Judge James L. Robart

Magistrate Judge Brian A. Tsuchida

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

ARTURO MARTINEZ BANOS,	)	No. 2:16-cv-01454-JLR-BAT
Petitioner-Plaintiff	)	
v.	)	RESPONDENTS' CROSS-MOTION FOR
	)	SUMMARY JUDGMENT AND
NATHALIE ASHER, et al.,	)	OPPOSITION TO PETITIONERS'
Respondents-Defendants.	)	MOTION FOR SUMMARY JUDGMENT
	)	
	)	**Noted on Motion Calendar:**
_____	)	**Friday, January 12, 2018**

INTRODUCTION

The class members allege that they are individuals who have been detained for an unreasonably prolonged period of time under 8 U.S.C. § 1231(a)(6), the post-order detention provision, such that they are entitled to bond hearings. They are mistaken; under the post-order detention provision none of the class members are eligible for a bond hearing, and they may only

Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 305-7181

be released either in the discretion of the Secretary of Homeland Security or if the detainee establishes that there is no significant likelihood of removal in the reasonably foreseeable future. Because the Secretary exercises her discretion in the continued detention of the class members, and the class members haven not claimed, let alone shown, on a class wide basis that there is no significant likelihood of removal in the reasonably foreseeable future for each and every individual class member, this Court should deny the class members' claims.

RELEVANT PROCEDURAL BACKGROUND

The parties have fully fleshed out the factual background involved in this case in its various filings. Accordingly, Respondents incorporate herein the totality of those pleadings as found in ECF Nos. 16, 24, 26, 29, 35, 42, 44, 45, and 57. In deference to judicial economy, Respondents will only recount the procedural background since the filing of the Writ of Habeas Corpus and Class Action Complaint.

On September 14, 2016, petitioner Arturo Martinez Baños ("Martinez") filed with this Court a petition for a writ of habeas corpus and class certification complaint on behalf of himself, individually, and all others similarly situated to him. ECF 1. Martinez, in following this Court's orders, filed his motion for class certification on October 20, 2016. ECF 6. Respondents filed their opposition to the motion for class certification on November 7, 2016, ECF 17, to which Martinez replied on November 11, 2016, ECF 18. On the same day that Respondents filed their opposition for class certification, Respondents also filed a motion to dismiss all individual claims raised by Martinez. ECF 16. Martinez opposed the motion to dismiss on November 29, 2016, ECF 21. Respondents subsequently filed their Reply on December 2, 2016, ECF 24, and supplemented their motion on February 13, 2017, ECF 42. On December 1, 2016, Martinez requested this Court issue a preliminary injunction, which Respondents opposed on December 16, 2016, and to which Martinez replied on December 23, 2016. ECF 23, 26, and 27.

This Court, on December 13, 2016, issued an order setting a hearing for February 1, 2017, to address Martinez's Motion for Class Certification, Respondents' Motion to Dismiss,

Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 305-7181

and Martinez's Motion for a Preliminary Injunction. In response to this Court's order, Martinez also filed a request for leave to amend his complaint on January 9, 2017, which this Court granted. ECF 37. Martinez then filed an Amended Petition for Writ of Habeas Corpus and Class Action Complaint adding two additional individual petitioners – Edwin Flores Tejada ("Flores") and German Ventura Hernandez ("Ventura") –on January 31, 2017, ECF 38, and an Amended Motion for Class Certification on February 8, 2017, ECF 41. This Court re-noted Respondents' motion to dismiss at ECF 16 for March 3, 2017, ECF 40, and on February 27, 2017, Respondents filed a second motion to dismiss in order to address the newly-named petitioners' individual claims and their opposition to the amended motion for class certification. ECF 44, 45.

On March 29, 2017, Magistrate Judge Tsuchida recommended denying Respondents' first motion to dismiss and striking the second motion to dismiss. ECF 49. On July 11, 2017, this Court, however, granted Respondents' first motion to dismiss Martinez's individual claims, and struck the second motion to dismiss without prejudice. ECF 53. This Court further concluded that, contrary to that alleged in the amended complaint, the proper detention authority was 8 U.S.C. § 1231(a). *Id.* Respondents filed an amended motion to dismiss Flores and Ventura's individual claims on August 4, 2017. ECF 57.

Magistrate Judge Tsuchida then issued an order for supplemental briefing on the class definition on September 8, 2017, ECF 62, and on September 13, 2017, denied Petitioners' request for the issuance of a preliminary injunction, ECF 63. After the parties submitted their supplemental briefs on the class definition proposed by the Court, ECF 64-66, Magistrate Judge Tsuchida recommended that Respondents' amended motion to dismiss be granted as to Ventura's individual claims but otherwise denied, and that Petitioners' request for class certification be granted. ECF 67. This Court adopted Magistrate Judge Tsuchida's recommendation *in toto* on December 11, 2017. ECF 70. The class members filed a motion for summary judgment on December 14, 2017. ECF 72.

Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 305-7181

DETENTION OVERVIEW

I. Pre-Order Detention

Congress granted the Secretary of Homeland Security authority to detain individuals while their removal proceedings under 8 U.S.C. § 1229a are ongoing. *See generally* 8 U.S.C. § 1226. While on the one hand, Congress granted broad discretion to the Secretary to release these individuals on bond pending the conclusion of their removal proceedings, 8 U.S.C. § 1226(a), Congress totally withheld discretion from the Secretary to release certain categories of criminal aliens during the agency adjudication of their removal case. *See, generally*, 8 U.S.C. § 1226(c)(1) (providing that certain criminal and terrorist aliens "shall" be taken into custody); 8 U.S.C. § 1226(c)(2) (prohibiting release except when necessary to provide protection to a witness, and the alien satisfies the Secretary of Homeland Security that he "will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding"). The Supreme Court finds this mandatory detention provision to be constitutional. *Demore v. Kim*, 538 U.S. 510, 531 (2003) (finding mandatory detention of criminal aliens during removal proceedings under 8 U.S.C. § 1226(c) constitutionally valid even where there has been no individualized finding that the alien is dangerous or unlikely to appear for his deportation hearing).

In the pre-order context, the Department of Homeland Security makes initial custody or bond determinations, 8 C.F.R. § 1236.1, and these are subject to the review by an immigration judge if the detainee seeks such review. 8 C.F.R. § 1003.19. The decision of the immigration judge may thereafter be appealed to the Board of Immigration Appeals. 8 C.F.R. §§ 1003.19(f), 1003.38. But, the "discretionary judgment regarding the application of [section 1236] shall not be subject to [judicial] review," 8 U.S.C. § 1226(e), though, certainly, constitutional challenges to § 1236 are reviewable. *Demore*, 538 U.S. at 521.

II. Administratively Final Order of Removal

Congress provided that an order of removal entered by an immigration judge is deemed "final" either 30 days after the immigration judge enters the order of removal, 8 U.S.C.

Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 305-7181

§ 1101(a)(47)(B) (stating that removal order is final upon "the expiration of the period in which the alien is permitted to seek review of such order by the [Board of Immigration Appeals]"), or if the order was timely appealed to the Board, "upon a determination by the Board of Immigration Appeals affirming such order[.]" *See also* 8 C.F.R. § 1241.1 (in pertinent part specifying that Board affirmance of a removal order results in an administratively final order of removal). Only on either of those two dates does a removal order become administratively final.

III. Post-Order Detention

Detention following entry of an administratively final order of removal is governed by 8 U.S.C. § 1231(a). Under this provision, Congress has required that "the Attorney General shall remove the alien from the United States within a period of 90 days [the removal period]." 8 U.S.C. § 1231(a). The removal period begins, inter alia, on the date the order of removal becomes administratively final, or "if the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order." 8 U.S.C. § 1231(a)(1)(B)(i)-(iii). Following expiration of the removal period, the government has discretionary authority to continue detention of certain categories of criminal, terrorist, and dangerous individuals under § 1231(a)(6). 8 U.S.C. § 1231(a)(6) (providing that an individual inadmissible under 8 U.S.C. § 1182, removable under 8 U.S.C. § 1227(a)(1)(C), (2), (4), or determined to be a risk to the community or unlikely to comply with removal "may be detained beyond the removal period").

In *Zadvydas v. Davis*, the Supreme Court analyzed whether an individual admitted to the United States, but subsequently ordered removed, may continue to be detained beyond the ninety-day removal period pursuant to § 1231(a)(6). 533 U.S. 678, 682, 688-702 (2001). In a case where no stay of removal was involved, the Supreme Court held that § 1231(a)(6) does not generally authorize the indefinite detention of removable individuals; rather, absent "special" circumstances, the statute permits the detention of such persons only for a period reasonably necessary to bring about their removal. *Id*. at 698-99. Applying this statutory interpretation, the Supreme Court determined that six (6) months was a presumptively reasonable period. *Id*. at

Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 305-7181

701. The Supreme Court further explained that once a presumptively-reasonable six-month period of post-removal order detention passes, the detainee bears the initial burden of establishing that there is "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," after which the government must come forward with evidence to rebut that showing. *Id*.; *see also* 8 C.F.R. § 241.13. Only where the detainee establishes that there is no significant likelihood of removal in the reasonably foreseeable future, should such individual be released from immigration detention. *Id*.

ARGUMENT

Only one question is before this Court today: which standards apply to this Court's consideration of the class members' continued detentions. The Court should deny the class members' claims because their individual detentions continue to further Congress's interest in removing individuals subject to a reinstated final order of removal are in accordance with regulations, and are constitutionally allowed because their detentions are not indefinite and the class as a whole does not claim that there is no significant likelihood for removal in the reasonably foreseeable future for each individual class member – the forward-looking individual analysis required under *Zadvydas*.

Under the plain language of § 1231(a)(1)(B)(i), the removal periods for the class members were triggered when each of their removal orders became administratively final – a different and specific date for each class member. As soon as each class member's removal period began to run, he or she was no longer entitled to a bond hearing. To the extent that this Court may review the class members' claims of prolonged detention, it must do so under the forward-looking framework established by the Supreme Court in *Zadvydas* and, thus, must deny the class members' claims because they cannot show that each class member's continued detention is unconstitutional as none can establish that removal in each of their cases is not significantly likely to occur in the reasonably foreseeable future. Notably, the class has not alleged that there is no significant likelihood of removal in the reasonably foreseeable future. Indeed, even the remaining and sole class representative, Flores, was already removed to his

Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 305-7181

home country of El Salvador on December 22, 2017 – a mere thirty-seven days into the ninety-day removal period. Troubling, though, the class asks this Court to conduct an improper backward-looking analysis (how long each has been detained), *see Demore*, rather than conduct the forward-looking frame of reference required by the Supreme Court for post-order cases in *Zadvydas*.

I. The class members are is not entitled to a bond hearing under *Diouf II* or *Rodriguez III*.

Notably, nothing in § 1231(a)(6) itself or the applicable regulations entitles any of the class members to a bond hearing. 8 U.S.C. § 1231(a)(6); 8 C.F.R. § 1003.19 (providing jurisdiction for immigration judges to review only custody determinations under 8 C.F.R. § 1236). Although in *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011) ("*Diouf II*"), the Ninth Circuit held that certain aliens detained under § 1231(a)(6) are entitled to bond hearings, *Diouf II* does not apply to or govern this case.[1] In *Diouf II*, the Ninth Circuit considered whether the regulatory safeguards implemented by the government to comport with the Supreme Court's ruling in *Zadvydas* are constitutionally insufficient with respect to aliens detained beyond a six-month threshold while seeking collateral review of their underlying removal orders. *Diouf II*, 634 F.3d at 1086, 1091. The court held that with respect to aliens like Diouf – individuals who, unlike every single class member here, could still seek collateral review of their removal order – the procedures were insufficient and that a bond hearing must be provided after 180 days of detention if removal is not imminent. *Id*. at 1091-92. All of the class members' cases, however,

[1] Respondent acknowledges that this Court has previously held that *Diouf II* applies in cases like the one at hand and requires a bond hearing if the detainee is denied release in the 180-day review. *See Mendoza v. Asher*, No. 2:14-cv-811, 2014 WL 8397145, (W.D. Wash. Sept. 16, 2014). That holding is inapplicable, however, because the petitioner in *Mendoza* had already been detained for more than 180 days in post-order custody – a prerequisite to the applicability of *Diouf II*. *Id*. at 1 (noting that the petitioner had been detained since October 24, 2013). Moreover, Respondents present the argument that *Diouf II* does not apply to individuals subject to reinstated orders of removal and in withholding-only proceedings in order to urge the Court to reach a different result in this case, and if necessary, to preserve the argument for appeal.

Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 305-7181

present a qualitatively different set of circumstances and government interests from those examined in *Diouf II* as none of their removal orders may be reviewed.

There are three major distinctions between the petitioner in *Diouf II* and the class members here – individuals who are subject to a reinstated order of removal and in withholding-only proceedings. First, unlike the petitioner in *Diouf II* who could challenge his removal order itself and, if his removal proceedings were reopened, could seek adjustment of status, all of the class members will remain subject to unreviewable final orders of removal even if withholding of removal is ultimately granted. *Compare Diouf II*, 634 F.3d at 1088 (finding petitioner similarly situated to § 1226(a) detainees, in part, because "both may succeed in setting aside their removal orders"), *with Lanza v. Ashcroft*, 389 F.3d 917, 933 (9th Cir. 2004) (stating that a grant of withholding is not a basis for adjustment to lawful permanent resident status and only prohibits removal to the country of risk). Indeed, withholding of removal is country-specific relief, thus the government could potentially remove any or all of the class members to alternate countries even if they are granted protection from removal to their native countries. 8 U.S.C. § 1231(b)(2)(E); 8 C.F.R. § 1208.16(f). Moreover, all of the class members, unlike Diouf, are statutorily ineligible to apply for any form of relief under the INA. 8 U.S.C. § 1231(a)(5).

Second, unlike the petitioner in *Diouf II* who entered the United States on a visa and had never been physically removed from the United States, the class members were previously physically removed from the United States at least once. The government's interest in detaining aliens previously removed and who have illegally reentered the United States presents qualitatively different concerns than those addressed in *Diouf II*. *Diouf II*, 634 F.3d at 1088 ("It is far from certain that § 1231(a)(6) detainees such as Diouf will be removed."). In the absence of careful consideration of the government's interest in the continued detention of previously removed individuals who have illegally reentered the United States, a sweeping extension of *Diouf II*'s requirement of an individualized bond hearing for individuals being held in custody pursuant to 8 U.S.C. § 1231(a)(6) for more than 180 days after reinstatement of their prior removal order is unwarranted.

Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 305-7181

Third, unlike the petitioner in *Diouf II*, the class members' removal orders are not and cannot be judicially reviewed. *Compare Diouf II*, 634 F.3d at 1087 (discussing the importance of motions to reopen in safeguarding aliens' rights), *with* 8 C.F.R. § 1208.2(c)(3)(i) ("The scope of review in [withholding-only] proceedings . . . shall be limited to a determination of whether the alien is eligible for withholding or deferral of removal."). The government reinstated unreviewable removal orders for each of the class members, and no class member either challenged the reinstatement before the Department of Homeland Security ("DHS") or filed a petition seeking review of DHS's determination to reinstate the prior removal order. *See* 8 C.F.R. § 241.8(b) (providing alien notice and opportunity to make statement contesting reinstatement determination); *Garcia de Rincon v. Dep't of Homeland Security*, 539 F.3d 1133, 1137 (9th Cir. 2008) ("[A] petitioner cannot raise a due process challenge to an underlying removal order and review of the reinstatement itself is limited to confirming the agency's compliance with the reinstatement regulations."). The very definition of the class precludes its members from filing a motion to reopen the original removal proceedings, *cf. Diouf I*, 542 F.3d at 1226-27 (recounting the petitioner's multiple motions to reopen his removal proceedings), and indeed they would be legally ineligible to do so, 8 U.S.C. § 1231(a)(5) ("[T]he prior order of removal is . . . not subject to being reopened or reviewed.").

An extension of *Diouf II* to the class members – individuals subject to reinstatement – would, in conflict with the Supreme Court's decision in *Zadvydas*, effectively strip DHS of all discretion over custody determinations made pursuant to 8 U.S.C. § 1231(a)(6) in cases in which aliens are held for longer than 180 days. In *Zadvydas*, however, the Supreme Court recognized that the government would retain discretion to detain final-order aliens beyond the presumptively reasonable 180-day period, albeit subject to the "significant likelihood of removal in the reasonably foreseeable future" inquiry. *Zadvydas*, 533 U.S. at 701 ("[A]n alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.").

Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 305-7181

Simply put, the *Diouf II* court did not weigh the government's significant interest in maintaining discretion to continue detention of individuals like the class members, to wit, aliens under § 1231(a)(6) who: (1) have previously been removed; (2) have illegally reentered the United States; (3) have not sought judicial review of their removal order; and (4) are eligible for, at most, relief from physical removal to a specific country. For these reasons, the holding in *Diouf II* does not govern this case.

The class members continue to claim that the Ninth Circuit's decision in *Padilla-Ramirez v. Bible*, 862 F.3d 881, 884, 886 (9th Cir. 2017), affirmed *Diouf II*. Motion for Summary Judgment, ECF No. 72, at 11-14. Contrary to the class members' insistence, *Padilla-Ramirez* should not be read to have any bearing on their claims that they are entitled to a bond hearing based on prolonged detention under *Diouf II*. In *Padilla-Ramirez*, the Ninth Circuit took pains to explain that it was "*not* address[ing] [petitioner's] entitlement to a bond hearing after prolonged detention." 862 F.3d 881, 884 (9th Cir. 2017). Indeed, unlike the class members in this case, Padilla-Ramirez made no claim that he was entitled to a bond hearing based on prolonged detention, and thus the Court had no reason to consider that issue.

Padilla-Ramirez did quote the Court's earlier statement in *Diouf II* that "individuals detained under § 1231(a)(6) are entitled to the same procedural safeguards against prolonged detention as individuals detained under § 1226(a)." *Id*. (quoting *Diouf II*, 634 F.3d at 1084). But the decision makes abundantly clear that the Court "d[id] not address" – *even in dicta* – the issue presently before this Court: whether the holding in *Diouf II* regarding "individuals detained under § 1231(a)(6)" applies equally to aliens who are subject to a reinstated order of removal. *Id*. In other words, the Ninth Circuit's reference to *Diouf II* in *Padilla-Ramirez* only served to explain why it was unnecessary there to resolve the issue presented in that case.

Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015) ("*Rodriguez III*") is equally unavailing to the class members' claims. The Ninth Circuit in *Rodriguez III* expressly excluded individuals detained under § 1231(a), including those in reinstatement proceedings, from the certified class required to be given custody redetermination hearings after 180 days in detention.

Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 305-7181

Indeed, the Ninth Circuit ruled that detainees in removal proceedings who are facing prolonged detention pursuant to *certain* immigration statutes are entitled to a bond hearing where it is the government's burden to prove that continued detention is warranted. *Rodriguez v. Robbins*, 715 F.3d 1127, 1130-1131 (9th Cir. 2013) (*Rodriguez II*); *Rodriguez III*, 804 F.3d 1060. Still, the fact remains that the Ninth Circuit affirmed the permanent injunction for individuals detained under §§ 1225(b), 1236(a) and (c), but lifted the injunction for individuals like the class members here who are detained under § 1231(a). *Rodriguez III*, 804 F.3d at 1078-86. Notably, the Ninth Circuit found that aliens detained under § 1231(a) "have been 'ordered removed'" and therefore do not belong in a class "defined, in relevant part, as non-citizens who are detained 'pending completion of removal proceedings, including judicial review.'" *Id*. at 1085-86. By finding that those detained under § 1231 are not a part of the *Rodriguez* class, the Ninth Circuit specifically reversed the district court's inclusion of those detainees in reinstatement proceedings from inclusion in the permanent injunction. Because the Ninth Circuit expressly excluded individuals like the class members here who are detained under § 1231 from class membership, any reliance on *Rodriguez III* is misguided or, at best, questionable.

II. The post order custody review process satisfies the class members' constitutional rights.

The class members' continued detention is constitutional and complies with immigration regulations. Their claim that they do not have an opportunity to even request release, Motion for Summary Judgment, ECF No. 72 at 15-16, is belied by the regulations in place. There is no basis for a claim that their ongoing detention is either contrary to law, indefinite, or otherwise unconstitutional, because the Regulations, in compliance with *Zadvydas*, entitle the class members to regular review of their custody status throughout their detention. 8 C.F.R. § 241.4. Under those regulations, a detainee is entitled to review of his custody status prior to the expiration of the removal period, 8 C.F.R. § 241.4(k)(1), and at annual intervals thereafter, 8 C.F.R. § 241.4(k)(2), with the right to request interim reviews not more than once every three months in the interim period between annual reviews. 8 C.F.R. § 241.4(k)(2)(iii). This post-

Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 305-7181

order custody review ("POCR") process satisfies the requirements of 8 U.S.C. § 1231(a)(6) and the due process clause. *Zadvydas*, 533 U.S. at 724.

A. The post-order custody review regulatory framework.

1. The ninety-day POCR

Section 241.4(k)(1)(i) of the regulations require that DHS conduct a POCR before the ninety-day removal period expires if removal cannot be accomplished during the removal period. In conducting the POCR, DHS must review the detainee's records and all documents submitted by the alien, and must inform the alien of the decision. 8 C.F.R. § 241.4(h)(1). DHS must also provide written notice to the detainee approximately thirty days in advance of the pending POCR review so that the he or she may submit information in writing in support of release. 8 C.F.R. § 241.4(h)(2). The detainee is also permitted to be assisted by any individual of his or her choosing in preparing or submitting information in response to the notice. *Id.* If the detainee requests additional time to prepare a response, however, the request shall constitute a waiver of conducting the POCR review prior to the expiration of the removal period. *Id.*

The ninety-day POCR requires that several criteria and factors be considered when reaching the decision to release or continue detaining the individual. 8 C.F.R. §§ 241.4(e), (f), and (h)(2). Before making any recommendation or decision to release a detainee, DHS must conclude that:

> (1) Travel documents for the alien are not available or, in the opinion of the Service, immediate removal, while proper, is otherwise not practicable or not in the public interest;
>
> (2) The detainee is presently a non-violent person;
>
> (3) The detainee is likely to remain nonviolent if released;
>
> (4) The detainee is not likely to pose a threat to the community following release;
>
> (5) The detainee is not likely to violate the conditions of release; and
>
> (6) The detainee does not pose a significant flight risk if released.

Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 305-7181

8 C.F.R. § 241.4(e). Moreover, the regulations provide that the following factors should be weighed in considering whether to recommend further detention or release of a detainee:

> (1) The nature and number of disciplinary infractions or incident reports received when incarcerated or while in Service custody;
>
> (2) The detainee's criminal conduct and criminal convictions, including consideration of the nature and severity of the alien's convictions, sentences imposed and time actually served, probation and criminal parole history, evidence of recidivism, and other criminal history;
>
> (3) Any available psychiatric and psychological reports pertaining to the detainee's mental health;
>
> (4) Evidence of rehabilitation including institutional progress relating to participation in work, educational, and vocational programs, where available;
>
> (5) Favorable factors, including ties to the United States such as the number of close relatives residing here lawfully;
>
> (6) Prior immigration violations and history;
>
> (7) The likelihood that the alien is a significant flight risk or may abscond to avoid removal, including history of escapes, failures to appear for immigration or other proceedings, absence without leave from any halfway house or sponsorship program, and other defaults; and
>
> (8) Any other information that is probative of whether the alien is likely to--
>
> > (i) Adjust to life in a community,
> >
> > (ii) Engage in future acts of violence,
> >
> > (iii) Engage in future criminal activity,
> >
> > (iv) Pose a danger to the safety of himself or herself or to other persons or to property, or
> >
> > (v) Violate the conditions of his or her release from immigration custody pending removal from the United States.

Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 305-7181

8 C.F.R. § 241.4(f). At this stage of the POCR process, the Field Office Director or Director of the Enforcement and Removal Field Office decides whether the individual be released from custody or remains in detention pending removal or further review of his or her custody status. 8 C.F.R. § 241.4(k)(1)(i).

2. The 180-day POCR

If the detainee is not released or removed at the time of the initial POCR and has cooperated with the removal process, he or she will receive a second review three months later, or after 180 days have passed from the date the removal period began. 8 C.F.R. § 241.4(k)(2)(ii). The 180-day review is conducted by the ICE Headquarters Post-Order Detention Unit ("HQPDU") which considers whether there is a significant likelihood of removal in the reasonably foreseeable future. 8 C.F.R. § 241.13. At the 180-day determination, the HQPDU considers whether it is reasonable to believe that travel documents can be obtained in light of the government's efforts, the receiving country's willingness to facilitate the process, and other factors. 8 C.F.R. § 241.4(e) & (f). If the detainee is not released following the 180-day POCR, a subsequent review will be commenced within approximately one year after the 180-day POCR. 8 C.F.R. § 241.4(k)(2)(iii). If HQPDU determines that there is not a significant likelihood of removal in the reasonably foreseeable future, the detainee must be released unless his or her continued detention is justified by the special circumstances provided for in 8 C.F.R. § 241.14. 8 C.F.R. § 241.13(b)(1).

3. All of the class members may request a POCR under 8 C.F.R. § 241.13.

Contrary to the class members' claims that there is no opportunity to request release, Motion for Summary Judgment, ECF No. 72 at 15, in addition to the required review procedures outlined in 8 C.F.R. § 241.4, any detainee, including all the class members, may also request a determination from HQPDU of whether there is a significant likelihood of removal in the reasonably foreseeable future at any time after a removal order becomes final. 8 C.F.R. § 241.13(d)(3). The detainee must submit a written request for release and show that there is no significant likelihood of removal in the reasonably foreseeable future. 8 C.F.R. § 241.13(d)(1).

Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 305-7181

If the individual submits a request before the expiration of the removal period, HQPDU may postpone its consideration of the request until the removal period expires. 8 C.F.R. § 241.13(d)(3).

In deciding whether a detainee should be released under § 241.13, the regulations provide that HQPDU will consider the history of the individual's efforts to comply with the order of removal, the history of DHS's efforts to remove aliens to the country in question, including the ongoing nature of DHS's efforts to remove a particular detainee and that detainee's assistance with those efforts, the reasonably foreseeable results of those efforts, and the views of the Department of State regarding the prospects for removal of individuals to the country or countries in question. 8 C.F.R. § 241.13(f). If HQPDU denies the request for release under § 241.13, he or she is still entitled to the normal § 241.4 review procedures outlined above. There is no administrative appeal from a HQPDU decision denying such a request. 8 C.F.R. § 241.13(g)(2).

B. Due process does not require that the class members be provided with in-person review before an immigration judge.

The Supreme Court held in *Demore* that, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." 538 U.S. at 521 (internal citations omitted). Undoubtedly, detention is a "constitutionally valid aspect of the deportation process." *Id.* at 523. The due process issue in this case, if any, is limited to what procedural protections must be provided to a detainee who is under a final order of removal and subject to a significant likelihood of being removed from the United States in the reasonably foreseeable future. Suffice it to say, none of the class members are subject to indefinite or permanent detention, or have a right to remain in the United States, even if they are successful in their withholding-only proceedings. As the dissent in *Zadvydas* correctly states, Zadvydas "offer[s] no justification why an alien under a valid and final order of removal - which has totally extinguished whatever right to presence in this country he possessed - has any greater due process right to be released into the country than an alien at the border

Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 305-7181

seeking entry." 533 U.S. at 705 (Scalia, J., dissenting) (referencing *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953)).

Moreover, the current post-order custody review regulations were amended and new regulations were promulgated in order to conform to the Supreme Court's guidance in *Zadvydas*. This is significant, yet ignored by the class members. Indeed, the regulations provide that aliens are not to be detained if there is "no significant likelihood of removal in the reasonably foreseeable future." 8 C.F.R. § 241.13; *see also* 8 C.F.R. § 241.13(g)(1) (requiring, in pertinent part, that the government "shall promptly make arrangements for the release of the alien subject to appropriate conditions" if there is no significant likelihood of removal in the reasonably foreseeable future). Simply put, due process does not require that the class members be provided a mandatory in-person review before an immigration judge, or that the government shoulder the burden of proof to demonstrate that the ongoing detentions remain justified.[2] This is particularly the case where *Zadvydas* requires that an individual detained under § 1231(a)(6) bear the initial burden of proof when challenging whether his or her removal is significantly likely to occur in the reasonably foreseeable future. *Zadvydas*, 533 U.S. at 701. The post-order custody review regulations otherwise provide ample protection of any liberty interests retained by the class members. *Id.* at 693 (stating "the nature of [due process] protection may vary depending upon status and circumstance") (citing *Landon v. Plasencia*, 459 U.S. 21, 32-34 (1982); *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950)). Ongoing detention of the class members, thus, remains statutorily justified while their detention serves the legitimate interest of securing their removal. *Id.*

[2] Although not required to satisfy due process, the regulations do allow for discretionary in-person interviews for custody determinations not transferred to the "HQPDU" following expiration of the 90-day removal period. *See* 8 C.F.R. § 241.4(h)(1) (stating the "district director or Director of the Detention and Removal Field Office may in his or her discretion schedule a personal or telephonic interview with the alien as part of this custody determination."). If jurisdiction is transferred to the HQPDU, in-person interviews are required "[i]f the HQPDU Director does not accept a panel's recommendation for release, or if the alien is not recommended for release." 8 C.F.R. § 241.4(i).

Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 305-7181

More importantly, the class members have no entitlement to lawful status in this country, and any liberty interest they retain is protected by the POCR procedures in place. Moreover, the balance of interests weighs in favor the government, which has a strong interest in securing the removal of all individuals ordered removed. The class members' citation to cases of detained individuals are also distinguishable. Motion for Summary Judgment, ECF No. 72, at 14-18. Aside from involving criminal pre-trial detention, rather than the civil detention at issue here,[3] the cases cited by the class members all involve individuals who presumably have a right to be free in the United States. The class members retain no such right.

Respondents are lawfully and properly detaining all of the class members under 8 U.S.C. § 1231(a). Respondents' decision to continue their detentions conforms to both the letter and spirit of the relevant statutory and regulatory scheme. It further meets all constitutional requirements. Ignoring existing regulations places a burden on the administrative process and immigration courts at the period closest to an individual's removal. This runs afoul of the laws and regulations that consistently recognize the Executive Branch's authority to remove individuals in an expeditious manner. *See, e.g.*, *Shaughnessy*, 345 U.S. at 210 ("the power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control"). To best balance the paramount considerations addressed by § 1231(a)(6) and *Zadvydas*, and to provide for sufficient custody reviews under the circumstances, the Executive Branch properly amended and promulgated the rigorous series of regulations detailed above. *See* 8 C.F.R. §§ 241.4, 241.13. Accordingly, Respondents have provided the class members, who cannot show on a class-wide basis that there is no significant likelihood of removal in the reasonably foreseeable future for each individual class member, with all process they are due and this Court should deny their claims.

[3] Indeed, Petitioners ignore the distinction between criminal detention – which is not at issue here – and civil immigration detention. The analysis has *always* been different in the immigration context. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in this country is itself a crime.").

Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 305-7181

CONCLUSION

For the forgoing reasons this Court should grant Respondents' Cross Motion for Summary Judgment, deny the class members' claims, and hold that the post-order custody review process promulgated at 8 C.F.R. §§ 241.4 and 241.13 provides a statutorily authorized and constitutionally sufficient means of carrying out the purpose of 8 U.S.C. § 1231(a)(6).

Dated: January 8, 2018

Respectfully submitted,

CHAD READLER
Acting Assistant Attorney General
Civil Division

WILLIAM C. PEACHEY
Director, Office of Immigration Litigation

KATHLEEN A. CONNOLLY
Senior Litigation Counsel
District Court Section

/s/ Gladys M. Steffens Guzmán
GLADYS M. STEFFENS GUZMÁN
Trial Attorney
District Court Section
Office of Immigration Litigation
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Tel: 202.305.7181
eMail: Gladys.Steffens-Guzman@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2018, I served a copy of this Opposition and Cross-Motion on counsel for Petitioners via the district court's ECF system.

Respectfully submitted,

/s/ Gladys M. Steffens Guzmán
GLADYS M. STEFFENS GUZMÁN
Office of Immigration Litigation
Department of Justice, Civil Division
Trial Attorney, District Court Section
P.O. Box 898, Ben Franklin Station
Washington, DC 20044
Telephone: (202) 305-7181
Facsimile: (202) 305-1890
E-Mail: gladys.steffens-guzman@usdoj.gov

Attorney for Defendants