Ass'n v. City and County of San Francisco,
512 F.3d 1112 (9th Cir. 2008) 23

Goldie's Bookstore, Inc. v. Superior Court of the State of Calif.,
739 F.2d 466 (9th Cir. 1984) 20

Gonzalez v. O'Connell,
355 F.3d 1010 (7th Cir. 2004) 14

Idema v. Dreamworks, Inc.,
162 F.Supp.2d 1129 (C.D. Cal. 2001) 14

Kansas v. Hendricks,
521 U.S. 346 (1997) 9

Krolak v. Ashcroft,
No. 04-C-6071 (N.D. Ill. Dec. 1, 2004) 15

Kwong Hai Chew v. Colding,
344 U.S. 590 (1953) 19

Landon v. Plasencia,
459 U.S. 21 (1982) 16

Ma v. Ashcroft,
257 F.3d 1095 (9th Cir. 2001) 20

Manimbao v. Ashcroft,
329 F.3d 655 (9th Cir. 2003) 10

Matter of Carlos Alberto Flores-Lopez,
2008 WL 762690 (BIA Mar 05, 2008) 5

Matter of Joseph,
22 I. & N. Dec. 799 (BIA 1999) .... *passim*

Matter of X-K,
23 I&N Dec. 731 (BIA 2005) 19

Memphis Light, Gas and Water Division v. Craft,
436 U.S. 1 (1978) 9

Murray v. The Schooner Charming Betsy,
6 U.S. (2 Cranch) 64 (1804) 20

Nadarajah v. Gonzales,
443 F.3d 1069 (9th Cir. 2006) .... *passim*

Nat'l Ctr. for Immigrants Rights, Inc. v. INS,
743 F.2d 1365 (9th Cir. 1984) 22

Phelps-Roper v. Nixon,
545 F.3d 685 (8th Cir. 2008) 24

Preminger v. Principi,
422 F.3d 815 (9th Cir. 2005) 24

S.O.C. Inc. v. County of Clark,
152 F.3d 1136 (9th Cir. 1998) 21

Sammartano v. First Judicial District Court,
303 F.3d 959 (9th Cir. 2002) 21

Tijani v. Willis,
430 F.3d 1241 (9th Cir. 2005) .... *passim*

United States v. Bogle,
855 F.2d 707 (11th Cir. 1998) 21

United States v. Salerno,
481 U.S. 739 (1987) 9

V. Singh v. Holder,
638 F.3d 1196 (9th Cir. 2011) .... *passim*

Winter v. NRDC, Inc.,
129 S. Ct. 365 (2008) 7

Zadvydas v. Davis,
533 U.S. 678 (2001) 8, 13

STATUTES

8 U.S.C. § 1101(a)(13)(C) 6

8 U.S.C. § 1182(a)(2)(A)(i)(I) 4

8 U.S.C. § 1182(a)(2)(C) 4

8 U.S.C. § 1182(d)(5)(A) 6, 15, 18

8 U.S.C. § 1225(b) .... *passim*

8 U.S.C. § 1226a 13

8 U.S.C. § 1226(a) 1, 12, 18, 19

8 U.S.C. § 1226(c) .... *passim*

8 U.S.C. § 1226(c)(1) 4

8 U.S.C. § 1227(a)(2)(A)(iii) 4

8 U.S.C. §§ 1531-1537 13

18 U.S.C. § 3142(g)(3)(A) 10

REGULATIONS

8 C.F.R. § 1.2 6

8 C.F.R. § 1003.19 19

8 C.F.R. § 1003.19(h)(2)(i)(B) 6

8 C.F.R. § 1003.19(h)(2)(ii) 4

8 CFR § 212.5 18

OTHER AUTHORITIES

Richard A. Boswell, Essentials of Immigration Law 49 (2006) 4

Julie Dona, Making Sense of "Substantially Unlikely": An Empirical Analysis of the Joseph Standard in Mandatory Detention Custody Hearings 5 (June 1, 2011), http:// ssrn.com/abstract=1856758 5

UNHCR's Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers, Guideline 5 (February 1999) 20

Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, Article 9 (3d sess. 1948) 20

International Covenant on Civil and Political Rights art.9(1), 999 U.N.T.S. 171 20

Dep't of Homeland Security, U.S. Immigration and Customs Enforcement Salaries and Expenses, Fiscal Year 2012 Congressional Budget Justification, p. 57, http://www.dhs.gov/xlibrary/assets/dhs-congressional-budget-justification-fy2012.pdf. 23

Anil Kalhan, Columbia Law Review, —Rethinking Immigration Detention (July, 21, 2010), p. 55, http://www.columbialawreview.org/assets/sidebar/volume/110/42_Anil_Kal han........ 23

Dora Schriro, U.S. Dep't of Homeland Sec., Immigration Detention Overview and Recommendations 10, 15 (2009)........ 23

I. INTRODUCTION

Petitioners hereby move for a preliminary injunction requiring the government to provide rigorous bond hearings to subclass members detained pursuant to 8 U.S.C. §§ 1226(c) and 1225(b) (the "PI Subclasses"). Members of the PI Subclasses have *never* had the necessity of their detention assessed by an Immigration Judge, even though the government has detained all of them for at least six months, and many for far longer. The Ninth Circuit has held that the immigration statutes cannot be construed to authorize detention for more than six months without providing a bond hearing before an Immigration Judge with authority to grant release unless the government shows, by clear and convincing evidence, that continued detention is justified. *See Diouf v. Napolitano*, 634 F.3d 1081, 1086 (9th Cir. 2011). Despite this, the government continues to misconstrue Sections 1226(c) and 1225(b) to authorize detention of the PI Subclasses members beyond six months without providing bond hearings of any kind. The Court should grant this motion and put a stop to a shameful practice that deprives individuals of fundamental rights protected by the Constitution. The harm to the class members is clear, and the law overwhelmingly supports their position.[1]

II. LEGAL BACKGROUND

This motion concerns individuals detained under two different legal regimes

[1] The PI Subclasses contain the only class members who continue to be subject to prolonged detention without bond hearings of any kind: class members detained under Section 1226(a) are eligible for release on bond pursuant to existing regulations, while class members detained under Section 1231 are now eligible for release on bond pursuant to the recent *Diouf* decision. After additional discovery, Petitioners will move for complete relief on behalf of all class members, including greater procedural protections at bond hearings for those who already receive them. But given the difficulties in obtaining discovery from Respondents, the irreparable harm presently occurring, and the settled precedent now clearly requiring rigorous bond hearings after six months for persons detained under 8 U.S.C. §§ 1226(c) and 1225, Petitioners cannot continue to wait to secure basic protections for the PI Subclass members.

that, in the government's view, do not permit an Immigration Judge to hold a rigorous bond hearing, or indeed a bond hearing of any kind, to determine whether further detention is warranted.[2]

The first legal regime applies to members of the Section 1226(c) subclass, which forms roughly half of the class as a whole, *see* Dkt. 101, Ex.26 [Stark Decl. ¶ 15]. A detainee becomes subject to Section 1226(c) if 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 matters stand, the government provides these individuals with *no* avenue to challenge whether their detention is justified based on lack of danger to the community or flight risk, regardless of its length. Respondents detained Petitioner Jose Farias Cornejo – a member of 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 relief from removal. *See* Dkt. 148; 158 (observing Farias was released after he won his case and DHS declined to appeal).

The second legal regime concerns members of the Section 1225(b) subclass – most of whom are arrested at ports of entry coming into the United States, often because they seek asylum. They too receive no bond hearings notwithstanding prolonged detention. Unlike the 1226(c) class members, these individuals are eligible for release, but only based on the unfettered discretion of Department of Homeland Security officers. Should an officer decide to detain a 1225(b) subclass member, even for years, the government provides no in-person hearing of any kind

---

[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, 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).

1 to challenge that decision. *See* Ex. 45, excerpts of deposition transcript[3] of Wesley
2 Lee, 18:12-16, Jan. 12, 2012.[4] Instead, agents render decisions simply by checking
3 a box on a form that contains no specific explanation and reflects no individualized
4 deliberation. *See* Ex. 45 at 106:18 – 107:23; *see, e.g*., Ex. 51 (parole decision for
5 class member, Ex. 5 to deposition of Wesley Lee) (to be subsequently filed *under*
6 *seal* pursuant to Stipulated Protective Order (Dkt. 227)). For example, Section
7 1225(b) Subclass Member [redacted] was denied parole as a danger and
8 flight risk despite the fact that he had a very strong claim for asylum, no criminal
9 history, and support within the United States. Nonetheless, ICE detained him until
10 he won his case, at which point it released him after months of pointless detention.

11 **A. Mandatory Detention Under Section 1226(c)**

12 For roughly half of the PI subclasses members – those subject to mandatory
13 detention under Section 1226(c) – the government provides no opportunity for
14 release even if such individuals could show that they present no danger or flight
15 risk if given the chance at a hearing. Rather, individuals become subject to
16 detention without the possibility of release based solely on an ICE officer's review
17 of their criminal history. If an ICE officer (not an attorney) determines that a non-
18 citizen has been convicted of a triggering offense, the individual is classified as a
19 mandatory detainee and told that they are ineligible for release on bond. *See* Ex.
20 48, excerpts of deposition transcript of Eric Saldana, 37:12-20, Jan. 13, 2012.
21

22 [3] Because the deposition transcripts are extremely voluminous, Petitioners have
23 submitted only the cited transcript pages. The whole transcripts can be made available upon the Court's request.
24 [4] Wesley Lee, the Assistant Field Office Director of the Los Angeles Field Office
25 was designated as the government's 30(b)(6) to testify as the person most knowledgeable concerning the parole and POCR processes, and release
26 determinations and notice provided for *Casas* hearings and *Joseph* hearings. *See*
27 Ex. 45 at 12:11-12; Ex. 46 (Amended 30(b)(6) deposition notice to Department of Homeland Security); Ex. 47 (email dated January 11, 2012 from Theodore
28 Atkinson to Michael Kaufman)

Triggering convictions include nearly all controlled substance offenses, *see* 8 U.S.C. 1182(a)(2)(C), all crimes involving moral turpitude, *see* 8 U.S.C. 1182(a)(2)(A)(i)(I), and all aggravated felonies, *see* 8 U.S.C. 1227(a)(2)(A)(iii).[5] *See* 8 U.S.C. 1226(c)(1).[6]

Under agency regulations and 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, detainees are not informed of their right to seek a *Joseph* hearing, *see* Ex. 45 at 207:19 - 208:6. In fact, the form provided to such detainees specifically states that there is no opportunity to challenge ICE's mandatory detention determination. *See* Ex. 45 at 208:18-209:4 (if [ICE] determines a detainee is subject to mandatory detention under 236(c), the Notice of Custody Determination form specifically "says [a detainee] *cannot* have a bond hearing.") (emphasis added)); *see also* Ex. 45 at 243:16-22.

Even if a detainee manages to learn about the existence of this right, the deck is still heavily stacked against the detainee who claims that he is not subject to mandatory detention. 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

[5] Despite its terminology, an "aggravated felony" need not be "aggravated" or a "felony" and includes many relatively minor convictions. *See* Richard A. Boswell, Essentials of Immigration Law 49 (2006).

[6] 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 attorney's opinion. *See* Ex.48 at 52:10 – 53:16.

1 detention. *Joseph*, 22 I. & N. Dec. at 799. As one Ninth Circuit judge has
2 observed, this burden is "all but insurmountable." *Tijani v. Willis*, 430 F.3d 1241,
3 1246 (9th Cir. 2005) (Tashima, J., concurring). *See also Matter of Carlos Alberto*
4 *Flores-Lopez*, 2008 WL 762690 (BIA Mar 05, 2008) (finding for DHS in *Joseph*
5 challenge despite unpublished decision from governing Circuit Court finding
6 conviction was not a removable offense); Julie Dona, *Making Sense of*
7 *"Substantially Unlikely": An Empirical Analysis of the Joseph Standard in*
8 *Mandatory Detention Custody Hearings* 5 (June 1, 2011) (forthcoming in
9 Georgetown Immigration Law Journal), *available at* http://
10 ssrn.com/abstract=1856758 (reviewing *Joseph* decisions reported on Westlaw
11 between November 2006 through October 2010 and finding that the BIA construes
12 the 'substantially unlikely' standard "to require that nearly all legal and evidentiary
13 uncertainties be resolved in favor of the DHS").
14 In essence, the Board has interpreted the *Joseph* standard to permit the
15 detainee to escape mandatory detention only if the government's argument
16 concerning the triggering conviction is frivolous. That a detainee presents no
17 danger or flight risk, or, relatedly, that the detainee will likely win relief from
18 removal, provides no reason to refrain from imposing mandatory detention. *See*
19 Ex. 49, excerpts of deposition transcript of Chief Immigration Judge Ivan Fong,
20 88:23-89:21, Feb. 28, 2012 (explaining his "understanding" that a detainee's
21 eligibility for relief "would not be a basis" for finding him or her subject to
22 mandatory detention). These factors remain irrelevant regardless of the length of
23 detention. Ex. 49 at 46:6-9. Indeed, even if a detainee wins before the Immigration
24 Judge and remains detained only because the government has appealed, the
25 mandatory detention regime continues to apply. *See Joseph*, 22 I. & N. Dec. at
26 801.
27 **B. Detention Without Bond Hearings under Section 1225(b)**
28 The other subclass of detainees who still receive no bond hearings under the

1 government's interpretation of the immigration detention statutes are those who are
2 apprehended at a port of entry – typically a border crossing or international airport
3 – and detained under Section 1225(b) as "arriving aliens" who are "seeking
4 admission." *See* 8 C.F.R. § 1.2 (defining term "arriving alien"). As the
5 government interprets Section 1225(b) and 8 C.F.R. § 1003.19(h)(2)(i)(B), non-
6 citizens arrested at a port of entry may be released only by ICE officials, without
7 any possibility for review by an Immigration Judge. *See* Ex. 45 at 18:12-16;
8 118:23-119:9.

9 Importantly, this rule applies even to arriving non-citizens who have
10 previously resided in the United States. Thus, even long-time lawful permanent
11 residents returning from brief trips abroad are ineligible for bond hearings if, for
12 example, they have been convicted of crimes involving moral turpitude (a very
13 broad category of offenses) at any point in their past. *See* 8 U.S.C. §
14 1101(a)(13)(C); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1077 (9th Cir. 2006)
15 (recognizing that lawfully-admitted non-citizens are detained under Section
16 1225(b)); *Camins v. Gonzales*, 500 F.3d 872, 875 (9th Cir. 2007) (petition for
17 review filed by returning lawful permanent resident who was treated as an "alien
18 seeking admission").

19 The Section 1225(b) subclass also includes a large number of asylum
20 seekers who have fled their home countries because of persecution, have no
21 criminal history of any kind in the United States, and will ultimately win the right
22 to reside here under the asylum laws. Under the government's view, they too have
23 no right to a bond hearing before an Immigration Judge. Instead, the government
24 leaves the decision to detain members of the Section 1225(b) subclass, even for
25 prolonged periods, entirely in the hands of their jailers. The government reads the
26 immigration statutes to permit the release of such individuals only if they qualify
27 for "parole" under 8 U.S.C. § 1182(d)(5)(A), which permits discretionary release
28 where doing so satisfies an "urgent humanitarian reason" or creates a "significant

1 public benefit." DHS officers decide whom to parole based only on a review of
2 the detainee's file and, occasionally, an informal discretionary interview; they
3 provide no hearing before an Immigration Judge to determine whether detention is
4 warranted. Nor is there an appeal of any kind from parole denials. *See* Ex.45 at
5 97:15 – 98:15; 18:12-16. Indeed, according to the government, the officer who
6 decides to detain someone pursuant to this 'process' need only check a box on a
7 form; the decision to detain such individuals for months or years can be made with
8 no further explanation. *See* Ex.45 at 106:18-107:23.

9 **III. ARGUMENT**

10 To obtain a preliminary injunction, Petitioners must demonstrate that (1)
11 they are likely to succeed on the merits, (2) they are likely to suffer irreparable
12 harm in the absence of preliminary relief, (3) the balance of equities tips in their
13 favor, and (4) an injunction is in the public interest. *Winter v. NRDC, Inc.*, 129 S.
14 Ct. 365, 374 (2008). Where the balance of hardships tips sharply in Plaintiffs'
15 favor, the Court should issue the injunction as long as Plaintiffs raise "serious
16 questions" on the merits. *Alliance for the Wild Rockies v. Cottrell*, 622 F.3d 1045,
17 1052 (9th Cir. 2010) ("A preliminary injunction is appropriate when a plaintiff
18 demonstrates . . . that serious questions going to the merits were raised and the
19 balance of hardships tips sharply in the plaintiff's favor" and meets the other
20 *Winter* factors). Here, Petitioners easily satisfy these standards.

21
22 **A. Petitioners are Substantially Likely to Prevail on Their Claim that the Immigration Detention Statutes Must be Construed to Require Rigorous Bond Hearings for the PI Subclasses Members**

23
24 **1. All Applicable Immigration Detention Statutes Must Be Construed to Require Rigorous Bond Hearings for Detention Beyond Six Months**

25
26 **i. Prolonged Detention Without Rigorous Bond Hearings is Unconstitutional**

27 The Ninth Circuit has repeatedly and unequivocally held that prolonged
28 immigration detention without a bond hearing raises serious constitutional

concerns. *See 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") (citing *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005)) (emphasis in original)); *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) (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 holdings of *Tijani*, *Casas*, *V. Singh*, and *Diouf* 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 equally to the PI Subclasses members, just as it did to the petitioners in *Tijani*, *Casas*, *V. Singh*, and *Diouf*. 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 in regard to their

1 detention than do Sections 1226(c) and 1225(b) subclass members under the
2 government's system. *See United States v. Salerno*, 481 U.S. 739, 750-52 (1987)
3 (upholding a federal bail statute permitting pretrial detention in part because the
4 statute required strict procedural protections for detention, including prompt
5 hearings before a judicial officer where the government bore the burden of proving
6 dangerousness by clear and convincing evidence); *Foucha v. Louisiana*, 504 U.S.
7 71, 81-83 (1992) (striking down a civil insanity detention statute because it placed
8 the burden on the detainee to prove eligibility for release); *Kansas v. Hendricks*,
9 521 U.S. 346 353, 368 (1997) (upholding involuntary civil commitment for certain
10 sex offenders, but requiring "strict procedural safeguards" including a right to a
11 jury trial and proof beyond a reasonable doubt).
12 Even in situations where far lesser interests are at stake, the Supreme Court
13 has held that due process requires in-person hearings. The government may not
14 terminate welfare benefits or public utilities, or even recover excess Social
15 Security benefits, without providing an in-person hearing. *See, e.g.*, *Goldberg v.*
16 *Kelly*, 397 U.S. 254, 268 (1970) (government's failure to provide an in-person
17 hearing prior to termination of welfare benefits was "fatal to the constitutional
18 adequacy of the procedures"); *Memphis Light, Gas and Water Division v. Craft*,
19 436 U.S. 1, 16 (1978) (due process requires, at minimum, an opportunity for utility
20 clients to argue their cases prior to termination of service); *Califano v. Yamasaki*,
21 442 U.S. 682, 696 (1979) (in-person hearing required for recovery of excess Social
22 Security payments where beneficiary was at fault because "written review hardly
23 seems sufficient to discharge the Secretary's statutory duty to . . . assess the
24 absence of 'fault'"). It follows from these cases that the Due Process Clause
25 requires the government to provide a rigorous in-person hearing to justify the
26 prolonged incarceration of people who may present no danger or flight risk,
27 especially when some of them will ultimately win their immigration cases and be
28

1 allowed to remain in the United States.[7]

2 Given the serious due process concerns presented by prolonged detention
3 without individualized hearings, this Court must construe the immigration
4 detention statutes so as to avoid those serious constitutional problems, so long as
5 such a construction is fairly possible. As the Supreme Court explained in *Clark*,
6 the canon of constitutional avoidance "is not a method of adjudicating
7 constitutional questions" but rather one of statutory interpretation – "a tool for
8 choosing between competing plausible interpretations of a statutory text, resting on
9 the reasonable presumption that Congress did not intend the alternative which
10 raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).
11 Under the canon, a court must reject any interpretation of a statute that raises
12 serious constitutional problems so long as an alternative construction is "fairly
13 possible." *Nadarajah*, 443 F.3d at 1076. Because it follows from *Tijani*,
14 *Nadarajah*, *Casas*, *V. Singh*, and *Diouf* that the prolonged detention without
15 hearings of the PI Subclasses members raises serious constitutional problems,
16 those statutes can and should be construed to require rigorous bond hearings for
17 people subject to prolonged detention , i.e., hearings where the government bears
18 the burden of justifying their continued imprisonment.

19 **ii. Detention Becomes Prolonged at Six Months**

20 While it has been well-established for years in the Ninth Circuit that
21

22 [7] The justification for an in-person hearing in the prolonged detention context is
23 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
24 appear for removal should the government ultimately prevail in the immigration
case. *See, e.g.*, *Califano*, 442 U.S. at 697 (paper review failed to satisfy due
25 process because determination at issue "usually requires an assessment of the
26 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*,
27 329 F.3d 655, 661 (9th Cir. 2003) (holding, in the asylum context, that
28 immigration judges are in a "superior position" to assess credibility).

1 "prolonged" immigration detention without a bond hearing raises serious
2 constitutional concerns, the Ninth Circuit has now definitively resolved any dispute
3 as to *when* detention becomes prolonged. In *Diouf*, the court held that an
4 immigration custody determination system that does not provide for rigorous bond
5 hearings *at six months* "raise[es] serious constitutional concerns." 634 F.3d at
6 1091. *Diouf* therefore construed Section 1231(a)(6) – the detention statute that
7 governs for a different subclass of the detainees in this case – to require rigorous
8 bond hearings at six months. *Id*. at 1091-92.

9 While *Diouf* did not involve a detainee held under Section 1226(c), the
10 Court relied heavily on the time periods described in *Demore* and *Casas*, both of
11 which did involve Section 1226(c). *Id*. at 1091 (noting that *Demore* "upheld a six
12 month detention with the specific understanding that § 1226(c) authorized
13 mandatory detention only for the 'limited period of [the detainee's] removal
14 proceedings,' which the Court estimated 'lasts roughly a month and a half in the
15 vast majority of cases in which it is invoked, and about five months in the minority
16 of cases in which the alien chooses to appeal' his removal order to the BIA")
17 (citing *Casas*); *see also Nadarajah*, 443 F.3d at 1079-80 (holding that all the
18 "general detention statutes" only authorize detention pending completion of
19 removal proceedings for a "brief and reasonable" period, and concluding that such
20 a period is presumptively six months, based on *Zadvdyas*, *Clark*, and *Demore*, as
21 well as Congress' express authorization of detention beyond six months in the
22 national security detention statutes).

23 Thus, clear Ninth Circuit authority establishes that detention becomes
24 "prolonged" at six months, such that the more rigorous procedural protections
25 afforded by a bond hearing where the government bears the burden of proof must
26
27
28

be provided to continue detention beyond that point.[8]

B. The Court Should Construe Section 1226(c) to Avoid the Constitutional Problem 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.*, Dkt. 101 Ex. 22 [Rodriguez Decl. ¶ 3]; Dkt. 101 Ex. 24 [Farias Cornejo Decl. ¶ 4]. Therefore, it undoubtedly raises the same serious constitutional problems that the Ninth Circuit has repeatedly recognized in similar contexts.

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 to "require" a bond hearing in such cases. *Casas*, 535 F. 3d at 951. Importantly, the court adopted that construction not only for people whose removal cases were pending before the Ninth Circuit on petition 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), unlike the immigration detention

---

[8] Indeed, the court in *Diouf* 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*, 634 F.3d at 1092 n.13 (emphasis added).

1 statutes involving national security, is silent with respect to the procedures required
2 when detention is *prolonged*. *Compare* 8 U.S.C. § 1226a *and* 8 U.S.C. §§ 1531-
3 1537 (legislation specifically authorizing detention for longer than six months
4 without a hearing in a narrow set of cases implicating national security). The
5 Supreme Court has previously found that silence is not a basis for assuming that
6 Congress intended to authorize unlimited detention. *Zadvydas*, 533 U.S. at 698-99;
7 *cf. Nadarajah*, 433 F.3d at 1076 ("Congress cannot authorize indefinite detention
8 in the absence of a clear statement"). That same rationale requires a limiting
9 construction of Section 1226(c) here.

10 Indeed, the Section 1226(c) subclass members have a stronger claim for a
11 bond hearing than did the petitioners in *Tijani*, *Casas*, and *V. Singh*, because,
12 unlike the petitioners in those cases, they have not lost their immigration cases at
13 the administrative level, but rather are still challenging their removal before the
14 immigration courts. Thus, none of them have a final order of removal, and in fact
15 many of them never will – they will defeat the charges against them or win relief
16 from removal and retain their immigration status. There is no reason to deny them
17 even the opportunity to show that they should be released when the law already
18 affords that opportunity to people in a weaker position, who have already lost
19 before the immigration courts.

20 Another district judge in this Court recently adopted these arguments in a set
21 of preliminary injunctions involving individuals with serious mental disabilities
22 subject to prolonged detention under Section 1226(c). Although the Plaintiffs in
23 that case (represented by counsel undersigned) face unique circumstances due to
24 their mental disabilities, the Court's reasoning with respect to their right to a bond
25 hearing was not premised on that fact, but instead involved a straightforward
26 application of the same generally-applicable Ninth Circuit cases on which
27 Petitioners here rely. *See Franco-Gonzales v. Holder*, 767 F.Supp.2d 1034, 1060
28 (C.D. Cal. 2010); *Franco-Gonzales v. Holder*, 828 F.Supp.2d 1133 (C.D. Cal.

2011); *Franco-Gonzales v. Holder*, 2011 WL 5966657, *5 (C.D.Cal. Aug 2, 2011).

Finally, because most 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, it should still grant relief from prolonged mandatory detention to these subclass members by construing 1226(c) as requiring mandatory detention only where the government shows that a detainee lacks a substantial challenge to removal. *See* Dkt. 111 at 32 (Prayer For Relief) (requesting any other appropriate relief); *Cf. Idema v. Dreamworks, Inc.*, 162 F.Supp.2d 1129, 1142 (C.D. Cal. 2001) ("It need not appear that [a] plaintiff can obtain the specific relief demanded as long as the court can ascertain from the face of the complaint that some relief can be granted.") (internal citation and quotation marks omitted).

Section 1226(c) requires the mandatory detention of noncitizens who are "deportable" or "inadmissible" under the designated criminal grounds. 8 U.S.C. § 1226(c). In *Demore*, the Supreme Court upheld the constitutionality of mandatory detention where the detainee had *conceded* both that he was deportable and that he was properly subject to mandatory detention under the statute. *Demore*, 538 U.S. at 513-14.[9] As a result, the Court had no occasion to address the permissibility of applying mandatory detention to a noncitizen with a *substantial challenge* to removal—that is, a substantial challenge to the removability charge, or a substantial claim to relief that would allow them to retain or obtain lawful permanent resident status. *See 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)); *see also Gonzalez v. O'Connell*, 355 F.3d 1010, 1020-21

[9] The only relief for which he was applying was withholding of removal, which merely protects someone from removal to a country where they would face persecution, without providing any of the rights that accompany lawful permanent residence. A person who is granted withholding of removal remains under a final removal order; the order's execution has merely been withheld.

1 (7th Cir. 2004) (noting that this "important issue" was left open in *Demore*). In
2 light of such detainees' heightened liberty interests, their prolonged mandatory
3 detention raises particularly serious constitutional problems. *Demore*, 538 U.S. at
4 577 (Breyer, J., dissenting); *see also Krolak v. Ashcroft*, No. 04-C-6071 (N.D. Ill.
5 Dec. 1, 2004) (holding mandatory detention unconstitutional where individual had
6 "colorable" challenge to removal).

7 Thus, should this Court decline to adopt the six month rule Petitioners
8 advocate, it should still construe Section 1226(c) to apply only where the
9 government shows that a detainee lacks a colorable challenge to his removability,
10 both because of the constitutional problems with prolonged mandatory detention
11 and because of the absence of any evidence that Congress intended to impose it in
12 cases where detainees had substantial challenges to removal. *See also Demore,* 538
13 U.S. at 578 (Breyer, J., dissenting) (advocating "substantial question" standard,
14 which was never rejected by majority, in part because "the relevant statutes
15 literally say nothing about an individual who, armed with a strong argument
16 against deportability, might, or might not, fall within their terms"); *accord Tijani v.*
17 *Willis*, 430 F.3d 1241, 1246 (9th Cir. 2005) (Tashima, J., concurring) (same, in
18 light of "egregiously" unconstitutional *Joseph* standard).

19
20 **C. The Court Should Construe Section 1225(b) to Authorize Rigorous Bond Hearings at Six Months**

21 For largely the same reasons applicable to the Section 1226(c) subclass, the
22 detention of Section 1225(b) subclass members without affording them rigorous
23 bond hearings also presents serious constitutional problems. As described above,
24 *see supra* Section I.B., Section 1225(b) class members also receive no hearing
25 before an Immigration Judge with respect to their detention, regardless of its
26 length. Instead, the government interprets Section 1225(b) to authorize release
27 only pursuant to the parole determination procedures set forth in Section
28 1182(d)(5)(A) – procedures that do not permit an Immigration Judge to conduct a

hearing to determine whether the class members' detention is warranted. Notably, parole determinations are made by the same ICE officials who are in charge of ensuring the detainees' removal. Unsurprisingly, that legal regime presents serious constitutional problems, for several reasons.

First, the government's detention scheme for Section 1225(b) class members is plainly unlawful under two closely related Ninth Circuit cases. First, in *Nadarajah*, the Ninth Circuit 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 other lawfully-admitted non-citizens, whose prolonged detention indisputably raises serious due process problems. 443 F.3d. at 1077. Such individuals are subject to prolonged detention under Section 1225(b) because they can be treated as "arriving aliens." *Id.*; *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 to avoid those problems – regardless of whether it would raise the same constitutional problems with respect to "arriving aliens" who are first time entrants.[10] In reaching this conclusion *Nadarajah* relied heavily on the Supreme Court's decision in *Clark v. Martinez*, which had already

---

[10] Petitioners do not concede that government can subject any noncitizen to prolonged detention without triggering serious due process concerns, including "arriving aliens" who are first time entrants. *See* Dkt 149 at 28 (citing, *inter alia*, *Kwai Fun Wong v. United States*, 373 F.3d 952, 971 (9th Cir. 2004) (holding that "excludable" aliens retain Fifth Amendment rights)); Dkt. 155 at 2 (order denying Respondents' Rule 12(c) motion) (holding that "the Entry Fiction Doctrine does not preclude Plaintiff from bringing procedural due process claims under 8 U.S.C. § 1225(b), regardless of the sub-class's immigration status"). However, the Court need not reach the question given *Nadarajah*'s recognition that the government also detains lawful permanent residents under Section 1225. 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).

construed Section 1225 (albeit in a slightly different context) to avoid constitutional problems arising from its applicability to lawfully-admitted non-citizens. *See Clark*, 543 U.S. at 378 ("The operative language of [§ 1225] applies without differentiation to all . . . categories of aliens that are its subject.").

Second, as explained in detail above, the Ninth Circuit 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*, 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*, so long as the statute can reasonably construed in such a manner.

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 existing Ninth Circuit law. The petitioners in both *Casas* and *Diouf* 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*). Just like the parole process, the post-order custody review is simply a form filled out by a DHS bureaucrat. The Ninth Circuit 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*, 634 F.3d at 1091 (same).

All of the same deficiencies exist with respect to the parole process. In

1 contrast to the procedure required by the Due Process Clause – an in-person
2 hearing before an Immigration Judge where the government bears the burden of
3 proof, by clear and convincing evidence, to show that the detainee presents a
4 danger or flight risk, *see V. Singh*, 638 F.3d at 1203, the parole process provides
5 only an unappealable paper review by an ICE official (with an occasional
6 interview if a DHS officer feels so inclined),where the detainee bears the burden to
7 show that his release is in the public's interest or necessitated by urgent
8 humanitarian reasons. *See* 8 U.S.C. § 1182(d)(5)(A); *see also* 8 CFR § 212.5.
9 Testimony from the government's 30(b)(6) witness confirms that the
10 structural defects in the parole process have practical consequences. As Assistant
11 Field Office Director Lee candidly admitted, "the custody decision" has always
12 "really just been about how much bed space [ICE has]." *See* Ex. 45at 40:17-19.
13 Unsurprisingly, the Ninth Circuit has already recognized that a review system that
14 leaves an individual's liberty to the unreviewable decisions of such officers fails to
15 adequately protect against the risk of unnecessary and unwarranted prolonged
16 detention, and therefore cannot satisfy minimal due process standards. *See Casas*,
17 535 F.3d at 951-52; *Diouf*, 634 F.3d at 1091.
18 Given the serious constitutional problems described above, this Court should
19 construe Section 1225(b) to authorize rigorous bond hearings before Immigration
20 Judges, because such a construction is "fairly possible." *Nadarajah*, 443 F.3d at
21 1076. It can do so in one of two ways. First, it could construe Section 1225(b)
22 itself to require rigorous bond hearings. The Ninth Circuit adopted that approach
23 in *Diouf* with respect to Section 1231(a)(6). 634 F.3d at 1092. Alternatively, it
24 could construe Section 1225(b) to not apply to cases involving prolonged
25 detention, such that detention "shifts" to Section 1226(a) in such cases. The Ninth
26 Circuit used that approach in *Casas* with respect to Section 1226(c). 535 F.3d at
27 951. Both constructions are "fairly possible," allowing the Court to easily construe
28 Section 1225(b) to authorize the rigorous bond hearings that due process demands.

1 With respect to the first approach, the BIA has already interpreted Section
2 1225(b) to allow bond hearings for noncitizens who were arrested and placed in
3 removal proceedings after their entry. *Matter of X-K*, 23 I&N Dec. 731, 731-32,
4 734-35 (BIA 2005). Although the BIA also noted that the implementing
5 regulations for Section 1225(b) prohibited IJ bond hearings for "arriving aliens",
6 *see id*. at 735 (citing 8 C.F.R. §§ 1003.19(h)(2)(i)(B), 1235.3(c)), it made clear that
7 *the statute* in no way forecloses bond hearings before an Immigration Judge. *X-K*,
8 23 I&N Dec. at 734.
9 To the extent that the regulations preclude such review, this Court should
10 hold them inapplicable to cases involving prolonged detention, just as *Casas*
11 construed Section 1226(a) to authorize bond hearings due to the serious
12 constitutional problems posed by prolonged detention, notwithstanding a
13 regulation prohibiting bond hearings for people with administratively final removal
14 orders. *See* 8 C.F.R. § 1003.19. Similarly, here the Court should construe Section
15 1225(b) to authorize bond hearings to avoid significant constitutional problems.
16 To the extent that the regulations do bar Immigration Judge review, they are *ultra*
17 *vires* and therefore not dispositive. *See Kwong Hai Chew v. Colding*, 344 U.S.
18 590, 599 (1953) (construing regulation to avoid constitutional problems).
19 Alternatively, if the Court concludes that Section 1225(b) cannot be
20 construed to authorize bond hearings, the Court should find that it simply does not
21 apply to cases involving prolonged detention – as the Ninth Circuit found with
22 respect to Section 1226(c) in *Casas* and *Tijani* – and therefore that authority for
23 prolonged detention "shifts" to Section 1226(a), under which the detainees are
24 indisputably eligible for bond hearings. *See* 8 U.S.C. § 1226(a) (authorizing
25 detention "pending a decision" on removal). Given that Section 1225(b), like
26 Section 1226(c), makes no explicit reference to prolonged detention, its text can
27 easily be read simply not to apply in such cases. Accordingly, the Court should
28 construe Section 1225(b) so as to require bond hearings for subclass members.

Two recent district court decisions from the Southern District of California have adopted the arguments presented here. *See Centeno-Ortiz v. Culley*, 2012 WL 170123, *9 (S.D.Cal. Jan. 19, 2012) (requiring that "the Government shall provide Petitioner [an "arriving alien"] with an individualized bond hearing before an immigration judge, where the Government will have the burden of establishing that Petitioner should not be released because he is either a flight risk or will be a danger to the community.") ; *Crespo v. Baker*, 2012 WL 1132961, * 9 (S.D.Cal. Apr. 3, 2012) (same).[11]

IV. PETITIONERS WILL CONTINUE TO SUFFER IRREPARABLE HARM AS A RESULT OF THEIR PROLONGED DETENTION, AND THE BALANCE OF HARDSHIPS TIPS SHARPLY IN THEIR FAVOR

Petitioners suffer irreparable harm as their unlawful detention continues, and the balance of hardships tips sharply in their favor.

The Ninth Circuit has made clear that "[a]n alleged constitutional infringement will often alone constitute irreparable harm." *Goldie's Bookstore, Inc. v. Superior Court of the State of Calif.*, 739 F.2d 466, 472 (9th Cir. 1984); *Associated General Contractors of Calif., Inc. v. Coalition for Economic Equity*,

---

[11] 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.*, 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.

950 F.2d 1401, 1412 (9th Cir. 1991) (recognizing presumption of irreparable harm when constitutional infringement alleged); *see, e.g.*, *Sammartano v. First Judicial District Court*, 303 F.3d 959, 973 (9th Cir. 2002) (explaining that the existence of a colorable First Amendment claim is sufficient to establish irreparable harm under Ninth Circuit precedent); *S.O.C. Inc. v. County of Clark*, 152 F.3d 1136,1148 (9th Cir. 1998) (same); *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."). Further, as the Eleventh Circuit has held, the "unnecessary deprivation of liberty clearly constitutes irreparable harm." *United States v. Bogle*, 855 F.2d 707, 710-11 (11th Cir. 1998).

The harm suffered by unlawful detention without adequate process is particularly severe for the class members seeking relief in this preliminary injunction. Although a comprehensive presentation of data and other information from the voluminous discovery concerning these individuals must await the conclusion of discovery, it is already readily evident that a number of individuals detained in these two subclasses have colorable defenses against 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 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* Ex. 49, 130:17-131:11 (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.*; Ex. 49 (Exhibits 5, 6, 7 to deposition of Judge Fong, containing data on detention length). Such unnecessary detention obviously constitutes irreparable

1 harm. *Cf. Nat'l Ctr. for Immigrants Rights, Inc. v. INS*, 743 F.2d 1365, 1369 (9th
2 Cir. 1984) ("The hardship from being unable to work to support themselves and
3 their dependents, to obtain release bonds, and to pay for legal representation is
4 beyond question.").
5 In contrast to the harm suffered by Petitioner, the government will not suffer
6 irreparable harm should the injunction be entered. As an initial matter, because the
7 government's detention of these class members is almost certainly illegal under
8 controlling statutory and constitutional authority, it "cannot reasonably assert that
9 it is harmed in any legally cognizable sense by being enjoined from [statutory and]
10 constitutional violations." *Id.* (holding that district court did not err in enjoining
11 INS practices that probably violated plaintiffs' constitutional rights).
12 Nor can the government argue that relief would result in the release of
13 individuals who present a serious danger or flight risk, because *its own*
14 *Immigration Judges* will have authority to make the final determination as to
15 whether any given individual may be released on bond. *See* Ex.50 (DHS
16 Statement of New Legal Authority and Supplemental Brief at 7, *In the Matter of*
17 *Garcia-Arreola* (BIA Feb. 10, 2010) ("Adopting this [narrower interpretation of
18 section 1236(c)] would not undercut needed protections against dangerous
19 individuals. A criminal alien not covered by mandatory detention can nevertheless
20 be detained if the facts and circumstances show that he or she is a flight risk or
21 danger to the community.") . For those individuals ordered released, the
22 government can utilize sophisticated alternatives to detention, including an
23 "Intensive Supervision Appearance Program" (ISAP II), that ensures extremely
24 high appearance rates. *See* Ex. 48 at 111:4-112:24 (DHS is "at, if not close to, [a]
25 100 percent compliance rate" for noncitizens enrolled in the ISAP II program in
26 San Bernadino, and at around a 90 percent compliance rate for those in the Los
27 Angeles area). The government can thus ensure that those class members who
28 obtain release on bond will appear in the event of removal, without subjecting

1 them to prolonged detention.
2 Moreover, to the extent the government claims that providing bond hearings
3 to Section 1226(c) and 1225(b) subclass members would be costly or an
4 administrative burden, the government in fact stands to realize substantial financial
5 savings from the release of individuals in this case. The average cost of detention
6 per day, not including payroll costs, is $122. *See* Dep't of Homeland Security, U.S.
7 Immigration and Customs Enforcement Salaries and Expenses, Fiscal Year 2012
8 Congressional Budget Justification, p. 57, *available at*
9 http://www.dhs.gov/xlibrary/assets/dhs-congressional-budget-justification-
10 fy2012.pdf. In contrast, the cost of supervision is no greater than $14. *See* Dora
11 Schriro, U.S. Dep't of Homeland Sec., Immigration Detention Overview and
12 Recommendations 10, 15 (2009); *see also* Anil Kalhan, Columbia Law Review,
13 —Rethinking Immigration Detention (July, 21, 2010), p. 55, *available at*
14 http://www.columbialawreview.org/assets/sidebar/volume/110/42_Anil_Kalhan.
15 pdf.
16 Of course, even if the financial calculus were different, any harm to the
17 government would pale in comparison to the irreparable harm that Petitioners
18 continue to suffer. *Cf. Alliance for Wild Rockies v. Cottrell*, 622 F.3d 1045, 1055
19 (9th Cir. 2010) (holding that the balance of hardships tipped sharply against
20 government because its additional costs of "up to $70,000" were "so small that
21 they cannot provide a significant counterweight to the harm caused" by logging in
22 a forest); *Golden Gate Rest. Ass'n v. City and County of San Francisco*, 512 F.3d
23 1112, 1126 (9th Cir. 2008) ("Faced with . . . a conflict between financial concerns
24 and preventable human suffering, we have little difficulty concluding that the
25 balance of hardships tips decidedly in favor of the latter.") (internal quotation
26 marks omitted). In any event, the government has stipulated that the cost of bond
27 hearings cannot justify their denial, as a matter of due process. *See* Dkt. 165 at 4-
28 5.

1 **V. AN INJUNCTION IS IN THE PUBLIC INTEREST**

2 Finally, the injunction sought here is in the public interest. The public has
3 an interest in upholding constitutional rights. *See Preminger v. Principi*, 422 F.3d
4 815, 826 (9th Cir. 2005) ("Generally, public interest concerns are implicated when
5 a constitutional right has been violated, because all citizens have a stake in
6 upholding the Constitution."); *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir.
7 2008) ("[I]t is always in the public interest to protect constitutional rights.").

8 In addition, the public has an interest in accurate determinations in all legal
9 proceedings, including in the decision of whether to detain individuals during their
10 immigration cases, and in ensuring that the government only expends its resources
11 to detain individuals where it is necessary to prevent danger or flight risk.

12 **VI. CONCLUSION**

13 For the foregoing reasons, Petitioners respectfully request that the Court
14 grant this preliminary injunction and order Respondents to provide bond hearings
15 consistent with the requirements of *Casas* and subsequent Ninth Circuit authority
16 interpreting that decision to all members of the Section 1226(c) and Section
17 1225(b) subclasses. Specifically, Petitioners request that the Court order the
18 government to provide such individuals with bond hearings before Immigration
19 Judges with authority to grant them release on bond unless the government shows
20 by clear and convincing evidence that those individuals present a danger or flight
21 risk sufficient to warrant their continued detention.

22 Respectfully submitted,

23 ACLU OF SOUTHERN CALIFORNIA

24 Dated: June 25, 2012 /s Ahilan T. Arulanantham
AHILAN T. ARULANANTHAM
25 Counsel for Petitioners

26

27

28