No. 18-1233

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

USAMA JAMIL HAMAMA, et al.,
Petitioners-Appellees,
v.
THOMAS HOMAN, Deputy Director and
Senior Official Performing the Duties of the Director,
U.S. Immigration and Customs Enforcement, et al.,
Respondents-Appellants.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
D. Ct. No. 2:17-cv-11910

PETITIONERS-APPELLEES' BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 18-1233 Case Name: Hamama, et al. v. Homan, et al.

Name of counsel: Kimberly L. Scott

Pursuant to 6th Cir. R. 26.1, Petitioners-Appellees
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on April 13, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Kimberly L. Scott
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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Petitioners-Appellees (hereinafter Petitioners) respectfully request oral argument. The issues in this case are important and the Court will be aided by the opportunity to question counsel about the legal issues and voluminous record. Oral argument has been scheduled for April 25, 2018.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal under 28 U.S.C. §1292(a)(1).

STATEMENT OF ISSUES

1. Have Appellants established that the district court abused its discretion in granting a preliminary injunction where they have not challenged (a) the court's determination that the irreparable harm, balancing of equities, and public interest factors overwhelmingly favor the Petitioners, or (b) the court's constitutional due process ruling, which was one of two alternative grounds upon which the court determined Petitioners were likely to succeed on the merits?
2. Should this Court remand for the district court to consider in the first instance any impact *Jennings v. Rodriguez*, 583 U.S. ___, 138 S. Ct. 830 (2018), may have on Petitioners' statutory claims?
3. Did the district court err in finding sufficient likelihood of success to warrant preliminary relief on Petitioners' statutory claims that:
    a. 8 U.S.C. §1231, which provides that noncitizens with final removal orders "may be detained" after the 90-day removal period, should be interpreted to require release when detention becomes prolonged unless bond hearings are provided, in order to avoid serious constitutional questions; and

b. 8 U.S.C. §1226(c) applies, as it states, only to individuals "when ... released" from criminal custody?

4. Did the district court abuse its broad equitable discretion by requiring the Government, once detention becomes prolonged (*i.e.*, exceeds six months), to choose between:

   a. Releasing the detainee under supervision;

   b. Providing the detainee with a bond hearing before an immigration judge at which the Government must establish by clear and convincing evidence that prolonged detention is necessary to protect the public or prevent flight; or

   c. Demonstrating that a bond hearing would be inappropriate for some particular reason.

INTRODUCTION

In June 2017, Immigration and Customs Enforcement ("ICE") arrested hundreds of Iraqi nationals with old orders of removal, threatening immediate deportation. The district court's July preliminary injunction paused removal because of the grave risk of persecution, torture, and murder these long-time residents of the U.S. face in Iraq, giving them time to seek immigration court review of the current lawfulness of their deportation. *See* appeal No. 17-2171. They are winning in immigration court: cases are being reopened at a very high rate, and, though few have been decided on the merits, so far about half of the reopened cases have succeeded on the merits.

But while Petitioners fought to avoid dire harm in Iraq, they languished in detention, notwithstanding that most could safely be allowed to live in the community as they had done in years and decades prior. This appeal is of the district court's second preliminary injunction, entered January 2, 2018. The court found Petitioners likely to succeed on the merits of both their statutory and constitutional claims, and overwhelmingly favored with respect to the irreparable harm, balance of hardships, and public interest preliminary injunction factors. Based on its analysis of facts (unchallenged here), equities (unchallenged here), statutes, and the Constitution (unchallenged here), the court exercised its discretion to order narrow preliminary relief: a rebuttable presumption that Petitioners receive

bond hearings when detention reaches six months. At the resulting 227 hearings so far, immigration judges found insufficient justification for detention over 60% of the time. Absent the injunction, Petitioners would be detained today and for many more months or years, without the basic procedural protection of a hearing to determine if their detention is necessary to protect the community or guard against flight.

STATUTORY AND REGULATORY FRAMEWORK

The Immigration and Nationality Act ("INA") governs immigration detention both before and after noncitizens receive a final removal order. Post-final-order immigration detention is governed by 8 U.S.C §1231(a); pre-final-order detention by 8 U.S.C. §1226.

Post-final-order detention: 8 U.S.C. §1231(a)(2) authorizes a 90-day period of mandatory post-final-order detention—the "removal period," *see* §1231(a)(1)(A)—during which ICE is to effectuate removal. Individuals unable to be removed during the removal period are generally to be released under conditions of supervision, including periodic reporting and other "reasonable written restrictions on the alien's conduct." §1231(a)(3). Those ordered removed for specified criminal convictions, or whom the Attorney General determines to be a danger or flight risk, "*may* be detained beyond the removal period." §1231(a)(6) (emphasis added).

In *Zadvydas v. Davis*, the Supreme Court read 8 U.S.C. §1231(a)(6) to authorize detention beyond the removal period only insofar as removal is "reasonably foreseeable." 533 U.S. 678, 699 (2001). That is because, to satisfy due process, detention must "bear a reasonable relation to the purpose for which the individual was committed." *Id*. at 690. The Court construed §1231(a)(6) to authorize post-final-order detention only for a "period reasonably necessary to secure removal"—presumptively six months. *Id*. at 699-701. Thereafter, if a detainee provides "good reason" to believe removal is not significantly likely in the reasonably foreseeable future, "the Government must respond with evidence sufficient to rebut that showing." *Id*. at 701.

Even if removal *is* reasonably foreseeable, detention must be reasonably related to its purpose, i.e. to protect against danger or flight risk. *Id*. at 690. ICE's post-*Zadvydas* regulations require that ICE conduct Post-Order Custody Reviews ("POCRs"), even when removal *is* reasonably foreseeable, to consider release of those who pose no danger or flight risk. 8 C.F.R. §§241.13(b)(1), 241.13(g)(2) (where removal is foreseeable, "detention will continue to be governed under the established standards" in 8 C.F.R. §241.4, which provide for 90 and 180-day custody reviews).

Pre-final-order detention: Detention while removal proceedings are pending—including for individuals with reopened cases—is governed by 8 U.S.C.

§1226. That section provides generally for discretionary detention, *see* §1226(a), 8 C.F.R. §236.1, but *mandates* detention of certain persons with criminal convictions, *see* §1226(c). With some exceptions, an individual detained under §1226(a) is entitled to an immigration judge bond hearing; an individual detained under §1226(c) is not. Section 1226(c) is triggered "when the alien is released" from criminal custody for an offense covered by that section.

Movement from post-final-order to pre-final-order detention: Class members litigating a motion to reopen (MTR) have final removal orders and are detained under §1231. If they win reopening, the authority for their detention shifts to §1226; whether they are then eligible for bond hearing depends on whether they are subject to §1226(a) or §1226(c).

BACKGROUND

A. Procedural History

Petitioners filed this action on an emergency basis in June 2017 seeking relief for a putative class of Iraqi nationals whom the federal government sought to remove to Iraq. Petition, R.1, Pg.ID#1-26. On July 24, 2017, the district court paused their deportation, ruling "that they must be given a hearing before immigration judges on their claims that they would face persecution, torture and possibly death if sent back." Op., R.191, Pg.ID#5318. That injunction staying removal, R.87, Pg.ID#2323-57, is the subject of appeal No. 17-2171. The instant

appeal arises from the Government's decision to keep Petitioners detained, even though—as the Government concedes—immigration proceedings initiated after the first injunction will take "many months if not years." Appellants' Br. at 5, No. 17-2171 (6th Cir. Nov. 21, 2017).

Petitioners filed their Second Amended Petition on October 13, 2017, setting out three detention-related claims, two of which are at issue in this appeal. 2d Am. Pet., R.118, Pg.ID#2956-3030. Count Five (Prolonged Detention Claim) alleged that detention is unlawful unless it bears a reasonable relationship to the government's legitimate purposes—protecting against danger and flight risk—and that therefore detainees cannot be subject to prolonged detention without an individualized determination of those factors. *Id.* ¶¶133-138, Pg.ID#3024-25. Count Six (§1226 Claim) alleged that because §1226(c)'s mandatory detention provisions do not apply to reopened proceedings or where individuals were released from criminal custody long ago, Respondents were violating both the INA and due process by applying §1226(c) to class members. Class members are actually subject to §1226(a), and therefore entitled to immigration bond hearings. *Id.* ¶¶139-143, Pg.ID#3025-26.

On November 7, 2017, Petitioners filed their Motion for a Preliminary Injunction on Detention Issues, R.138, Pg.ID#3338-3733, and an Amended Motion for Class Certification, seeking certification of a Primary Class (for the removal

claims) and three detention subclasses, R.139, Pg.ID#3734-3836; R.176, Pg.ID#4956-66. The two detention subclasses relevant here are: the Detained Final Order Subclass, which encompasses detainees in post-final-order detention, and the Mandatory Detention Subclass, which encompasses pre-final-order detainees held under the purported authority of §1226(c). Op., R.191, Pg.ID#5359-62. Petitioners sought preliminary relief on the Prolonged Detention Claim for both subclasses; they sought preliminary relief on the §1226 Claim for the Mandatory Detention Subclass. Prelim. Inj. Mot. R.138, Pg.ID#3340-50, 384-3392.

On January 2, 2018, the district court granted in part Petitioners' preliminary injunction motion. Op., R.191, Pg.ID#5318-47, 5359-62. The Court certified the three detention subclasses and deferred decision on certification of the Primary Class to await guidance from this Court.[1] *Id.*, Pg.ID#5318-28, 5347-60. A subsequent order implements and clarifies the January 2nd Order. Order, R.203, Pg.ID#5456-59.

On February 28, 2018, the district court held a status conference and solicited written submissions about the impact of *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018), decided the previous day. The Government responded that it would

[1] Respondents have not appealed class certification. *See* Rule 23(f) (court of appeals may permit appeal of class certification if a petition is filed within 14 days).

likely file a motion for reconsideration. Notice, R.249, Pg.ID#6188. To date no such motion has been filed; the district court has not yet considered *Jennings*.

On March 2, 2018, at the end of the appeal period and after almost all detainees had received bond hearings, Respondents filed a notice of appeal from the preliminary injunction. R.247, Pg.ID#6182-83.

B. The District Court's Injunction

The court found Petitioners likely to succeed on both their statutory and constitutional arguments. Op., R.191, Pg.ID#5345. On the Prolonged Detention Claim, the court found that prolonged detention without procedural protections would violate both due process and the INA. *Id.*, Pg.ID#5335-47. Recognizing the Government's interest in ensuring that individuals appear for immigration proceedings and do not endanger the public, the court found "those interests can be served by a bond hearing process before immigration judges, who can sort out those who endanger the efficacy of the immigration system and public safety from those who will not." *Id.*, Pg.ID#5319. Assessing when detention becomes "prolonged," the court cited *Zadvydas* and concluded that "any presumption of reasonableness ends after six months." *Id.*, Pg.ID#5343. However, following *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003), which in lieu of a bright line rule required assessment of individual circumstances, the court allowed the Government to file evidence that bond hearings should not be provided because of a detainee's

particular circumstances. *Id.*, Pg.ID#5343-44, 5360-61. The court granted relief to both the Detained Final Order Subclass and the Mandatory Detention Subclass. *Id.*, Pg.ID#5345-46, 5359-61.

With respect to the Mandatory Detention Subclass's §1226 claim, the court agreed with Petitioners for two reasons. First, §1226(c) does not apply to individuals "adjudicating their cases for a second time, by way of a motion to reopen." *Id.*, Pg.ID#5339. Second, the "terms of §1226(c) plainly state that mandatory detention is only authorized for those who are taken into custody 'when ... released' from their criminal sentence." *Id.*, Pg.ID#5341. Section 1226(c) is inapplicable because Petitioners "were taken into custody years after their release from the criminal sentences." *Id.*

Turning to the remaining preliminary injunction factors, the court found that "Petitioners have unquestionably met their burden regarding irreparable harm," "the Government does not substantiate any claim that it will suffer any harm if enjoined," and bond hearings are in the public interest. *Id.*, Pg.ID#5346-47.

The court's order gave the Government three options for detainees whose incarceration exceeds six months: 1) release under supervision; 2) a bond hearing to determine if the individual is a flight or public safety risk; or 3) "objecti[ions] to the bond hearing for any specific detainee." *Id.*, Pg.ID#5360-61; *see also id.*, Pg.ID#5343-44. The court allowed the Government 30 days to select among these

options. *Id.*, Pg.ID#5360-61. To date, the Government has not objected to bond hearings in any individual case. It has instead elected option two: bond hearings.[2]

The district court ordered that the Government must prove flight risk or dangerousness by clear and convincing evidence. *Id.* ¶2, Pg.ID#5360-61. This heightened burden applies only to hearings held after prolonged detention. *Id.* The immigration judge may impose "appropriate conditions of release." Order ¶4, R.203, Pg.ID#5458-59.

The district court's implementation order clarifies additional relief available to the Mandatory Detention Subclass: under the §1226 Claim, regardless of how long subclass members have been detained, they are entitled to a bond hearing held under ordinary scheduling practices and the ordinary burden of proof for §1226(a) hearings. *Id.*, ¶8, Pg.ID#5459.

C. Immigration Judges Find Most Detainees Can Safely Be Released While Immigration Proceedings are Pending.

The Government did not seek a stay, and nearly all the bond hearings have occurred. As of early April, 117 detainees—more than half of the 227 who had bond hearings—were home with their families, most after payment of monetary bonds and under conditions of supervision. Ex. A, Schlanger Decl., ¶27, tbl.2. In 142 cases (63%), immigration judges found that the detainee does not pose a

[2] For subclass members whose detention first exceeds six months after January 2, the Government has 30 days to hold a bond hearing, object to a hearing, or release. Op., R.191, Pg.ID#5361.

danger and that either there is no flight risk or that any flight risk can be mitigated by bond. *Id.* Twenty-two detainees (10%) were ordered released on recognizance; for the other 120 (53%), bond amounts were set between $1,500 and $100,000. *Id.* Eighty-five (37%) were denied bond. *Id.* DHS appealed 10 bond grants; in each, DHS obtained a Board of Immigration Appeals (BIA) stay of the release order. *Id.*, ¶26. (At least two of these detainees were released and then voluntarily appeared to be redetained.[3]) There are 151 class members still detained. Eighty-five lost bond hearings, and 10 had their bond orders stayed. The others cannot afford bond, have not had hearings because they have not yet been detained 180 days, waived hearings or sought continuances, or are ineligible for hearings under the subclass definitions. *Id.*, ¶28.

FACTS

A. Petitioners Suffered Prolonged Detention Without Individualized Determinations Of Danger Or Flight Risk.

When the district court entered the preliminary injunction, nearly all detainees had been held for over six months without any determination that they posed a danger or flight risk. Schlanger Decl., ¶26, R.174-3, Pg.ID#4923.

[3] *See* Maze Decl. ¶¶4-11, 20-27, R.263-3, Pg.ID#6350-55; Bajoka Decl. ¶¶5-14, R.263-4, Pg.ID#6381-82.

1. Petitioners with Final Orders.

Prior to the injunction, Petitioners detained under §1231 were legally entitled to POCRs to determine whether detention beyond the 90-day removal period was justified. 8 C.F.R. §241.4(e)-(f). By regulation, those posing no danger or flight risk are to be released even if removal is reasonably foreseeable.[4] *Id.* §§241.4, 241.13(b)(1).

But the district court found that:

> there is strong evidence that the [POCR] reviews in our case were not undertaken in a good faith effort to detain only those who were flight and safety risks. Virtually every detainee who had a POCR review was denied release, and given a terse written statement that the Government was still interested in removing the detainee; there is no indication that any legitimate bond issue was even considered.

Op., R.191, Pg.ID#5345 n.12.

The case of **Jony Jarjiss**, a 57-year-old Michigan resident and Chaldean Christian, exemplifies that the POCRs were a sham. Mr. Jarjiss, who came to the U.S. in 1993 on a fiancé visa, did not marry his fiancé, and was ordered removed in 1996. His daughter and grandchildren are U.S. citizens. He was detained by ICE

[4] Among the factors supposed to be considered in these custody reviews—which are wholly administrative and do not provide for a hearing or appeal—are "ties to the United States such as the number of close relatives residing here lawfully"; whether the noncitizen "is a significant flight risk"; and "[a]ny other information that is probative of whether" the noncitizen is likely to "[a]djust to life in a community," "[e]ngage in future acts of violence," "[e]ngage in future criminal activity," pose a danger to themselves or others, or "violate the conditions of his or her release from immigration custody pending removal from the United States." 8 C.F.R. §§241.4(e)-(f), 241.13(b)(1), 241.13(g)(2).

for 11 months in 2000 and then released on a supervision order, with which he complied. He was not detained during the June ICE raids; knowing he would almost certainly be arrested, he reported for supervision in July and was taken into custody. His MTR was granted in April 2018; it could take over a year for his case to be finally decided. Despite the fact that he has no criminal history and turned himself in, ICE issued him a boilerplate POCR denial in October 2017, stating: "You have a final order of removal from the United States and ICE is actively pursuing your removal." As a result of the injunction, Mr. Jarjiss had a bond hearing on January 31, 2018, and was granted release on his own recognizance. Jarjiss Decl., R.138-14, Pg.ID#3500-03; Schlanger Decl. ¶33, R.138-2, Pg.ID#3409; Ex. A, tbl.5.

The government does not contest the district court's factual finding that the POCRs were not performed in good faith, and the record establishes that (1) some putative class members did not even get POCRs[5]; (2) the required procedures (*e.g.*, notice and an opportunity to respond) were not followed[6]; and (3) there was a uniform or all-but-uniform policy of pro-forma denial.[7] POCRs merely rubber-

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[5] *See* Al-Sokaini Decl. ¶¶13-17, R.138-3, Pg.ID#3414-17; Murad Decl. ¶15, R.138-15, Pg.ID#3509; Nissan Decl. ¶¶17-20, R.138-16, Pg.ID#3515.

[6] *See* Free Decl., ¶¶4-8, R.138-23, Pg.ID#3660-62.

[7] Petitioners collected 53 POCR decisions, of which 47 contain the boilerplate language, "You have a final order of removal from the United States and ICE is actively pursuing your removal." The remainder noted the person's criminal

stamped the Government's class-wide decision against release. ICE personnel specifically told several Petitioners and attorneys that the *Hamama* litigation relieved ICE of the obligation to conduct POCRs, and that the decision not to release *Hamama* detainees was made at ICE headquarters.[8]

2. Petitioners Whose MTRs Had Been Granted.

Prior to the injunction, approximately 50 class members whose MTRS were granted were being detained without any individualized determination of flight risk or dangerousness because they were allegedly subject to 8 U.S.C. §1226(c). Schlanger Decl., ¶¶5-12, R.174-3, Pg.ID#4917-19.

Two examples show how §1226(c) resulted in prolonged detention. **Atheer Ali** is a 41-year-old Michigan resident who has lived in the U.S. since 1992, having left Iraq at age 15; a family member there was kidnapped and beaten because he was Christian. Mr. Ali has a U.S.-citizen daughter. In 1996, he was convicted of theft-related offenses, and served his sentence in a "boot camp." He was ordered removed in 2004, but remained in the community under supervision. On June 11, 2017, Mr. Ali learned that ICE agents were looking for him; he called ICE to

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history but contain no finding of dangerousness or flight risk. Andrade Decl., ¶¶6-8, Exs. A-B, R.138-22, Pg.ID#3563-64, 3567-3621.

[8] *See* Yacou Decl. ¶7, R.138-25, Pg.ID#3676; Abraham Decl. ¶¶6, 11-12, 16, R.138-24, Pg.ID#3669, 3671, 3672; Al-Saedy Decl. ¶¶16-19, R.138-9, Pg.ID#3466; Al-Sokaini Decl. ¶¶14-16, R.138-3, Pg.ID#3415-16; Jahanaian Decl. ¶¶7-13, R.138-26, Pg.ID#3680; Free Decl. ¶¶4-5, 8-9, R.138-23, Pg.ID#3660-62; Al-Shimmary Decl. ¶11, R.138-33, Pg.ID#3731.

inform them of his whereabouts, knowing he would likely be arrested, which he was. While detained, he was forced to close his auto body shop, and his elderly mother went without needed care. On September 11, 2017, ICE issued him a boilerplate POCR denial, stating: "You have a final order of removal from the United States and ICE is actively pursuing your removal." Mr. Ali's MTR was granted in October 2017, but ICE continued to detain him. Ali Decl., R.138-10, Pg.ID#3471-75.

At a bond hearing on January 26, 2018, Mr. Ali was found not to be a danger and granted a $5000 bond. Ex. A, tbl.5. The Detroit Immigration Court subsequently granted Mr. Ali's asylum application. ICE has appealed.

Abbas Al-Sokaini is a 52-year-old father and grandfather who came to the U.S. more than 20 years ago as a refugee; he lived in Albuquerque, New Mexico, working three jobs to support his U.S. citizen family. He was arrested on June 20, 2017, based on a 2003 removal order he received after pleading no contest to two drug charges sixteen years ago—convictions for which he was not incarcerated. His deportation officer recommended release, because Mr. Al-Sokaini suffers from medical problems and because Iraq has not issued him travel documents. Nevertheless, in October 2017, Mr. Al-Sokaini received a boilerplate POCR denial, stating: "You have a final order of removal from the United States and ICE is actively pursuing your removal." The deportation officer told Mr. Al-Sokaini

that the decision came from "Washington." Al-Sokaini Decl., R.138-3, Pg.ID#3412-17.

As a result of the injunction, Mr. Al-Sokaini had a bond hearing on January 31, 2018 and was released on $1,500 bond. On March 1, 2018, his MTR was granted. Ex. A, tbl.5. Absent the injunction, ICE would likely subject him to mandatory detention under §1226(c), as it did for more than seven months in 2003-2004. Al-Sokaini Decl. ¶11, R.138-3, Pg.ID#3414.

B. Many Petitioners Have Been Successful In Immigration Court.

As of early April, 264 class members had filed MTRs; 138 had been granted, 12 had been finally denied, and 113 were pending. Thus the administrative grant rate for decided MTRs was 92%. Ex. A, ¶17. Twenty-five class members won on the merits in the immigration court, obtaining immigration relief or protection, including asylum; withholding and deferral under the Convention Against Torture; cancellation of removal; and termination of proceedings on grounds that the individual was not actually deportable. *Id.*, ¶¶19-20. Twenty-four lost. *Id.*, ¶19. Both ICE and class members have appealed some of these outcomes. *Id.* But for the district court's injunction, all would have remained incarcerated while their cases and any appeals were heard. *See* Abrutyn Decl. ¶¶12-19, R.138-18, Pg.ID#3526-29.

The named Petitioners have procedural postures very like the class as a whole. Of the 15 named Petitioners, 9 have succeeded in reopening their cases, and 6 have MTRs pending in the BIA. Petitioners Taymour and Ali have won their merits cases; Petitioner Hamad lost his claim for deferral under the Convention Against Torture, which is on appeal. Ex. A, tbl.5.

C. Absent the Injunction, Petitioners' Prolonged Detention Could Last Years.

The district court found that "[d]etention may stretch into years, as the immigration court proceedings and subsequent appeals wind their way to conclusion." Op., R.191, Pg.ID#5318. Some 60 class members are still awaiting an initial decision on their motions to reopen. Ex. A, ¶16, tbl.1. Currently, over 70% of cases pending in the BIA were filed over 6 months ago; there are over 40 cases where the MTR has been pending over 8 months. *Id.*, ¶22. For those who prevail on those motions—and so far over 90% have, *id.*, ¶17—"the merits proceeding will likely not conclude for several months or possibly years." Op., R.191, Pg.ID#5339**.** As the record shows, "if a detainee is denied at every stage of the litigation, from immigration judge to the court of appeals, the process can take nearly three years**."** *Id.*, Pg.ID#5332-34 (citing Table A, R.138, Pg.ID#3373-75.).

D. Detention is Not Necessary For Individuals Who Are Not a Flight Risk or Danger.

The "vast majority of [the detainees] were ordered removed to Iraq years ago (some decades ago)," but were then released because Iraq refused to accept repatriation. *Id.,* Pg.ID#5320-22. "[T]hey lived peaceably in their respective communities under orders of supervision—a point the Government does not contest." *Id.*, Pg.ID#5322. After release, they raised children, built businesses, and contributed to their communities; most were required to report to ICE only once a year. *See* Petitioner Decls., R.138-3 to 138-16, Pg.ID#3412-3516; Bajoka Decl. ¶¶3, 7–8, R.138-20, Pg.ID#3546-47.

ICE typically uses supervision orders for noncitizens who have final removal orders. *See* Abrutyn Decl. ¶¶21, 34, R.138-18, Pg.ID#3529, 3532-33. Restrictions like reporting or electronic monitoring are available and cost-effective. Brané Decl. ¶¶10-27, R.138-19, Pg.ID#3538-44. Individuals under supervision for an extended period are likely compliant, because otherwise they would have been redetained. *Id.* ¶14, R.138-18, Pg.ID#3540-41.

ICE presented no evidence that revocation of class members' supervision orders was needed to prevent flight or danger to the community.[9] Not only had

[9] ICE did not, as the regulations require, provide notice of the reasons for revoking the supervision orders, 8 C.F.R. § 241.13(i)(3), although after the fact, some Petitioners received boilerplate letters that revocation was due to their failure to obtain Iraqi travel documents; in fact they had unsuccessfully tried to obtain

detainees been complying with their supervision orders and living safely in the community for years, but many of them reported for supervision after the mass arrests or affirmatively contacted ICE knowing that they were likely to be taken into custody.[10]

ICE has not detained all 1,400 Iraqis who have final orders, and attorneys who represent both detained class members and non-detained Iraqis report no discernable difference between the two groups.[11] If and when individuals lose their cases and if and when ICE is actually able to deport them, they can then report to ICE, rather than be held for years before removal is possible.

E. Petitioners And Their Families Were Suffering Severe Harm.

The district court found that detention "has inflicted grave harm." Op., R.191, Pg.ID#5346. While class members "languish[] in detention facilities," they are "deprived of the intimacy of their families, the fellowship of their communities, and the economic opportunity to provide for themselves and their loved ones." *Id.*, Pg.ID#5318. Detainees have lost businesses and jobs; they have been assaulted;

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such documents. *See, e.g.*, Al-Dilaimi Decl. ¶¶11-13, R.138-7, Pg.ID#3452; Al-Sokaini Decl. ¶14, R.138-3, Pg.ID#3415-16; Andrade Decl. ¶11, Ex. C, R.138-22, Pg.ID#3565, 3622-46.

[10] *See* Al-Issawi Decl. ¶¶9-10, R.138-18, Pg.ID#3459; Ali Decl. ¶¶9-15, R.138-10, Pg.ID#3472-73; Derywosh Decl. ¶10, R.138-12, Pg.ID#3487-88; Jarjiss Decl. ¶¶7-12, 20, R.138-14, Pg.ID#3501, 3502-03; Murad Decl. ¶¶11-12, R.138-15, Pg.ID#3508; Abraham Decl. ¶5, R.138-24, Pg.ID#3669.

[11] *See* Abrutyn Decl. ¶30, R.138-18, Pg.ID#3531; Abraham Decl. ¶¶5, 12, R.138-24, Pg.ID#3669, 3671.

and their medical needs have gone unmet. *Id.*, Pg.ID#5346. "Immigration detention has been proven to traumatize vulnerable populations, jeopardize the basic health and safety of those detained, and undermine meaningful access to counsel in isolated, remote facilities;" it undermines detainees' physical and mental health and harms their families. Brané Decl. ¶¶10-12, R.138-19, Pg.ID#3538-40. For example, Mr. Al-Dilaimi suffered significant medical deterioration, but ICE did not respond to his request for humanitarian release. Al-Dilaimi Decl. ¶¶16, 20-25 R.138-7, Pg.ID#3453-55. Mr. Murad, who has limited mobility, was confined to a wheelchair and suffered panic attacks. Murad Decl. ¶¶5-10, R.138-15, Pg.ID#3507-08. Mr. Al-Saedy was assaulted and injured.[12] Al-Saedy Decl. ¶¶19-22, R.138-9, Pg.ID#3466-67.

The toll on detainees' families was likewise severe, as children suffered the loss of a parent, wives the loss of a husband, and elderly parents the loss of a care-giving son.[13] Many detainees were their family's primary source of income; many of those families have struggled, even losing their homes or businesses.[14]

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[12] *See also* Hamama Decl. ¶¶27-30, R.138-6, Pg.ID#3447-48; Jarjiss Decl. ¶23, R.138-14, Pg.ID#3503; Nissan Decl. ¶¶13-15, R.138-16, Pg.ID#3514; Shaba Decl. ¶¶24-26, R.138-5, Pg.ID#3434-35.

[13] *See, e.g.*, Al-Dilaimi Decl. ¶¶25-27, R.138-7, Pg.ID#3454-55; Barash Decl. ¶¶6-7, 17-18, R.138-11, Pg.ID#3478-80 (unable to care and provide for his disabled child); Ali Decl., ¶22, R.138-10, Pg.ID#3474.

[14] Taymour Decl. ¶¶6, 18-19, R.138-4, Pg.ID#3423, 3426-27; Hamama Decl. ¶¶19-26, R.138-6, Pg.ID#3443-46; Al-Dilaimi Decl. ¶26, R.138-7, Pg.ID#3455;

SUMMARY OF ARGUMENT

The district court found that all four preliminary injunction factors—(1) likelihood of success on the merits, (2) irreparable harm to Petitioners (3) the balance of equities, and (4) the public interest—support Petitioners. The Government's challenge on appeal is extremely narrow. It addresses only one of the four factors, success on the merits, leaving undisturbed the findings on the other three. And on the factor the Government does challenge, it complains of only one of two alternative legal grounds on which the district court ruled.

The court found Petitioners likely to prevail on both their constitutional and statutory claims. The Government, however, does not address the constitutional due process claim, and expressly says it should be dealt with by the district court after remand. Appellants' Br. at 46. The district court's unchallenged findings and holdings are independently sufficient to support the preliminary injunction.

The Government's limited argument is that the district court erred in its constructions of 8 U.S.C. §§1226 and 1231. Specifically, the Government argues that §1231 cannot be read to permit bond hearings after detention becomes prolonged, and that §1226(c) covers persons in reopened removal proceedings and persons not taken into immigration custody when released from criminal custody. The overarching theme of the Government's statutory arguments is that *Jennings v.*

Ali Decl. ¶23, R.138-10, Pg.ID#3474; Barash Decl. ¶¶7, 16-17, R.138-11, Pg.ID#3479-80; Hamad Decl. ¶22, R.138-13, Pg.ID#3496.

Rodriguez, 138 S.Ct. 830 (2018), has either entirely foreclosed Petitioners' claims or so altered the legal landscape as to have the same effect.

Because *Jennings* post-dates the injunction, the most appropriate course for decision on the statutory issues is to remand to allow the lower court to serve its function of first view, reserving to this Court its institutional role of review.

Should this Court choose to itself address the statutory issues, affirmance is the correct outcome. Section 1231 was not at issue in *Jennings*, except insomuch as the *Jennings* majority contrasted its more permissive and ambiguous language with the mandatory language of the statutes before the Court. 138 S.Ct. at 844. Prolonged civil detention without any meaningful opportunity to adjudicate release before an independent adjudicator raises significant due process concerns, and §1231 is reasonably read to require such a hearing. The district court did not abuse its discretion in granting a preliminary injunction, especially where the irreparable harm to Petitioners is substantial and unrebutted, and where there is a strong likelihood that Petitioners' construction of §1231 will prevail.

The district court also properly construed §1226(c)—which mandates immigration detention of certain noncitizens "when … released" from criminal custody—not to apply here. Class members had been living in the community for years, and purportedly fell under §1226(c) only because they *won* motions to reopen their removal proceedings to present claims that they will be tortured or

killed if deported to Iraq. The "when released" language of §1226(c) is properly understood to require that immigration detention commence immediately after criminal detention, not years later and not in reopened proceedings.

Finally, the Government challenges the remedy. The district court gave the Government three options:

- Release;
- Hold a bond hearing;
- Explain to the court why a particular individual should not receive a hearing.

The district court has broad equitable/remedial powers. To be lawful, immigration detention must serve the purposes of protecting the community and preventing flight. The bond hearings focused on precisely those issues. The six-month limit on detention without a hearing was reasonable, and parallels analogous situations addressed by the Supreme Court and other courts, including *Zadvydas*, 533 U.S. 678. The clear-and-convincing standard is likewise supported by other cases involving civil detention.

ARGUMENT

Standard of Review

Preliminary injunctions are governed by the familiar four-factor test, examining (1) likelihood of success on the merits, (2) irreparable harm, (3) balance of equities, and (4) the public interest. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). These factors reflect the "concerns [that] arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." *Nken v. Holder*, 556 U.S. 418, 434 (2009).

"The first two factors of the traditional standard are the most critical." *Id.* As this Court has explained,

> the purpose of the [balance of harms] test is ... to underscore the flexibility which traditionally has characterized the law of equity. It permits the district court, in its discretion, to grant a preliminary injunction even where the plaintiff fails to show a strong or substantial probability of ultimate success on the merits of his claim, but where he at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if the injunction is issued.

Jones v. Caruso, 569 F.3d 258, 277 (6th Cir. 2009). "[T]he degree of likelihood of success required may depend on the strength of the other factors." *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985). Thus, "the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the movants will suffer." *N.E. Ohio Coal. for Homeless v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006). *Cf. Family Tr. Found.*

of Ky., Inc. v. Ky. Judicial Conduct Comm'n, 388 F.3d 224, 227 (6th Cir. 2004) (applying inversely proportional test for likelihood of success and irreparable harm in stay context).

To demonstrate a likelihood of success, the movant must show, "at a minimum, serious questions going to the merits." *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016). It lies within the court's discretion to grant a preliminary injunction "where the plaintiff fails to show a strong or substantial probability of ultimate success on the merits of his claim, but where he at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant." *DeLorean Motor Co.*, 755 F.2d at 1229.

Factual findings underlying a preliminary injunction are reviewed for clear error, while legal conclusions are reviewed de novo. *In re Eagle-Picher Indus., Inc.*, 963 F.2d 855, 858 (6th Cir. 1992). "[T]he district court's ultimate determination as to whether the four preliminary injunction factors weigh in favor of granting or denying preliminary injunctive relief" is reviewed for abuse of discretion. *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc). Under this "highly deferential" standard, the reviewing court does "not decide whether we would grant a preliminary injunction if we were

acting in the place of the district court." *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000).

I. Appellants Have Not Challenged the District Court's Decision That Three Preliminary Injunction Factors Overwhelmingly Favor Petitioners.

As Appellant, the Government chose which issues to advance and which to leave unchallenged. Here the district court's conclusions with respect to the second, third, and fourth preliminary injunction factors—irreparable harm, balance of equities, and the public interest—are uncontested. The Government does not even discuss them, much less attempt to argue that the district court erred in finding that they overwhelmingly support the detainees.[15] While these issues are not challenged on appeal, they represent three of the four factors to be weighed, and this Court cannot evaluate the injunction under the abuse of discretion standard without considering all four.

The district court found that "Petitioners have unquestionably met their burden regarding irreparable harm." Op., R.191, Pg.ID#5346. Detention harms physical and mental health, financial stability, family relationships, and ability to

[15] The Court should not countenance any attempt by the Government to challenge these issues for the first time in reply. Issues not raised in the opening brief are waived. *See Aetna Cas. and Sur. Co. v. Leahey Constr. Co.*, 219 F.3d 519, 545 (6th Cir. 2000) (issue raised for the first time in reply brief should not be considered because appellee had no chance to respond); *Operating Eng'rs Local 324 Health Care Plan v. G & W Constr. Co.*, 783 F.3d 1045, 1057 (6th Cir. 2015) ("[I]t is not our function to craft an appellant's arguments.").

fight immigration cases. *See* Facts, Parts A-F, *supra*. To languish in jail, removed from a life built over years, is the very definition of irreparable harm. *See, e.g.*, *United States v. Montalvo-Murillo*, 495 U.S. 711, 723 (1990) (describing "magnitude of the injury" that detention inflicts)(Stevens, J., dissenting); *United States v. Bogle*, 855 F.2d 707, 710-11 (11th Cir. 1998) ("[u]nnecessary deprivation of liberty clearly constitutes irreparable harm."); *Grodzki v. Reno*, 950 F.Supp. 339, 342 (N.D. Ga. 1996) (detention of permanent resident "without affording him an individualized bond determination hearing [] constitutes irreparable injury").

The court further found that the "[t]he balance of equities tips decidedly in favor of preliminary relief." Op., R.191, Pg.ID#5346. Without an injunction, detainees would suffer grave harm, while the Government, in contrast, "does not substantiate any claim that it will suffer any harm if enjoined." *Id.*, Pg.ID#5346-47. The Government has ample alternatives short of detention to ensure presence at removal proceedings; supervision programs are effective at ensuring compliance at significantly less cost than wholesale detention.[16] The relief merely allows class members a hearing where an immigration judge *considers* release from prolonged detention under necessary supervision (and the Government can object to even such hearings). Immigration judges, as the record here shows, are fully capable of

[16] Immigration detention is expensive, averaging $133-319 per day, depending on the type of facility. Brané Decl. ¶13, R.138-19, Pg.ID#3540. By contrast, alternatives to detention cost from 17 cents to $44 a day. *Id.*

vetting flight risk and danger, rejecting release where release is not warranted, and imposing conditions to mitigate any flight risk or danger. *See* Background, Part C, *supra*.

Finally, the public interest favors Petitioners because "allowing bond hearings for those who have been subjected to prolonged detention is in keeping with the core value of liberty our Constitution was designed to protect." Op., R.191, Pg.ID#5347. The public has an interest in ensuring "that those whose right to remain in this country is yet to be determined must not undermine the administration of justice by fleeing before that determination is made, nor endanger the public while that process unfolds." *Id.*, Pg.ID#5319. But the court found that "those interests can be served by a bond hearing process before immigration judges, who can sort out those who endanger the efficacy of the immigration system and public safety from those who will not." *Id.* The public has no interest in prolonged detention of those who are neither a danger nor a flight risk, at a cost of one million dollars a month, Schultz Decl. ¶8, R.81-4, Pg.ID#2008.

The Government challenges only the first factor—likelihood of success on the merits. The likelihood required "is inversely proportional to the amount of irreparable injury." *Blackwell*, 467 F.3d at 1009. Here the injury could scarcely be more severe or more irreparable. Appellees have demonstrated "irreparable harm

which decidedly outweighs any potential harm to the defendant." *DeLorean Motor Co.*, 755 F.2d at 1229.

II. The District Court's Constitutional Rulings, Which Were Not Appealed, Provide an Independent Basis for the Preliminary Injunction.

The Government challenges only the district court's holding that bond hearings are supported by the relevant statutes. *See, e.g.*, Appellants' Br. at 25, 28-29. The Government expressly disavows any request that this Court rule on the constitutional issues, which it says should be addressed on remand. *Id.* at 46.[17]

But Petitioners pursued preliminary relief on two grounds: constitutional and statutory. Petitioners' Br., R.138, Pg.ID#3384-88. They argued that "both the Due Process Clause, and the immigration statute construed in light of due process concerns, require that Petitioners be afforded individualized determinations by an impartial adjudicator that their continued detention is justified based on danger or flight risk." *Id.*, Pg.ID#3386. The district court held that "Petitioners have demonstrated a probability of success both as to their statutory *and constitutional* arguments regarding their prolonged detention claim…." Op., R.191, Pg.ID#5345 (emphasis added). It noted that the relief sought was "consistent with the demands

[17] The Government likewise fails to dispute predicate facts underlying that due process holding, including that detainees face incarceration that "may stretch into years" with absolutely no procedural protections. Op., R.191, Pg.ID#5318. Those held under §1226(c) were denied any review whatsoever. For those held under §1231, POCRs "were not undertaken in a good faith effort to detain only those who were flight and safety risks." Op., R.191, Pg.ID#5344-45 n.12.

of our Constitution—that no person should be restrained in his or her liberty beyond what is reasonably necessary to achieve a legitimate governmental objective." *Id.*, Pg.ID#5319.

Given that (1) the Government has not contested three of the four factors, (2) the district court ruled in Petitioners' favor on the constitutional issues, and that constitutional decision provides an independent ground for the preliminary injunction, (3) the constitutional issues are not properly before this Court because the Government failed to present them, and (4) this Court's appropriate role is "review ... not first view", *Jennings*, 138 S.Ct. at 851, this Court should leave the injunction in effect if it remands for any additional development.[18]

If the Government wishes to challenge the district court's constitutional rulings in the ongoing litigation, it can of course do so. *See*, *e.g.*, *William G. Wilcox, D.O., P.C. Emps.' Defined Benefit Pension Tr. v. United States*, 888 F.2d 1111, 1114 (6th Cir. 1989) (generally "decisions on preliminary injunctions do not constitute law of the case"). The court ruled on a preliminary basis, and made no

[18] The Government also seeks "instructions" to the district court to consider the operation of 8 U.S.C. §1252(f)(1), and to "take a hard look" at class certification more generally. Appellants' Br. at 48-49. The Government misreads §1252(f)(1) and vastly overreads the *Jennings* Court's cautionary words on class certification. In any event, Appellants did not seek interlocutory appeal of class certification, *see* Fed. R. Civ. P. 23(f), so the class issues are not before this Court. Of course on remand the Government can, if it chooses, ask the district court to reconsider class certification; no special instructions from this Court are necessary.

final decision on the merits: this issue will, of necessity, be addressed again in order to reach a final judgment. What matters for present purposes is that the court's preliminary injunction was based on its balancing of the injunction factors, including its constitutional analysis, and that the Government has affirmatively stated that the constitutional issues are not before this Court.[19]

III. If the Statutory Claims Need to Be Addressed at All, This Court Should Remand Them to the District Court To Analyze the Impact of *Jennings v. Rodriguez* in the First Instance.

Because the constitutional claims are unappealed and independently sufficient to support the injunction, there is no reason for this Court even to consider the statutory claims; it should simply affirm. However, should this Court disagree, it has two options: It can remand the statutory claims to the district court to analyze the impact of the Supreme Court's intervening decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). Or it can itself review the statutory claims to

[19] If the constitutional issue *were* before this Court, the proper course would be for this Court to affirm the injunction without deciding the constitutional question. Under *Ashcroft v. ACLU*, 542 U.S. 656, 664-65 (2004), for close constitutional questions, reviewing courts should uphold preliminary injunctions and remand for final adjudication. An appellate court "must send the case back to the district court with the preliminary injunction intact" whenever "the district court's analysis of the preliminary injunction factors reflects a reasonable conclusion about a close question of constitutional law, and contains no other legal error." *Gordon v. Holder*, 721 F.3d 638, 644 (D.C. Cir. 2013). "[E]ven though Congress has provided for interlocutory review of preliminary injunctions, premature resolution of difficult constitutional questions is undesirable." *Id.* at 644-45. *See also Red Earth LLC v. United States*, 657 F.3d 138, 145 (2d Cir. 2013) ("Because the district court reached a reasonable conclusion on a close question of law, there is no need for us to decide the merits at this preliminary stage.").

determine if they have a sufficient likelihood of success. Remand is more appropriate.

The Government argues that the district court's rulings on the statutory claims are undermined by *Jennings*. If this Court believes the balance of the four injunction factors could come out differently after that decision—even though three factors concededly and overwhelmingly favor the Petitioners and the injunction's constitutional basis is not challenged—then it should remand so that the district court can reassess the first factor and then re-exercise its discretion in weighing it against the others. *See NAACP v. N. Hudson Reg'l Fire & Rescue*, 367 F. App'x 297 (3d Cir. 2010) (summarily remanding with preliminary injunction intact for district court to consider implications of a recent Supreme Court decision).

The district court made three statutory rulings. The relevance rulings of *Jennings*—which interpreted only one of the two INA provisions at issue in this case, 8 U.S.C. §1226(c)—to those rulings varies:

(1) As a matter of constitutional avoidance, §1226(c) precludes prolonged detention absent bond hearings. *See* Op., R.191, Pg.ID#5335-37. *Jennings* rejected this reading of §1226(c). 138 S. Ct. at 846-47.

(2) As a matter of constitutional avoidance, §1231 similarly precludes prolonged detention absent bond hearings. *See* Op., R.191, Pg.ID#5335-37. This

statute was not at issue in *Jennings*, and the interpretive question is substantially different. However, *Jennings*' analysis is instructive on both the constitutional avoidance canon and in contrasting the statutes that were at issue with §1231. See 138 S.Ct. at 842-44.

(3) Section 1226(c) does not apply to reopened immigration cases and does not authorize detention of individuals who are not taken into immigration custody "when ... released" from criminal custody. Op., R.191, Pg.ID#5341. Again, *Jennings*' analysis of the constitutional avoidance canon is helpful to the correct statutory approach here.

Jennings itself ended with a remand; the Supreme Court explained that "consistent with [its] role as a court of review, not of first view," the lower court should consider the constitutional claims "in the first instance," 138 S.Ct. at 851. "[R]eview, not ... first view" is similarly this Court's assigned role. The district court's analysis would undoubtedly be sharper after a remand to consider *Jennings*.

If this Court remands, the preliminary injunction should remain in place. The Government concedes that more development of the constitutional issues is needed, regardless of how the statutory issues are resolved.[20] Appellants' Br. at 46.

[20] While Petitioners believe that the lower court's constitutional rulings are entirely sufficient, if this Court believes clearer delineation between the constitutional and constitutional avoidance rulings is needed, any remand should cover both.

It nevertheless argues that the injunction should be lifted first, followed by a remand. That is both inequitable and impractical. The Government has now conducted the vast majority of bond hearings. Those individuals who lost remain detained; those who won can be redetained if they violate the conditions of their release. Neither the Government nor the Petitioners will benefit from a wave of rearrests, which might well be followed by a new round of bond hearings if the district court, on remand, again finds that hearings are legally required. The injunction should remain in place during a remand, unless and until the district court actually changes course.

IV. Petitioners Are Substantially Likely to Prevail On Their Statutory Claims.

As discussed in Argument, Part I, *supra*, given the district court's unappealed findings on the other three injunction factors, this Court must affirm if there are "serious questions going to the merits." *Dodds*, 845 F.3d at 221. Here, Petitioners easily satisfy that standard and are substantially likely to prevail on the two statutory issues on appeal. First, §1231(a)(6)—the post-order detention statute—is appropriately subject to the limiting construction adopted by the district court. Second, §1226(c) does not authorize the mandatory detention of individuals in reopened proceedings if they were not detained "when ... released" from criminal custody but, rather, later.

A. Section 1231 Must Be Interpreted to Require a Bond Hearing When Detention Becomes Prolonged.

In *Jennings v. Rodriguez*, the Supreme Court warned against too broad an application of the constitutional avoidance canon. *Jennings* reaffirmed, however, the "cardinal principle" that "[w]hen a serious doubt is raised about the constitutionality of an act of Congress," the court must "ascertain whether a construction of the statute is fairly possible by which the question may be avoided." 130 S. Ct. at 842. The *Jennings* Court expressly contrasted §1231—which it said was ambiguous and could be read to contain an "implicit time limit on detention," *id.* at 844—to the statutes before it, which it found unambiguous. *Jennings* therefore only strengthens the district court's statutory reading, which is certainly "fairly possible," *id*. at 842, and must therefore must be adopted to avoid the constitutional issues.

1. Serious Constitutional Issues Are Raised by Prolonged Immigration Detention Without Procedural Protections.

"In our society liberty is the norm," and detention is the "carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690. "The bar for involuntarily removing someone from society against her will is high—quite understandably and quite legitimately so."

Howell v. Hodge, 710 F.3d 381, 385 (6th Cir. 2013). There is a "heavy presumption" against such "a massive curtailment of liberty." *Id.* at 385, 387. While the Constitution permits limited use of detention for non-punitive civil purposes, confinement must (1) serve a special, narrow, nonpunitive purpose that outweighs the individual's interest in liberty; and (2) be accompanied by adequate procedural safeguards to ensure that it actually serves that purpose.

First, because "civil commitment for any purpose constitutes a significant deprivation of liberty," it "requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979). Substantively that means that "the nature and duration of commitment [must] bear some reasonable relation to the purpose for which the individual is committed," *Jackson v. Indiana*, 406 U.S. 715, 738 (1972), and that use of detention may not be excessive in relation to that purpose, *Salerno*, 481 U.S. at 747. *See also Foucha v. Louisiana*, 504 U.S. 71, 88 (1992) (opinion of O'Connor, J.) (requiring a "necessary connection between the nature and purposes of confinement"). In addition, the Supreme Court's focus on detention length in *Demore* and *Zadvydas* exemplifies the common-sense notion that as detention length grows, greater justification is required to sustain it. *Zadvydas*, 533 U.S. at 701; *Demore*, 538 U.S. at 529.

Second, due process requires the use of "constitutionally adequate procedures to establish the grounds for … confinement." *Foucha*, 504 U.S. at 79.

To ensure that civil detention serves its non-punitive purpose and does not become punishment without trial, "proper procedures and evidentiary standards" must be employed. *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997). The Supreme Court has repeatedly insisted that due process allows civil detention only if the detaining authority makes an individualized showing, before an independent adjudicator, that the deprivation of liberty is justified in each particular case. *See, e.g.*, *Salerno*, 481 U.S. at 742 (pretrial detention); *Foucha*, 504 U.S. at 77-83 (insanity acquittees); *Addington*, 441 U.S. at 425-27 (mentally ill); *Jackson*, 406 U.S. at 738 (individuals incompetent to stand trial).

Demore v. Kim carved out a narrow exception to this requirement, upholding the constitutionality of §1226(c)'s mandatory detention provisions for noncitizens pending removal proceedings who are deportable based on certain crimes. However, the *Demore* Court emphasized the "brief" duration of such detention—typically only one-and-a-half months for cases without BIA appeals and five months for the small minority of cases that were appealed. 538 U.S. at 513, 523, 530. The Court held that this "limited" period of mandatory detention—of individuals who had conceded deportability—–satisfied due process because it was reasonably related to the purpose of preventing danger and flight. *Id.* at 528-29. Concurring, Justice Kennedy stated that if detention were to become unreasonably prolonged, due process would require a bond hearing. *Id.* at 532-33.

Following *Zadvydas* and *Demore*, every Court of Appeals to address the question has agreed that prolonged detention without a bond hearing raises serious constitutional problems. *See Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 233, 235 (3d Cir. 2011) ("[W]hen detention becomes unreasonable, the Due Process Clause demands a hearing."); *Sopo v. U.S. Attorney Gen.*, 825 F.3d 1199, 1213 (11th Cir. 2016) (unreasonably prolonged detention without a hearing "patently raises serious constitutional concerns"); *Reid v. Donelan*, 819 F.3d 486, 494 (1st Cir. 2016) ("the concept of a categorical, mandatory, and indeterminate detention raises serious constitutional concerns"); *Lora v. Shanahan*, 804 F.3d 601, 606 (2d Cir. 2015) ("mandatory detention for longer than six months without a bond hearing affronts due process"), *vacated as moot, Shanahan v. Lora*, No. 15-1205, 2018 WL 1143819, at *1 (U.S. Mar. 5, 2018); *Rodriguez v. Robbins*, 804 F.3d 1060, 1069 (9th Cir. 2015) ("prolonged detention of an alien without an individual determination of his dangerousness or flight risk would be constitutionally doubtful"), *rev'd sub nom. Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

In *Ly v. Hansen*, 351 F.3d 263, 270 (6th Cir. 2003), this Court avoided the constitutional question and construed §1226(c) "to include an implicit requirement that removal proceedings be concluded within a reasonable time." The Court noted the constitutional underpinning: if §1226 were not interpreted to require that

"removal proceedings be concluded within a reasonable time," "additional process would be required." 351 F.3d at 273.

The Supreme Court's most recent immigration detention decision is *Jennings.* It rejected such a limiting construction of §1226(c) and of another detention provision, §1225. However, it did so based *not* on a finding that prolonged detention without a hearing raises no constitutional problems, but rather because the plain statutory language foreclosed any limiting construction. Without previewing the due process issue at all, the Court remanded for the Ninth Circuit to address §1226(c)'s constitutionality as applied to prolonged detention. The dissent expressed its view that "an interpretation of the statute before us that would deny bail proceedings where detention is prolonged would likely mean that the statute violates the Constitution." *Id.* at 869 (Breyer, J., dissenting). The Supreme Court's decision to remand—like this Court's analysis in *Ly* and the similar analysis of the other circuits—underscores the substantiality of the due process issue. Accordingly *Jennings* confirms that constitutional avoidance is necessary here, if—as the next section demonstrates—such avoidance is possible.

2. It is "Fairly Possible" To Construe Section 1231 To Avoid the Constitutional Question.

Section 1231(a)(6) reads:

> An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney

> General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

The language is permissive—a noncitizen "*may be detained* beyond the removal period." *Id*. (emphasis added). The *Jennings* Court explained that, in contrast to the detention provisions at issue there—§§1225 and 1226(c), which the Court found unambiguously "mandate detention ... until certain proceedings have concluded"—§1231(a)(6)'s "may be detained" language is ambiguous: "'[M]ay' ... 'suggests discretion' but not necessarily 'unlimited discretion. In that respect the word 'may' is ambiguous.'" *Jennings*, 138 S.Ct. at 843 (quoting *Zadvydas*, 533 U.S. at 697). *See also Ramos v. Sessions*, No. 18-cv-00413-JST, 2018 WL 1317276, at *3 (N.D. Cal. Mar. 13, 2018) (*Jennings* concluded that the text of §1231(a)(6) "left space for constitutional avoidance" and "left untouched the Ninth Circuit's requirement [in *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011)] of such hearings for immigrants detained under section 1231(a)(6)").[21]

The government itself has construed §1231's language as permissive, allowing release of individuals who demonstrate lack of danger and flight risk. This construction underlies 8 C.F.R. §241.5(b), which provides a constitutionally

[21] *Accord Borjas-Calix v. Sessions*, No. 16-cv-00685-TUC-DCB, 2018 WL 1428154 at *6 (D. Ariz. Mar. 22, 2018) (holding, after *Jennings*, that "*Diouf* remains good law"); *Baños v. Asher*, 16-cv-1454-JLR, 2018 WL 1617706, at *2 (W.D. Wash. Apr. 4, 2018).

inadequate (and, in this case, sham) administrative review process.[22] *See Diouf*, 634 F.3d at 1089 (citing administrative bond regulation, 8 C.F.R. §241.5, to hold that release on bond is authorized under §1231(a)(6)). Just as ICE itself has read the statutory text to allow POCRs after 90 days, that text can fairly be read to condition prolonged detention on constitutionally adequate procedures testing detention's justification.

Moreover, unlike §1225 and §1226(c), §1231(a)(6) contains no language expressly limiting release from detention to a certain procedure. *See Jennings*, 138 S.Ct. at 844 (the "express exception to detention [under §1225(b)] implies that there are no *other* circumstances under which aliens detained under §1225(b) may be released ... preclud[ing] the sort of implicit time limit on detention that [the Court] found in *Zadvydas*"); *id.* at 847 (discussing provisions in §1226(c) which "impose[] an affirmative *prohibition* on releasing detained aliens under any other conditions").[23]

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[22] The Government suggests that the POCRs, under this regulation, "constitute sufficient process." Appellants' Br. at 34. But the Government fails to show that the district court clearly erred in its factual finding that in this case those reviews were not done in good faith. *See* Facts, Part A.1, *supra*.

[23] The Government argues that the statutory requirement that individuals released from §1231 detention be subject to "terms of supervision" should be read as a comparable limitation on any other release procedure such as bond hearings. Appellants' Br. at 29-30. ICE's own regulations belie this litigation position, specifically providing for bond hearings for §1231 detainees (in circumstances not at issue here, when removal is not significantly likely in the reasonably foreseeable

Unlike §1225(b) and §1226(c), which *Jennings* found unambiguously "mandate detention ... until certain proceedings have concluded," §1231(a)(6) was held, in *Zadvydas*, to be ambiguous with respect to the length of detention it authorizes. In light of the serious constitutional problems that would be posed if the statute were read to authorize indefinite detention, the Court clarified that the statute authorized detention only for the period of time reasonably necessary to effectuate removal. *Zadvydas*, 533 U.S. at 701. The Government argues that *Zadvydas*'s rule—that §1231(a)(6) does not authorize post-final-order detention if removal is not significantly likely in the reasonably foreseeable future—is the *only* limit on such detention. *See* Appellants' Br. at 2. But the Government offers no justification whatsoever for that argument, and *Zadvydas*'s own reasoning belies it. *Zadvydas* establishes that the text of §1231(a)(6) is sufficiently ambiguous as to Congress' intended term of detention that the constitutional avoidance canon is appropriately invoked. Here, the constitutional doubt is significant, and therefore this Court should affirm the district court's construction of §1231(a)(6) to require that the Government justify prolonged detention at a hearing conducted by an independent decision-maker. *See Diouf*, 634 F.3d at 1092. Certainly the issues are

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future). *See* 8 C.F.R. §§241.14(g). And there is nothing incompatible with providing bond hearings to determine who should be released from prolonged detention and then requiring that release be subject to conditions of supervision; this has, indeed, been done in this very case. Exh. A, ¶25.

sufficiently substantial to make the preliminary injunction an appropriate exercise of discretion.

B. Section 1226(a), Not 1226(c), Applies to Noncitizens With Reopened Cases Long Ago Released Into the Community.

Pre-final-order class members, *i.e.*, those who have won MTRs, are almost all detained under §1226. Subsection 1226(a) provides that such detainees are eligible for bond hearings "[e]xcept as provided in subsection (c)." The district court correctly found that this exception does not cover detention of the Mandatory Detention Subclass because §1226(c) reaches only noncitizens whom ICE detains "when [they are] released" from criminal custody, and also does not apply to reopened proceedings. Op., R.191, Pg.ID#5337-41. Therefore, class members who were detained after living in the community for years or decades and who have now reopened their cases are held under §1226(a) and accordingly eligible for standard immigration bond hearings.[24]

Section 1226(c)(1) provides:

> The Attorney General shall take into custody any alien who [meets criteria (A)-(D), not contested here] *when the alien is released*, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

[24] The Government focuses on *Jennings'* conclusion that "§1226(c) mandates detention of any alien falling within its scope," 138 S.Ct. at 847, ignoring the threshold question whether these detainees "fall[] within its scope."

(Emphasis added.) Section 1226(c)(2) goes on to prohibit the release of "an alien described in paragraph (1)…."

As two courts of appeals and numerous district courts have held, §1226(c) "unambiguously imposes mandatory detention without bond only on those aliens taken by the [Secretary] into immigration custody 'when [they are] released' from criminal custody." *Preap v. Johnson*, 831 F.3d 1193, 1197 (9th Cir. 2016), *cert. granted. sub nom. Nielsen v. Preap*, No. 16-1363, 2018 WL 1369139, at *1 (U.S. Mar. 19, 2018); *accord Castañeda v. Souza*, 810 F.3d 15 (1st Cir. 2015) (affirming judgment below by evenly divided en banc court) (opinion of Barron, J.).[25] As First Circuit Judge Barron explained:

> the timing word 'when' is best read to impose an outer limit on the exception to the categorical bar to discretionary release carved out by §1226(c). In consequence, aliens like petitioners, who due to the unexplained years-long gap between their criminal custody and their immigration custody have had the opportunity to re-establish community ties, are not subject to the bar to release set forth in (c). They are subject instead to the default rule of discretionary release set forth in (a).

Castañeda, 810 F.3d at 41-42.

The Government's view, set forth in *In re Rojas*, 23 I. & N. Dec. 117, 121 (B.I.A. 2001), depends on an arbitrary and unpersuasive set of interpretive moves. First, the Government reads §1226(c)(2)'s reference to "an alien described in

[25] *But see Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015); *Sylvain v. Attorney Gen. of U.S.*, 714 F.3d 150 (3d Cir. 2013); *Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012); *Olmos v. Holder*, 780 F.3d 1313 (10th Cir. 2015).

paragraph (1)" to encompass only *part* of paragraph 1 (subparagraphs A to D), excluding, without textual or other warrant, the "when ... released" clause. *See Rojas*, 23 I. & N. Dec. at 125. Had Congress wanted to bar release of any noncitizen who had committed a predicate act without regard to whether they had been released long ago and were now back living with their families, Congress could simply have required the mandatory detention of "an alien described in subparagraphs (1)(A)-(D)." "We must presume that Congress selected its language deliberately, thus intending that 'an alien described in paragraph (1)' is just that—*i.e.* an alien who committed a covered offense *and* who was taken into immigration custody 'when ... released.'" *Preap*, 831 F.3d at 1201 (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)); *see also Castañeda*, 810 F.3d at 36 (Barron, J.) (similar); *Saysana v. Gillen*, 590 F.3d 7, 14-16 (1st Cir. 2009) (similar).

Alternatively, the Government reads the "when released" clause not to limit ICE's authority at all, claiming that text "does not explicitly remove [ICE's] authority if an alien has already left custody." *See* Appellants' Brf. at 41 (quoting *Sylvain v. Attorney Gen. of U.S.*, 714 F.3d 150, 157 (3d Cir. 2013)). That interpretation would reduce the "when ... released" clause—particularly its incorporation by reference in §1226(c)(2)—to mere surplusage. "To read the statute in a manner that allows the Attorney General to take a criminal alien into

custody without regard to the timing of the alien's release from custody would render the 'when the alien is released' clause redundant and therefore null." *Khodr v. Adduci*, 697 F. Supp. 2d 774, 779 (E.D. Mich. 2010). *See also, e.g.*, *Deluis-Morelos v. ICE Field Office Dir.*, No. 12CV-1905JLR, 2013 WL 1914390, at *6 (W.D. Wash. May 8, 2013). "If Congress really meant for the duty in (c)(1) to take effect 'in the event of' or 'any time after' an alien's release from criminal custody, Congress would have said so, given that it spoke with just such directness elsewhere in the IIRIRA." *Preap*, 831 F.3d at 1204 (citing 8 U.S.C. §1231(a)(5) ("[T]he alien shall be removed under the prior order *at any time* after the reentry.") (alteration in *Preap*)).

The district court properly applied a plain text reading—mandatory detention under §1226(c)(2) applies only to noncitizens who meet *all* the criteria in (c)(1)—both in terms of criminal history and when they were detained. This is consistent with the "structure and purpose of the statute." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996). Section 1226(c), is an exception to the general detention provision laid out in §1226(a). "The mandatory detention provision does not reflect a general policy in favor of detention; instead, it outlines specific, serious circumstances under which the ordinary procedures for release on bond at the discretion of the immigration judge should not apply." *Saysana*, 590 F.3d at 17. Congress instructed that certain individuals should be detained without even an

opportunity to prove that they are neither a flight risk nor a danger—but only when they are detained promptly, with no significant break in custody. Everyone else may still be detained when placed in removal proceedings, but has the opportunity to demonstrate before an independent adjudicator that they pose neither a flight risk nor danger.

Section 1226(c) reflects Congress's concern about release of deportable individuals completing criminal sentences, creating an irrebutable presumption that such individuals are too dangerous to be released. That presumption is illogical if applied to individuals released long ago who have been safely living in the community. Thus, "the 'when released' language serves [the] ... limited but focused purpose of preventing the return to the community of those released in connection with the enumerated offenses." *Saysana*, 590 F.3d at 17. As usual, this exception to a general rule is appropriately construed narrowly. *See City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-32 (1995); *Comm'r of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989).

The Supreme Court last month granted certiorari to resolve the circuit split over the "when released" language. *Nielsen v. Preap*, No. 16-1363, 2018 WL 1369139 (U.S. Mar. 19, 2018). The existence of that circuit split demonstrates the substantiality of Petitioners' claim, and therefore the appropriateness of the preliminary injunction. An injunction where three of the four factors indisputably

support Petitioners, and the merits issue has engendered a circuit split, should be sustained under the abuse of discretion standard. That the Supreme Court will shortly be deciding the issue also counsels in favor of simply affirming the injunction as within the discretion of the district court, rather than deciding the merits.

Moreover, Section 1226(c)'s "when ... released" language does not apply to reopened proceedings. The Government writes that Mandatory Detention Subclass members enter §1226 detention "by operation of law" once they won reopening of their cases. Appellants' Br. at 39. For reasons it does not explain, and with no discussion of the statutory text, the Government argues that in this procedural posture, "section 1226(c) by its terms applies to petitioners' detention." *Id*. at 40. (Indeed, the Government opaquely asserts that this Court can avoid the circuit split identified above, claiming that even if Petitioners' "when ... released" argument is correct, §1226(c) still covers reopened cases.) In fact, "by its terms," §1226(c) has no application at all to reopened cases: when a noncitizen moves from post-final-order detention under §1331 to pre-final-order detention under §1226, that noncitizen is not "take[n] into custody … when … released" from criminal custody, but is rather being moved from one form of immigration custody to another. *See In Re West*, 22 I & N Dec. 1405, 1410 (B.I.A. 2000) ("release" in

§1226(c) means release from physical criminal custody).[26] Therefore, §1226(a) (which authorizes bond hearings), not §1226(c), is the relevant detention authority for the Mandatory Detention Subclass.

V. The District Court Did Not Abuse Its Discretion in Fashioning the Remedy.

"Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Brown v. Board of Education*, 349 U.S. 294, 300 (1955). Courts must "mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). *See also Kansas v. Nebraska*, 135 S. Ct. 1042, 1053 (2015) ("When federal law is at issue and 'the public interest is involved,' a federal court's 'equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.'"). The district court tailored its remedy to ensure that Petitioners' incarceration actually serves the twin

[26] The district court relied in part on *Casas-Castrillon v. DHS*, 535 F.3d 942, 948 (9th Cir. 2008), which held that "[a]n alien whose case is being adjudicated before the agency for a second time—after having fought his case in this court and won, a process which often takes more than a year—has not received expeditious process" and his detention is therefore not encompassed by §1226(c)). Op., R.191, Pg.ID#5339; *see also Ly*, 351 F.3d at 269-70. (noting that Congress intended that removal proceedings on criminal grounds should be "expeditious" and citing this as additional reason for adopting reasonable time limit on §1226(c) detention). Appellants argue that *Casas'* analysis does not survive the Supreme Court's recent decision in *Jennings*. A remand would enable the district court to consider the impact of *Jennings* in the first instance.

purposes of immigration detention—protecting the public and preventing flight—while balancing resource and administrability concerns.

The court gave the Government substantial flexibility, including allowing the Government to "present evidence that specific individuals have themselves significantly contributed to the unreasonable length of detention because of bad faith or frivolous tactics that delayed adjudication of their case," and also of "other factors as to a particular detainee that it claims should be considered as a basis for denial of a bond hearing as to a particular detainee." Op., R.191, Pg.ID#5344. Having declined that opportunity, the Government should not now be heard to complain that the injunction is unduly rigid. (Moreover, the injunction also serves to remedy the constitutional violation the Government has declined to challenge.)

Nevertheless, the Government objects to: 1) the requirement for bond hearings at six months; and 2) the clear and convincing evidence standard. Those objections lack merit.

A. The District Court Did Not Abuse Its Discretion in Requiring Bond Hearings at Six Months.

The district court first held that once detention is unreasonably prolonged, detainees must receive procedural protections, and then "follow[ed] *Zadvydas* in concluding that any presumption of reasonableness ends after six months." *Id.*, Pg.ID#5343. A six-month rule was an appropriate use of the court's equitable discretion.

First, the Supreme Court has repeatedly recognized that administrability may be required to vindicate rights, and that in such cases "it is necessary to draw a line."[27] *Duncan*, 391 U.S. at 160-61. Administrable rules protect "the individual against arbitrary action of government," which the Court "ha[s] emphasized time and again [is] the touchstone of due process." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (alteration omitted). Such rules are particularly appropriate when, in their absence, courts or Government officials would be left "at sea" in attempting to enforce legal requirements. *Cheff*, 384 U.S. at 380 (plurality opinion). Indeed, in *Zadvydas*, the Court found it "practically necessary" to adopt a bright-line rule for when detention becomes unreasonable. 533 U.S. at 700-01 (citing *McLaughlin* and *Cheff* and adopting six-month rule "for the sake of uniform administration" and to avoid the need for lower courts to make "difficult judgments"). A clear rule is particularly important to ease administration in this class-action context.

Second, a six-month rule finds support in Supreme Court, congressional, and executive precedent. *Zadvydas* identified six months as when detention becomes unreasonably prolonged, observing that "Congress previously doubted the

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[27] *See, e.g.*, *Maryland v. Shatzer*, 559 U.S. 98, 110 (2010) (establishing 14-day limit for interrogations because "case-by-case adjudication" would be "impractical"); *County of Riverside v. McLaughlin*, 500 U.S. 44, 55-56 (1991) (48-hour limit on detention prior to probable cause hearing "reasonable" to "provide some degree of certainty" that States act "within constitutional bounds").

constitutionality of detention for more than six months." 533 U.S. at 701. Similarly, in upholding "brief" mandatory detention, *Demore* emphasized that even outlier cases would typically conclude in "about five months." 538 U.S. at 529-30. Congress and the Executive Branch have likewise used six months as a threshold beyond which certain procedural safeguards must be provided in immigration detention contexts. *See, e.g.* 8 C.F.R. §241.4(k)(2)(ii) (providing administrative custody reviews at six months for post-final-order detainees); 8 C.F.R. §§241.14(k)(1)-(3) (providing for immigration judge review every six months for specially dangerous post-order detainees whose removal is not significantly likely); 8 U.S.C. §§1226(a)(6), (a)(7), 1537(b)(2)(C) (limiting mandatory detention of noncitizens suspected of being a threat to national security to six months absent review).

Finally, the recognition that after six months additional process should support continued incarceration, both criminal and civil, is deeply rooted in our legal tradition. *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 161 (1968) (in late 18th century America, crimes triable without a jury were generally punishable by no more than a six months imprisonment); *Cheff*, 384 U.S. at 380 (plurality opinion) (if confinement could exceed six months, jury trial is required); *McNeil v. Director, Patuxent Inst.*, 407 U.S. 245, 250-52 (1972) (state's own maximum of

"six months" for observation on an ex parte commitment order provided "a useful benchmark" for outer limits of civil confinement without a hearing).

B. The District Court Did Not Abuse Its Discretion in Requiring Clear and Convincing Evidence of Danger or Flight Risk.

The district court required the Government to bear the burden of proof only when detention becomes prolonged, a ruling fully supported by the Supreme Court's precedents.[28] "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Addington*, 441 U.S. at 423 (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)). The Court, citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), noted that legal processes should minimize the risk of erroneous decisions, and found that "the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence." *Id.* at 427. Thus a "burden equal to or greater than

[28] As the government points out, *Jennings*, 138 S.Ct. at 847, notes that the "clear and convincing evidence" standard is not found in the text of §1226(a). Appellants' Br. at 47. This standard of proof arises from due process concerns, not statutory text.

the 'clear and convincing' standard ... is required to meet due process guarantees." *Id.* at 433.

Consistent with *Addington*, the Supreme Court has repeatedly placed the burden of proof to justify civil detention on the government, striking down schemes that place the burden on the detainee. *See, e.g.*, *Foucha*, 504 U.S. at 81-83 (statute authorizing detention of insanity acquittees violated due process because it "places the burden on the detainee to prove that he is not dangerous" rather than providing "an adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community"). *See also Zadvydas*, 533 U.S. at 692 (finding POCR procedures deficient because, *inter alia*, they placed burden on detainee). Conversely, the Court has upheld civil detention schemes that place the burden on the government. In *Salerno* the Court found that the individual's interest in pre-trial liberty is outweighed by the government's interest in public safety where the government "proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community." 481 U.S. at 751. *See also Hendricks*, 521 U.S. at 364.

The district court did not abuse its discretion in applying the same rule here. *See Singh v. Holder*, 638 F.3d 1196, 1203-06 (9th Cir. 2011) (because significant liberty interest at stake, due process requires government to justify prolonged

immigration detention by clear and convincing evidence). In fact, the Government itself has adopted a clear and convincing evidence standard for bond hearings held under the regulation implementing *Zadvydas*, 8 C.F.R. §241.14(i)(1), and Congress has repeatedly used the "clear and convincing standard" in statutes authorizing civil detention. *See e.g.* 18 U.S.C. §3142(f)(2) (pretrial detention); 18 U.S.C. §4248(d) (civil commitment of sexually dangerous persons).

The district court's decision with respect to the burden of proof is also entirely appropriate under the familiar *Mathews v. Eldridge* test, where one must balance the private interest at stake, the risk of erroneous deprivation, and the corresponding imposition on the government. 424 U.S. at 335. Here, prolonged incarceration deprives Petitioners of a "particularly important" interest. *Addington*, 441 U.S. at 424. *See also Zadvydas*, 533 U.S. at 690. Unless the government bears the burden, and by clear and convincing evidence, the risk of erroneous deprivation of that liberty interest is impermissibly high. The government has easy access to records relevant to an assessment of flight risk or danger, including any criminal history, institutional disciplinary records, and a complete immigration file, as well a range of other biometric and background information—ample information from which to make its case for continued detention under a clear and convincing evidence standard.

CONCLUSION

The preliminary injunction should be affirmed, or, in the alternative, the injunction should remain in place and the case should be remanded for the district court to consider *Jennings* in the first instance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 13, 2018, the above brief was served on all counsel of record through the Court's CM/ECF System.

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CERTIFICATE OF COMPLIANCE

I certify that the above brief contains 12,913 words, excluding portions exempted by Rule 32(f) of the Federal Rules of Appellate Procedure. I further certify that the above response brief complies with the type size and typeface requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure.: it was prepared in proportionally spaced typeface using Microsoft Word in Time new Roman, 14-point typeface.

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EXHIBIT A

DECLARATION OF MARGO SCHLANGER

No. 18-1233

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

USAMA JAMIL HAMAMA, et al.,
Petitioners-Appellees,
v.
THOMAS HOMAN, Deputy Director and
Senior Official Performing the Duties of the Director,
U.S. Immigration and Customs Enforcement, et al.,
Respondents-Appellants.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN

D.C. No. 2:17-cv-11910

DECLARATION OF MARGO SCHLANGER

I, Margo Schlanger, make this declaration based upon my own personal knowledge and if called to testify, I could and would do so competently as follows:

1. I am counsel for Petitioners/Plaintiffs and am one of the designated class counsel for the certified subclasses in the above captioned case.

2. I am the Wade H. and Dores M. McCree Collegiate Professor of Law at the University of Michigan Law School. I have longstanding professional expertise in quantitative empirical analysis. For example, I am the former Chair of the Association of American Law School's Section on Law and the Social Sciences. I have taught a law school class titled "Empirical Inquiries in Civil Litigation." I also have published quantitative empirical papers in both law reviews and peer-reviewed journals such as the Journal of Empirical Legal Studies.

3. Because of my expertise in quantitative data and methods, one of my roles in this litigation has been to supervise and direct the litigation team's maintenance, use, and analysis of the data disclosed by the Respondents/Defendants pursuant to the Court's Preliminary Injunction and other Orders. I also have had responsibility for directing the gathering of additional systematic information, described below.

4. This declaration addresses 6 topics:

- Class members' procedural progress as they file motions to reopen their immigration cases (MTRs) and pursue protection/relief after cases are reopened
- Processing times for MTRs
- Bond hearing results
- Detention statistics
- Repatriations
- Individual named plaintiffs/petitioners and their particular situations

Available Data

5. By court order in this case, ICE has provided biweekly disclosures of current detention locations for Iraqi nationals who had a final order of removal at any point between March 1 and June 24, 2017. The precise disclosures ordered have shifted over time, but not in ways that matter for this declaration.

6. Also by court order, the Executive Office for Immigration Review (EOIR), a component of the Department of Justice, has provided information about Iraqi nationals with final orders of removal, including the following procedural history:

   - Date and immigration court of the most recent final order of removal (or, for recently reopened cases, date of reopening).
   - Date, immigration court, disposition, and disposition date of the most recent stay of removal application in immigration court.
   - Date, immigration court, disposition, and disposition date of the most recent motion to reopen in immigration court.
   - Date, disposition, and disposition date of the most recent motion to reopen in the Board of Immigration Appeals.
   - Date, disposition, and disposition dates of the most recent appeal in the Board of Immigration Appeals.

7. The scope of EOIR's disclosures has varied over time. From July through the end of September 2017, disclosures covered all Iraqi nationals who had final orders of removal as of June 24, 2017. Beginning October 4, 2017, with the Court's permission, EOIR's disclosures were reduced to cover only currently detained individuals. Then beginning March 21, 2017, the disclosures were augmented to include Iraqi nationals who had a final order of removal at some point between March 1 and June 24, 2017, if they had been detained at any point since March 1, 2017. We have checked the EOIR-disclosed data with the class members' lawyers for EOIR disclosures that were ambiguous or unclear, and for bond hearing dates, because there were many rescheduled bond hearings.

8. EOIR's court-ordered disclosures do not track merits adjudication after a Motion to

Reopen is granted. For this, our source has been the Executive Office for Immigration Review (EOIR) 1-800 number (1-800-898-7180), which allows the public to find out limited information about ongoing proceedings in Immigration Court, if the user knows the A-number of the noncitizen of interest. Where the EOIR data is unclear or ambiguous, we have checked with class members' lawyers for clarification.

9. We have systematically tracked Iraqi nationals' cases in the federal court system, as well, looking for Court of Appeals Petitions for Review. These can be located online using the individuals' A-numbers, because the A-number is included in the Court of Appeals docket.

Class Members' Procedural Progress

10. Although this is an as-yet uncertified class, I refer to Iraqi nationals with removal orders as "class members" if they have been detained during the pendency of this litigation, including after they are released. There have been 324 class members who are or have been detained since July 2017, when Respondents first disclosed detention information.

11. Using the EOIR data, we are able to determine how many class members have so far filed Motions to Reopen (MTRs), and the progress and outcomes of those motions. The most recent data was received April 4, 2018; its information is a few days older than that. 264 have filed motions to reopen: 201 in Immigration Court, and 63 in the Board of Immigration Appeals.[1]

12. Of the MTRs filed by class members with the Immigration Court, immigration judges (IJs) have granted 112 and denied 65. Twenty-four remain pending. ICE filed a number of interlocutory appeals challenging the reopening in some of these cases, but it appears the BIA denied each such appeal.

13. Of the 65 cases in which IJs denied MTRs, over half were filed prior to the district court's stay of removal preliminary injunction, on July 24, 2017; these cases were filed in an emergency situation, generally by lawyers who did not have their clients' files and had not been able to assemble the evidence of changed country conditions that accompanied later filings.

14. Of the 65 IJ denials, the BIA has so far reversed 7 and has not affirmed any. Most are pending before the BIA. (Five individuals did not appeal the MTR denials to the BIA; for 15, there was, as of the last report, still time to appeal.)

15. Of the 63 MTRs filed directly in the BIA, the BIA has decided fewer than half: it has granted/remanded 19 and denied 7; 36 are pending. (1 was withdrawn.)

16. Table 1 summarizes most of the quantitative information in ¶¶11-15, above:

[1] A few class members have filed MTRs in both the immigration court and the BIA, apparently unsure about which forum has jurisdiction. I have counted those in whichever was the forum of the second filing, because that seems more likely to be procedurally correct.

Table 1: MTR Filings by *Hamama* Class Members

		Forum of Initial Filing	
	Total	**IJ**	**BIA**
a. All Class Members	**324**		
b. Filed MTRs	**264**	**201**	**63**
c. Outcome in Initial Forum:			
Grant		112	19
Deny		65	7
Pending		24	36
Withdrawn			1
d. Outcome on Appeal to BIA:			
Grant		7	
Deny		0	
Pending		38	
Still time for appeal		15	
No appeal taken		5	

17. All told, 264 of the class members (81%) have filed MTRs in one or the other forum: 138 have been granted (131 in the initial forum and 7 on appeal); 12 have been finally denied within the immigration court system (that is, denied by the BIA, or denied by an IJ with no remaining time for appeal); and 113 are pending or have time for appeal. Thus the current administrative grant rate for decided MTRs is 92% (138/(138+12)).

18. As just tallied, 138 cases have been reopened on the merits. Information on subsequent developments is not included in the government's biweekly disclosures. But the EOIR 1-800 number has information about them. Using this source, we have confirmed that of the 138, 49 have reached a conclusion in immigration court (though most of these are pending on appeal).

19. Using both the 1-800 information and information obtained from immigration counsel, we have ascertained that class members obtained protection or relief from removal in 25 of the cases—that is, just over half—that have concluded in immigration court. ICE has appealed 6 of these, and so far, has won a vacatur and remand in just one, which is now pending in the immigration court. ICE's other appeals are pending before the BIA. The non-citizens have so far appealed 16 of their 24 losses; these are all pending before the BIA. Time remains for 6 additional appeals; the loss has become final for just 2.

20. Of the 25 cases class members won in the immigration court on the merits, we are aware of several different types of relief, including asylum, withholding and deferral under the Convention Against Torture; cancellation of removal; and termination of removal proceedings on grounds that the individual was not actually deportable.

21. There are 60 individuals who have been detained at some point during the pendency of

this case who have not so far filed MTRs. Some of these individuals are not fighting their immigration cases. Others were only recently detained, and have not yet received the A-files and Records of Proceedings they need to prepare their MTRs. Others have recently received the files, but have not yet passed their MTR deadline under the District Court's July 24, 2017 preliminary injunction; that deadline gives them until 90 days after they receive their immigration file from the Government to file an MTR. About 25 have not filed MTRs within the 90 days after they received their immigration files.

Processing Times for MTRs

22. While many of the MTRs have been processed quickly in immigration court, the cases pending in the BIA have now been there for many months; over 70% of the cases pending in the BIA were filed over 6 months ago. There are over 40 cases pending in the BIA for which the MTR was filed over 8 months ago.

Bond Hearings

23. On January 2, 2018, the District Court entered a preliminary injunction requiring the Government to either release class members, hold a bond hearing for them, or explain to the District Court why they should not have a bond hearing. The Government is required to disclose the resulting bond hearings and their outcomes to class counsel. According to those disclosures, from January through the first few days of April (the end date is a little bit unclear), the Government held 227 bond hearings for class members that reached a conclusion.

24. All told, out of the 227 bond hearings that have been disclosed, there have been 22 releases on the detainees' own recognizance, 120 grants of bond, and 85 denials of release by immigration judges.[2] The bond amounts have varied between $1,500 and $100,000.

25. Immigration judges have included various other conditions of release, including requiring monthly check-ins with ICE, electronic monitoring if ICE chooses to impose it, and other ICE-determined conditions. For at least several of the individuals released, ICE has imposed or reimposed formal Orders of Supervision.

26. ICE has appealed 10 of the bond orders allowing detainee release, and in each one has sought and obtained a stay of the bond order from the BIA. For either 6 or 7 of these cases, the detainee had already been released, and therefore was redetained by ICE after the BIA issued a stay.

[2] In a prior declaration filed in the district court in this case, see ECF #263-2, Pg.ID#6344-45, I reported larger numbers of bond hearings. In preparing that declaration, I failed to realize that the government had disclosed bond hearings for Hamama class members that were held *prior* to the January 2 preliminary injunction, pursuant to other authority. This declaration corrects that mistake.

27. Of the bond hearings, an analysis of the disclosed data shows the following, also summarized in Table 2:

- 174 bond hearings were for members of the certified Detained Final Order subclass who had not yet reopened their immigration cases. Of these individuals, 20 were ordered released on recognizance and 89 on bond. One additional hearing was for a detainee whose immigration case *had* been reopened, but who had then won deferral of removal and was waiting in detention for further developments. He too was a member of the Detained Final Order subclass; he was ordered released on recognizance. Of the 110 individuals granted release on recognizance or on bond, 6 cases were appealed by ICE and stayed by the BIA. Nearly all the rest have managed to post bond and have therefore been released. But 13 remain in detention, presumably because they lack the financial resources to post the authorized bond.

- 52 bond hearings were for detainees whose immigration cases were pending after reopening, and were therefore almost all members of the certified Mandatory Detention subclass held under the purported authority of 8 U.S.C. § 1226(c). (It is possible that a very small number of these individuals were detained under 8 U.S.C. § 1226(a), and therefore were not members of the Mandatory Detention subclass.) Of these individuals, 1 was ordered released on recognizance and 31 on bond. Of the 32 individuals granted release on recognizance or on bond, 4 cases were appealed by ICE and stayed by the BIA. Nearly all the rest have managed to post bond and have therefore been released. But 2 remain in detention, presumably because they lack the financial resources to post the authorized bond.

Table 2: Bond Hearings for *Hamama* Class Members

	Total		**Forum of Initial Filing**	
	#	**%**	**Post-Order**	**Pre-Order**
a. All Hearings	227	100%	175	52
Results				
b. Detainee win	142	63%	110	32
Ordered released on recognizance	22	10%	21	1
Ordered released on bond	120	53%	89	31
c. ICE win (denied bond)	85	37%	65	20
Subsequent Procedure/Detention for Detainees Won Release				
d. Out of detention	117		91	26
e. Appealed by ICE/Stayed by BIA	10		6	4
f. Otherwise remain in detention	15		13	2

Detention Statistics

28. As of the most recent disclosure, there remain 151 detained class members. 95 of these lost their bond hearings or had bond stayed; 15, as just described, lack the money needed to make their bond. The other 41 are in detention for a variety of reasons. Some have sought continuances or waived bond hearings. Some have not yet been detained long enough to qualify for a hearing under the January 2 order. Some are not eligible for a bond hearing under that order because their cases have been reopened and they have the immigration status of "arriving aliens." A few elected to proceed with individual habeas actions and therefore do not meet the subclass definitions.

29. The 151 class members currently in detention are incarcerated in 29 different detention facilities. The facilities with 5 or more class-member detainees are set out in Table 3:

Table 3: Detention Locations as of 4/4 ICE Disclosure

Facility	Number
Calhoun Co.* (Battle Creek, MI)	34
Northeast Oh. Correct. (Youngstown, OH)	12
St. Clair County Jail* (Port Huron, MI)	11
Chippewa Co. Jail* (Sault Ste. Marie, MI)	8
Pine Prairie ICE Processing Center (Pine Prairie, LA)	8
Denver Contract Det. Fac. (Aurora, CO)	7
Etowah County Jail* (Gadsden, AL)	7
Lasalle ICE Processing Center (Jena, LA)	7
Otay Mesa Detention Center* (San Diego, CA)	6
Farmville Detention Center (Farmville, VA)	5

* Facility is a jail that also houses criminal defendants and/or convicts.

An additional 29 facilities all over the country each house one to four class members. The 39 facilities are, altogether, in 23 states.

Repatriation

30. The District Court has established a process for class members who wish to agree to repatriation to Iraq. Under that process 16 individuals have so agreed and, on the parties' stipulation, had the stay of removal lifted as to them. ICE has not repatriated these individuals quickly; some have now been waiting for months, as set out in Table 4.

Table 4: Volunteers for Prompt Removal

A-Number	Initials	Date Stay Lifted	Removal date
XXX-XXX-876	HAR	7/21/2017	8/8/2017
XXX-XXX-267	WY	10/16/2017	11/28/2017
XXX-XXX-443	JM	10/25/2017	1/22/2018
XXX-XXX-245	BAZ	11/16/2017	waiting
XXX-XXX-155	NAAS	11/20/2017	1/30/2018
XXX-XXX-510	IP	12/4/2017	12/19/2017
XXX-XXX-847	OAT	12/14/2017	waiting
XXX-XXX-156	RG	12/14/2017	waiting
XXX-XXX-585	DAS	12/14/2017	waiting
XXX-XXX-804	HHAS	1/4/2018	waiting
XXX-XXX-681	SAAM	2/15/2018	waiting
XXX-XXX-844	IN	2/15/2018	waiting
XXX-XXX-237	AJSAB	3/6/2018	waiting
XXX-XXX-723	AJAM	3/6/2018	waiting
XXX-XXX-142	JK	3/6/2018	waiting
XXX-XXX-798	SAJA	3/6/2018	waiting

Individual Plaintiffs/Petitioners.

31. The district court, in deciding Petitioners' Motion for a Preliminary Injunction on Detention Issues, had available to it information about the procedural status of each of the named Petitioners/Plaintiffs at that time. ECF 138-27, Pg.ID# 3684. Table 5 sets out updated information about the named Petitioners/Plaintiffs.

Table 5: Named Petitioners/Plaintiffs

Name	Date Detained	MTR			Bond				Current Merits Status	Current Detention
		Filed Date (Where)	Current status	Decision date	Hearing Date	Status at hearing	Out-come	$		
Ali Al-Dilaimi	6/11/2017	7/3/2017 (IJ)	Pending (BIA Appeal)		1/24/2018	Post-order	Grant	5,000	MTR Pending	Out on bond
Sami Al-Issawi	6/12/2017	6/13/2017 (IJ)	Grant	8/21/2017	9/18/2017	Pre-order, 1226(a)	Grant	8,000	Merits Pending	Out on bond
Qassim Al-Saedy	6/6/2017	6/22/2017 (IJ)	Pending (BIA Appeal)		1/22/2018	Post-order	Grant	25,000	MTR Pending	Detained (can't afford bond)
Abbas Al-Sokaini	6/20/2017	2/23/2018 (IJ)	Grant	3/1/2018	1/31/2018	Post-order	Grant	1,500	Merits Pending	Out on bond
Atheer Ali	6/12/2017	5/18/2017 (BIA)	Grant	10/12/2017	1/26/2018	Pre-order, 1226(c)	Grant	5,000	Won asylum; ICE appeal pending	Out on bond
Jihan Asker	6/11/2017	6/15/2017 (IJ)	Grant	6/16/2017	8/21/2017	Pre-order, 1226(a)	Grant	5,000	Merits Pending	Out on bond
Moayad Barash	6/12/2017	6/21/2017 (BIA)	Pending		1/26/2018	Post-order	Grant	10,000	MTR Pending	Out on bond
Jami Derywosh	7/20/2017	8/15/2017 (BIA)	Pending		1/25/2018	Post-order	Grant	2,500	MTR Pending	Out on bond
Anwar Hamad	6/12/2017	6/20/2017 (IJ)	Grant	8/16/2017	2/1/2018	Pre-order, 1226(c)	Deny		Lost CAT deferral; appeal pending	Detained (no bond)
Usama Hamama	6/12/2017	6/26/2017 (BIA)	Pending		2/1/2018	Post-order	Grant	100,000	MTR Pending	Out on bond
Jony Jarjiss	7/13/2017	10/23/2017 (BIA)	Grant	4/4/2017	1/31/2018	Post-order	Grant	ROR	Merits Pending	Out on OR
Mukhlis Murad	7/27/2017	10/19/2017 (IJ)	Grant	12/13/2017	1/9/2017	Pre-order, 1226(a)	Grant	3,000	Merits Pending	Out on bond
Habil Nissan	6/12/2017	6/16/2017 (IJ)	Grant	7/24/2017	12/20/2017	Pre-order, 1226(a)	Grant	7,500	Merits Pending	Out on bond
Adel Shaba	6/12/2017	6/23/2017 (BIA)	Pending		1/30/2018	Post-order	Grant	20000	MTR Pending	Out on bond
Kamiran Taymour	6/12/2017	6/13/2017 (IJ)	Grant	8/28/2017	NA				Won cancellation of removal; no ICE appeal	Out; won case

Pursuant to 28 U.S.C. § 1746, I state under penalty of perjury under the laws of the United States that the above statements are true and correct to the best of my knowledge, information, and belief.

Date: April 13, 2018

Margo Schlanger

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Hamama, et al., v. Adducci, et al., Case No. 18-1233

Eastern District of Michigan, Case No. 17-cv-11910

Record Entry Number	Page ID #	Date Filed	Description
1	1–26	06-15-2017	Habeas Corpus Class Action Petition
11 to 11-15	45–175	06-15-2017	Petitioners' Motion for a Temporary Restraining Order and/or Stay of Removal
14	178–81	06-16-2017	Declaration of Brianna Al-Dilaimi in Support of Petitioners' Motion for a Temporary Restraining Order and/or Stay of Removal
29 to 29-5	357–410	06-22-2017	Memorandum of The Chaldean Community Foundation in Support of Petitioners' Motion for Habeas Corpus Class Action Petition
30 to 30-5	411–54	06-22-2017	Petitioners' Reply in Support of Motion for Temporary Restraining Order and/or Stay of Removal
31	455–96	06-22-2017	Transcript of June 21, 2017 Hearing of Petitioners' Motion for Temporary Restraining Order and/or Stay of Removal
32	497–502	06-22-2017	Opinion & Order Staying Removal of Petitioners Pending Court's Review of Jurisdiction
34	507–08	06-23-2017	Order Regarding Public Access
35	509–48	06-24-2017	First Amended Habeas Corpus Class Action Petition and Class Action Complaint for Declaratory, Injunctive, & Mandamus Relief

Record Entry Number	Page ID #	Date Filed	Description
36 to 36-6	549–615	06-24-2017	Plaintiffs/Petitioners' Emergency Motion to Expand Order Staying Removal to Protect Nationwide Class of Iraqi Nationals Facing Imminent Removal to Iraq
43	671–77	06-26-2017	Opinion & Order Granting Petitioners'/Plaintiffs' Motion to Expand Order Staying Removal to Protect Nationwide Class (Dkt. 36)
44	678–711	06-27-2017	Transcript of June 26, 2017 Hearing of Plaintiffs/Petitioners' Emergency Motion to Expand Order Staying Removal to Protect Nationwide Class of Iraqi Nationals Facing Imminent Removal to Iraq
59	886–924	07-06-2017	Transcript of July 5, 2017 Hearing of Petitioners/Plaintiffs' Motion for Expedited Briefing Schedule for Plaintiffs/Petitioners' Motion for Preliminary Injunction and to Extend Order Staying Removal
60	925–26	07-06-2017	Plaintiffs/Petitioners' Letter to the Court in Response to Order Regarding Public Access (ECF# 34)
61	1195–97	07-06-2017	Order Extending Stay of Enforcement of Removal Orders Pending Court's Review of Jurisdiction
62	1198	07-10-2017	Order Directing Clerk's Office to Unseal Case
63	1199–1224	07-11-2017	Habeas Corpus Class Action Petition *Sealed Version at R. 1*
64	1225–48	07-11-2017	Opinion & Order Regarding Jurisdiction
70	1493–1553	07-13-2017	Transcript of July 13, 2017 Status Conference

Record Entry Number	Page ID #	Date Filed	Description
72	1572	7-14-2017	Order Directing Clerk's Office to Seal Docket #38
77 to 77-30	1703–1915	07-17-2017	Petitioners/Plaintiffs' Motion for Preliminary Stay of Removal and/or Preliminary Injunction *Sealed Versions of Declarations at R. 11,14, 30, 36*
79	1917-19	7-17-2017	Status Conference Order
80	1920–50	07-19-2017	Brief of Current & Former U.N. Special Rapporteurs on Torture as *Amici Curiae* in Support of Petitioners
81 to 81-17	1951-2055	07-20-2017	Respondents' Response in Opposition to Petitioners' Request for Preliminary Injunction
83 to 83-10	2061–2206	07-20-2017	Petitioners'/Plaintiffs' Motion for Class Certification
84 to 84-9	2207–64	07-21-2017	Petitioners/Plaintiffs' Reply in Support of Petitioners/Plaintiffs' Motion for Preliminary Stay of Removal and/or Preliminary Injunction
86	2269–2322	07-24-2017	Transcript of July 21, 2017 Hearing of Petitioners/Plaintiffs' Motion for Preliminary Stay of Removal and/or Preliminary Injunction
87	2323–57	07-24-2017	Opinion & Order Granting Petitioners' Motion for Preliminary Injunction
95	2522–55	08-30-2017	Petitioners' Status Report
100	2599–2661	09-01-2017	Transcript of August 31, 2017 Status Conference

Record Entry Number	Page ID #	Date Filed	Description
118	2956–3033	10-13-2017	Second Amended Habeas Corpus Class Action Petition and Class Action Complaint for Declaratory, Injunctive, and Mandamus Relief
135	3271-3317	11-01-2017	Motion to Dismiss Second Amended Class Petition
138 to 138-33	3338–3733	11-07-2017	Petitioners/Plaintiffs' Motion for Preliminary Injunction on Detention Issues *Sealed Version of Exhibits at R. 220*
139 to 139-5	3734-3836	11-07-2017	Petitioners/Plaintiffs' Amended Motion for Class Certification
143	3840–63	11-15-2017	[Respondents'] Motion to Lift Preliminary Injunction as to Maytham Al-Bidairi
144	3864-68	11-15-2017	Response to Motion to Lift Preliminary Injunction as to George P. Arthur and Others with Final Orders of Expedited Removal; Certificate of Service
152	3929-34	11-21-2017	Amended Order Regarding Production of A-Files and Records of Proceedings and Other Matters
154 to 154-6	3938-4070	11-22-2017	Petitioners/Plaintiffs' Response in Opposition to Respondents/Defendants' Motion to Dismiss Second Amended Class Petition
158 to 158-2	4083-4132	11-30-2017	Respondents' Opposition to Petitioners' Motion for Preliminary Injunction on Detention Issues
159 to 159-2	4133-78	11-30-2017	Respondents' Response in Opposition to Petitioners' Motion for Class Certification

Record Entry Number	Page ID #	Date Filed	Description
170 to 170-9	4526-4801	12-12-2017	Memorandum of the Chaldean Community Foundation (CCF) in Support of Petitioners/Plaintiffs' Motion for a Preliminary Injunction on Detention Issues
173	4871-89	12-12-2017	Reply to Petitioners' Opposition to Respondents' Motion to Dismiss Second Amended Class Petition
174 to 174-4	4890-4930	12-12-2017	Petitioners/Plaintiffs' Reply in Support of Motion for a Preliminary Injunction on Detention Issues
175 to 175-1	4931-55	12-12-2017	Petitioners/Plaintiffs' Reply Memorandum in Support of Amended Motion for Class Certification
176 to 176-2	4956-66	12-14-2017	Supplemental Filing with Amended Proposed Class Certification Definition
177	4967-5003	12-14-2017	Brief of Detention Watch Network as *Amicus Curiae* in Support of Petitioners' Motion for a Preliminary Injunction on the Detention Issues
184 to 184-2	5062-74	12-22-2017	Supplemental Response to Plaintiffs' Motion for Preliminary Injunction
185	5075-79	12-23-2017	Petitioners/Plaintiffs' Response to Respondents/Defendants' Supplemental Filing on Preliminary Injunction on Detention Issues
188	5088-5236	12-27-2017	Transcript of December 20, 2017 Hearing of Petitioners/Plaintiffs' Motion for Class Certification, Petitioners/Plaintiffs' Motion for a Preliminary Injunction on the Detention Issues and Respondent/Defendants' Motion to Dismiss Second Amended Class Petition

Record Entry Number	Page ID #	Date Filed	Description
191	5318-63	1-2-2018	Opinion & Order Denying in Part Respondents' Motion to Dismiss (Dkt. 135), Granting in Part Petitioners; Motion for Preliminary Injunction (Dkt. 138), and Granting in Part Petitioners' Amended Motion to Certify Class (Dkt. 139)
195	5372-77	1-4-2018	Order Regarding Production of Alien Files and Records of Proceedings
203	5456-64	1-19-2018	Order Regarding Further Proceedings
220 to 220-11	5656-5747	02-02-2018	Sealed Declarations of Abbas Oda Manshad Al-Sokaini, Kamiran Taymour, Adel Shaba, Usama Jamil Hamama, Ali Al-Dilaimi, Qassim Hashem Al-Saedy, Atheer Fawozi Ali, Moayad Jalal Barash, Jami Derywosh, Jony Jarjiss, Mukhlis Youssif Murad, Habil Nissan
227 to 227-8	5864-5931	2-8-2018	Petitioners' Motion for Relief on Issue Related to Implementation of Detention Orders
239 to 239-1	6110-24	2-20-2018	Response to Petitioners' Motion for Relief on Issues Related to Implementation of Detention Orders
241 to 241-2	6134-49	2-22-2018	Petitioners' Reply on Motion for Relief on Issues Related to Implementation of Detention Orders
247	6182-83	3-2-2018	Notice of Appeal

Record Entry Number	Page ID #	Date Filed	Description
249 to 249-1	6185-91	3-5-2018	Respondents' Notice Regarding the March 7, 2018 Status Conference
254	6222-39	3-13-2018	Order Regarding Further Proceedings
258 to 258-4	6258-83	3-16-2018	Respondents' Supplemental Response to Petitioners' Motion for Relief on Issues Related to Implementation of Detention Orders
263 to 263-6	6331-6424	3-22-2018	Petitioners/Plaintiffs' Supplemental Brief on Stay Issues