Honorable James R. Robart
Honorable Brian A. Tsuchida

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Arturo MARTINEZ BAÑOS, et al., Plaintiffs-Petitioners, v. Nathalie ASHER, et al., Defendants-Respondents	Case No. 2:16-cv-01454-JLR-BAT Agency Nos. A 089 091 010 A 098 225 790 A 206 104 257 **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** Noted on Motion Calendar: January 5, 2017

I. INTRODUCTION

Defendants' policy and practice of detaining class members directly flouts controlling caselaw. Class members are individuals who have been placed in withholding of removal proceedings after an asylum officer or immigration judge ("IJ") made a finding that they have a reasonable fear of persecution and torture. Defendants detain class members throughout the lengthy immigration proceedings, denying them the opportunity to even seek a custody redetermination from a neutral arbiter who determines whether the individual presents a flight risk or threat to the community. Yet, the Ninth Circuit and this Court have uniformly held that

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such prolonged detention without an opportunity to seek a custody redetermination by an IJ violates the Immigration and Nationality Act ("INA"). There is no genuine dispute of material facts in this case, for Defendants do not deny their policy and practice of denying individualized custody hearings to class members. Class members are thus entitled to declaratory and injunctive relief as a matter of law and now move for summary judgment.

II. BACKGROUND

A. Statutory background

Class members are all individuals who were subject to reinstatement of removal under 8 U.S.C. § 1231(a)(5), for having re-entered the United States after having been previously ordered removed. *See* Dkt. 67 at 9. Pursuant to the implementing regulations, persons subject to reinstatement of removal are not provided an opportunity to appear in front of an Immigration Judge. 8 C.F.R. § 241.8(a). Instead, they are placed through an expedited process where an ICE official issues a reinstatement order predicated upon the person's prior removal order and subsequent unlawful reentry. 8 C.F.R. § 241.8(c). The person is then summarily removed from the country.

However, an "exception" to the summary removal process exists for a noncitizen who expresses a fear of being persecuted or tortured if returned to their home country. 8 C.F.R. § 241.8(e). In such a case the noncitizen is interviewed by an asylum officer to determine if she or he has a reasonable fear of persecution or torture. *Id.* If an asylum officer determines that the person has a reasonable fear, they are then transferred out of the summary reinstatement process to hearings before an IJ "for full consideration of the request for withholding of

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removal only." 8 C.F.R. § 208.31(e).[1] These proceedings are referred to as "withholding only proceedings." While the scope is limited to applications for withholding of removal and relief under the Convention Against Torture, cases referred for withholding only proceedings are "conducted in accordance with the same rules of procedure" as full removal proceedings before the IJ. *See also* 8 C.F.R. § 1208.2(c)(3)(i).

Class members have all been referred for withholding only proceedings before an IJ. Defendants have thus already determined that all class members have a reasonable fear of persecution or torture and must be afforded an opportunity for hearings before an IJ to apply for withholding of removal and/or relief under the Convention Against Torture. *See* 8 C.F.R. § 1208.31(e). Moreover, class members have the right to an administrative appeal to the Board of Immigration Appeals ("BIA")—and thereafter to seek judicial review before the federal court of appeals)—if they are not granted either withholding of removal under 8 U.S.C. § 1231(b)(3), or relief under the Convention Against Torture, 8 C.F.R. § 1208.16(c), by the immigration court. *See* 8 C.F.R. § 1208.31(e).

8 U.S.C. § 1226 authorizes the detention of a noncitizen "pending a decision on whether the [noncitizen] is to be removed from the United States." For a person detained under § 1226, subject to limited exceptions laid out in subsection (c), the Department of Homeland Security ("DHS") may detain the noncitizen or release them subject to parole or a bond. If DHS elects to detain the noncitizen, the noncitizen may request a custody redetermination hearing before an IJ. 8 C.F.R. § 1236.1(d)(1). By contrast, 8 U.S.C. § 1231(a), governs the detention of noncitizens who are subject to a final order of removal. This section defines a 90-day "removal

[1] The asylum officer's negative determination regarding reasonable fear is reviewable by the IJ. 8 C.F.R. § 208.31(g). If an IJ disagrees with the asylum officer and finds that an individual has a reasonable fear, the individual is entitled to full withholding only proceedings. *Id.* § 208.31(g)(2).

[2] The Ninth Circuit subsequently affirmed and expanded upon this decision in *Rodriguez v. Robbins*, 804

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period" after a removal order becomes "administratively final"; during the removal period, detention is required. 8 U.S.C. § 1231(a)(1)-(2). However, after that 90-day removal period the individual is subject to discretionary detention pursuant to 8 U.S.C. § 1231(a)(6). Thus, "[w]here a [noncitizen] falls within this statutory scheme can affect whether his detention is mandatory or discretionary, as well as the kind of review process available to him if he wishes to contest the necessity of his detention." *Prieto-Romero v. Clark*, 534 F.3d 1053, 1057 (9th Cir. 2008); *see also Casas-Castrillon v. Holder*, 535 F.3d 942, 945 (9th Cir. 2008) (explaining that petitioner's "relief turns in part on locating him within the statutory framework of detention authority provided by . . . 8 U.S.C. §§ 1226 and 1231.").

B. Procedural background.

Plaintiff Martinez Baños filed the first complaint on September 14, 2016, presenting three claims on behalf of himself and putative class members (collectively, "Plaintiffs"): First, Plaintiffs asserted Defendants' failure to provide custody hearings to individuals initially placed in withholding only proceedings violates the INA, as 8 U.S.C. § 1226 and the implementing regulations provide for the right of persons in removal proceedings to obtain an initial custody redetermination hearing from an IJ (except as provided in § 1226(c)). Dkt. 1 ¶¶74-77. Second, Plaintiffs asserted Defendants' failure to provide automatic custody redeterminations at six months of detention, when class members' detention is deemed prolonged, violates the INA. *Id.* ¶¶78-80. The complaint explicitly asserts that prolonged detention is not authorized by either § 1226 or § 1231. *Id.* ¶¶45-51. Finally, Plaintiffs challenged Defendants' failure to provide custody determinations as violating their constitutional rights under the Due Process Clause of the United States Constitution. *Id.* ¶¶81-

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84. Plaintiffs filed an amended complaint on January 31, 2017, adding two named plaintiffs. Dkt. 38.

Almost six months after the filing of the amended complaint, the Ninth Circuit issued an intervening decision holding that individuals in withholding only proceedings following reinstatement of their removal orders are subject to the detention authority of 8 U.S.C. § 1231(a). *Padilla-Ramirez v. Bible*, 862 F.3d 881 (9th Cir. 2017). This Court accordingly found that *Padilla-Ramirez* forecloses Plaintiffs' first claim that they are detained under § 1226 and dismissed that claim with prejudice. Dkt. 63 at 2. However, the Court denied *without* prejudice Plaintiffs' claim that they are entitled to individualized custody hearings when their detention becomes prolonged. *See id.* (directing Plaintiffs to "file a new motion addressing this issue" after the court rules on class certification).

This Court thereafter certified the following class:

> All individuals who (1) were placed in withholding only proceedings under 8 C.F.R. § 1208.31(e) in the Western District of Washington after having a removal order reinstated, and (2) have been detained for 180 days (a) without a custody hearing or (b) since receiving a custody hearing.

Dkt. 67 at 17; Dkt. 70 at 3 (adopting the report and recommendation). Class members challenge Defendants' policy and practice of subjecting them to prolonged detention without any opportunity to seek an individualized custody redetermination by an IJ. Dkt. 67 at 1. Defendants' motion to dismiss the prolonged detention claim has been rejected by this Court. *See* Dkt. 67 at 15 ("[T]here is no serious dispute that the amended petition survives Rule 12(b)(6) review."). Furthermore, this Court has recognized that "[t]he answer to this central question will decide the case," Dkt. 67 at 20, and that "no further factual development is required" in order to resolve the issue, *id.* at 13.

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Class members now move this Court to enter summary judgment declaring Defendants' policy and practice unlawful, and ordering Defendants to provide all class members with individualized custody hearings in which the government bears the burden of justifying their detention with clear and convincing evidence.

III. ARGUMENT

Summary judgment is warranted where the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A material issue of fact is one that affects the outcome of litigation and requires a trial to resolve the parties' differing versions of the truth." *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982). There is no material issue of fact in this case, as the parties agree that Defendants have a policy and practice of denying individualized custody hearings to class members. Whether class members are entitled to relief turns on the purely legal question of whether Defendants are correctly interpreting and enforcing the law. Controlling caselaw from the Ninth Circuit Court of Appeals unequivocally requires Defendants to provide all persons subject to prolonged detention under the general detention statutes, including 8 U.S.C. § 1231(a), with individualized custody hearings before an IJ. Class members are thus entitled to relief as a matter of law.

A. Defendants have a policy and practice of denying individualized custody hearings to class members.

This Court has correctly identified the only material fact in this case: that Defendants "[have] a practice of detaining non-citizens who are subject to reinstated removal orders and who are seeking withholding of removal, for prolonged periods without providing custody hearings before immigration judges." Dkt. 67 at 1. The record clearly demonstrates this

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practice, resulting from Defendants' interpretation that IJs do not have jurisdiction over custody redetermination for individuals in withholding only proceedings. *See* Dkt. 8 ¶10 (stating that IJs at the Tacoma Immigration Court had been denying requests for custody redetermination by individuals in withholding only proceedings who had been detained for six months or longer); Dkt. 38-2 (IJ denials of custody redetermination based on "No Jurisdiction" for persons in "Withholding Only Proceedings"). Indeed, Defendants do not deny that it is their policy and practice to deny individualized custody hearings to class members. Rather, Defendants assert that class members are not entitled to individualized custody hearings under governing law. *See, e.g.*, Dkt. 57 at 18-21 (arguing that Ninth Circuit caselaw does not afford the right to custody hearings for individuals in withholding only proceedings); Dkt. 68 at 2 (asserting Plaintiff Flores's claims are not justiciable because he has no statutory or regulatory right to individualized custody hearings). Therefore, this case presents "no genuine dispute as to any material fact" and warrants resolution "as a matter of law." Fed. R. Civ. P. 56(a).

B. Class members are entitled to individualized custody hearings under the general detention statutes, including 8 U.S.C. 1231(a), in which the government bears of burden of proof.

1. All individuals subject to prolonged immigration detention are entitled to a custody redetermination by an IJ, in which the government must justify the continued detention with clear and convincing evidence.

There is simply no legal authority for Defendants' policy and practice of denying class members custody hearings before an IJ. Binding precedent makes clear that class members, like all noncitizens subject to the general immigration detention statutes, are entitled to an individualized hearing before an IJ the moment their immigration detention becomes prolonged—at six months. *Rodriguez v. Robbins* ("*Rodriguez II*"), 715 F.3d 1127, 1139 (9th Cir. 2013) (emphasis added) ("[I]mmigration detention becomes prolonged at the six-month

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mark *regardless* of the authorizing statute.").[2] While the general detention statutes permit the government to detain noncitizens who are in removal proceedings or subject to a removal order, *see* 8 U.S.C. §§ 1226, 1231, courts have found that in order to avoid grave constitutional concerns, the INA must be interpreted to limit the government's authority to subject individuals to prolonged detention without any opportunity to seek custody redetermination by a neutral decisionmaker.

Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942 (9th Cir. 2008), examined the question of whether an individual initially subject to mandatory detention under 8 U.S.C. § 1226(c) could be subsequently detained for a prolonged period while awaiting judicial review of his removal order. In *Demore v. Kim*, the Supreme Court had previously denied a constitutional challenge to mandatory detention without a bond hearing under § 1226(c). *See* 538 U.S. at 531. *Casas-Castrillon*, however, distinguished *Demore* by highlighting that its holding hinged on "the specific understanding" that mandatory detention under § 1226(c) is generally brief and does not usually exceed five and a half months. 535 F.3d at 950 (quoting *Demore*, 538 U.S. at 530). Finding that § 1226(c) "was intended to apply for only a limited time," the *Casas-Castrillon* court first concluded that the petitioner was subject to the detention authority of § 1226(a) while awaiting judicial review of his removal order. The court then held that the government may not detain an individual under § 1226(a) "for a prolonged period without providing him a neutral forum to contest the necessity of his continued detention," 535 F.3d at 949, because "prolonged detention without adequate procedural protections would raise serious constitutional concerns," *id.* at 950.

[2] The Ninth Circuit subsequently affirmed and expanded upon this decision in *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015) ("*Rodriguez III*"), *cert. granted sub nom Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016). *Rodriguez III* is currently pending review by the Supreme Court. *Jennings v. Rodriguez*, 136 S. Ct. 2489 (June 20, 2016) (No. 15-1203).

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Prieto-Romero v. Clark, 534 F.3d 1053 (9th Cir. 2008), reinforced *Casas-Castrillon*'s protection against prolonged detention without a bond hearing, recognizing that "due process requires 'adequate procedural protections' to ensure that the government's asserted justification for physical confinement 'outweighs the individual's constitutionally protected interest in avoiding physical restraint.'" 534 F.3d at 1065 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001)). *Prieto-Romero* affirmed that at a minimum, individuals subject to prolonged detention under § 1226(a) must be afforded "an opportunity to contest the necessity of [their] detention before a neutral decisionmaker." 534 F.3d at 1065-66 (finding that petitioner had been afforded such an opportunity based upon the district court's order that he be granted a new bond hearing before the IJ).

In *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011) the Ninth Circuit further clarified another issue left unanswered *Casas-Castrillon* and *Prieto-Romero*: which party bears of the burden of proof, and what standard of proof applies in custody redetermination of prolonged detention before an IJ. *Singh* confirmed that "the burden of establishing whether detention is justified falls on the government," 638 F.3d at 1203, and that the government must meet its burden with "clear and clear convincing evidence," *id.* at 1205.

The Ninth Circuit next concluded that even where a noncitizen is already subject to a final order of removal (i.e., there are no longer pending removal proceedings or direct judicial review of such proceedings), and thus detained pursuant to § 1231(a), that such a person is entitled to an individualized custody hearing before an IJ when facing prolonged detention. *Diouf v. Napolitano* ("*Diouf II*"), 634 F.3d 1081, 1092 (9th Cir. 2011)*; see id.* at 1086 ("We now extend *Casas-Castrillon* to [noncitizens] detained under § 1231(a)(6)."). Notably, the *Diouf II* court specifically defined "prolonged" detention as detention that reaches 180 days, or

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six months. *See id.* at 1092 n.13 ("As a general matter, detention is prolonged when it has lasted six months and is expected to continue more than minimally beyond six months."). In so doing, the *Diouf II* court relied on *Casas-Castrillon*'s analysis of *Demore*, in addition to the Supreme Court's recognition of six months as a "presumptively reasonable period of detention." *Zadvydas*, 533 U.S. at 701.

Then, in a series of three separate decisions addressing a class action for detainees facing prolonged detention under the general detention statutes—including 8 U.S.C. §§ 1225(b), 1226 and 1231(a), *see Rodriguez v. Hayes* ("*Rodriguez I*"), 591 F.3d 1105, 1113 (9th Cir. 2010)—the Ninth Circuit confirmed that *all* noncitizens subject to immigration detention for six months or longer are entitled to automatic custody hearings before an IJ. *Rodriguez III*, 804 F.3d at 1085; *see also Rodriguez II*, 715 F.3d at 1139 ("*Diouf II* strongly suggested that immigration detention becomes prolonged at the six-month mark regardless of the authorizing statute . . . [and] that conclusion is consistent with the reasoning of *Zadvydas*, *Demore*, *Casas* and *Diouf II*, and we so hold."). *Rodriguez II* and *Rodriguez III* also reaffirmed that the government must justify prolonged detention of each individual with clear and convincing evidence. *Rodriguez II*, 715 F.3d at 1135; *Rodriguez III*, 804 F.3d at 1086-87.

Several decisions from this district also make clear that class members are entitled to individualized custody hearings before an IJ regardless of which statute authorizes their detention. *See, e.g.*, *Mercado Gonzalez v. Asher*, No. C15-1778-MJP-BAT, 2016 WL 871073, at *3 (W.D. Wash. Feb. 16, 2016), *adopted*, No. C15-1778-MJP, 2016 WL 865351 (W.D. Wash. Mar. 7, 2016) (deciding that the Court need not determine whether a noncitizen is detained pursuant to 8 U.S.C. §§ 1226 or 1231 as he was detained for more than six months and thus entitled to a bond hearing under either statute); *Martinez Mendoza v. Asher*, No. C14-

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0811JCC, 2014 WL 8397145, at *2 (W.D. Wash. Sept. 16, 2014) ("Because, as this Court now finds, petitioner's detention falls under § 1226(a), he is entitled to a bond hearing under *Casas-Castrillon.* However, this would remain the case even if petitioner's detention were, in fact governed by § 1231(a)(6) . . .").

Class members, all of whom are subject to prolonged detention without a custody redetermination before an IJ, are thus being unlawfully deprived of their rights under the INA. In order to avoid serious constitutional concerns and offer adequate procedural safeguards for class members, Defendants must provide all class members with individualized bond hearings before an IJ in which the government bears the burden to justify each class member's detention with clear and convincing evidence.

2. Given the Court's finding that class members are detained under 8 U.S.C. § 1231(a), *Diouf II* squarely controls this case.

Moreover, where the Court has determined that class members are subject to the detention authority of § 1231(a), *see supra* § II.B, Defendants cannot seriously dispute that *Diouf II* directly controls in this case. Although the Ninth Circuit determined that individuals in withholding only proceedings after reinstatement are subject to detention under § 1231(a) and thus not initially entitled to custody redetermination hearings before an IJ, it confirmed that *Diouf II* governs the question of whether they are entitled to such hearings once their detention becomes prolonged. *See Padilla-Ramirez*, 862 F.3d at 884 (citing *Diouf II* as direct authority for this question). In fact, Defendants "acknowledge that this Court has previously held that *Diouf II* applies in cases like the one at hand" but "urge the Court to reach a different result in this case." Dkt. 16 at 22 n.8.

Diouf II unambiguously held that "[a noncitizen] facing prolonged detention under § 1231(a)(6) is entitled to a bond hearing before an immigration judge and is entitled to be

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released from detention unless the government establishes that the [noncitizen] poses a risk of flight or a danger to the community." 634 F.3d at 1092. The *Diouf II* court declined to accord *Chevron* deference to agency regulations implementing detention under § 1231(a)(6), recognizing that "prolonged detention under § 1231(a)(6), without adequate procedural protections, would raise 'serious constitutional concerns.'" *Id.* at 1086; *see also id.* at 1090 ("We may not defer to DHS regulations interpreting § 1231(a)(6), however, if they raise grave constitutional doubts.") (citations omitted). *Diouf II*'s holding specifically requires a custody redetermination hearing before an IJ as well as a hearing which places the burden of proof on the government because it is based on the determination that agency regulations "do not afford adequate procedural safeguards because they do not provide for an in-person hearing, they place the burden on the alien rather than the government and they do not provide for a decision by a neutral arbiter such as an immigration judge." *Id.* at 1091 (citations omitted).

Consistent with *Diouf II*, "[j]udges in this District have uniformly determined that a noncitizen who is subject to a reinstated removal order and in withholding only proceedings is entitled to a bond hearing at the latest after he or she has been detained for six months. *See, e.g., Gonzalez v. Asher*, No. C15-1778-MJP-BAT, 2016 WL 871073 (W.D. Wash. Feb. 16, 2016), *adopted by* 2016 WL 865361 (W.D. Wash. Mar. 7, 2016); *Chavez-Barahona v. Asher*, C15-222-JCC, Dkt. 18 (W.D. Wash. May 29, 2015) (Report & Recommendation); *Acevedo-Rojas v. Clark*, No. C14-1323-JLR, 2014 WL6908540, at * 5 (W.D. Wash. Dec. 8, 2014); *Giron-Castro v. Asher*, No. C14-0867JLR, 2014 WL 8397147, at * 1, *3 (W.D. Wash. Oct. 2, 2014); *Mendoza v. Asher*, No. C14-811-JCC-JPD, 2014 WL 8397145 (W.D. Wash. Sept. 16, 2014)." Dkt. 22 at 3-4 (finding there is "a strong argument that . . . putative class members are entitled to bond hearings after their detentions become prolonged"). Decisions from this district

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have also correctly placed the burden of proof on the government in these custody redetermination hearings. *See, e.g.*, *Mercado Gonzalez v. Asher*, 2016 WL 871073, at *1 (requiring that the petitioner "be provided an individualized bond hearing before an IJ where the government bears the burden of establishing by clear and convincing evidence that he presents a flight risk or a danger to the community"); *Acevedo-Rojas v. Clark*, 2014 WL6908540, at *6 (". . . [*Diouf II*] dictates that she receive a bond hearing where the government bears the burden of establishing that she presents a flight risk or a danger to the community.").

Throughout this lawsuit, Defendants have assumed the untenable position that Plaintiffs "fall[] squarely within § 1231(a)(6)," Dkt. 26 at 2, but that *Diouf II* is inapposite. *See, e.g.*, Dkt. 57 at 19 (asserting that this case presents "a qualitatively different set of circumstances and government interests from those examined in *Diouf II*."). Defendants have primarily attempted to distinguish *Diouf II* by asserting that the petitioner there had been granted a stay of removal by the Ninth Circuit pending a motion to reopen, rather than being placed in withholding only proceedings after a final removal order was reinstated. *See, e.g.*, Dkt. 26 at 11; Dkt. 57 at 19-20. The argument that *Diouf II* applies only to a narrow subset of individuals detained under § 1231(a)(6) is meritless, for the *Diouf II* court specified that its holding pertains to all individuals subject to prolonged detention under § 1231(a)(6), "who, for one reason or another, have not yet been removed from the United States." 634 F.3d at 1085. Courts in this district have also repeatedly rejected the government's attempts to argue that *Diouf II* is not applicable to deciding the question of whether individuals subject to prolonged detention pending withholding only proceedings are entitled to individualized custody hearings before an IJ. *See, e.g.*, *Mendoza v. Asher*, 2014 WL 8397145, at *2 ("*Diouf II* does not distinguish between

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categories of [noncitizens] whose detention is governed by § 1231(a)(6), and instead applies to *every* [noncitizen] facing the prolonged detention under the statute") (emphasis added); *Gonzalez v. Asher*, 2016 WL 871073, at *4 ("Assuming Mr. Mercado is detained under § 1231(a)(6), the Court need not 'extend' *Diouf II* to find that it governs Mr. Mercado's case. The Ninth Circuit limited its holding to [noncitizens] detained under § 1231(a)(6)—not to 'certain [noncitizens] detained under § 1231(a)(6),' as respondents suggest.").

Class members, who have been determined to be detained under § 1231(a), are unquestionably "entitled to the same procedural safeguards against prolonged detention as individuals detained under § 1226(a)." *Diouf II*, 634 F.3d at 1084. Class members have established that they merit declaratory and injunctive relief as a matter of law.

C. The Due Process Clause entitles class members who have suffered prolonged detention to individualized custody hearings in which the government bears of burden of justifying their detention with clear and convincing evidence.

The Supreme Court has explained that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690; *see also id.* at 718 (Kennedy, J., dissenting) ("Liberty under the Due Process Clause includes protection against unlawful or arbitrary personal restraint or detention."). While controlling caselaw clearly demonstrates that the INA must be construed to afford individualized custody hearings to class members, the Due Process Clause also provides an independent basis for granting relief. Like the Supreme Court's opinion in *Zadvydas*, the statutory interpretations issued by the Ninth Circuit in *Prieto-Romero*, *Casas-Castrillon*, *Diouf II*, and the *Rodriguez* decisions are all guided by the principal of statutory interpretation instructing courts to avoid interpreting statutes in a manner that raises serious constitutional concerns. *See supra* § III.B.1; *see also*

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e.g., *Zadvydas*, 533 U.S. 678, 682 ("Based on our conclusion that indefinite detention of aliens in the former category would raise serious constitutional concerns, we construe the statute to contain an implicit 'reasonable time' limitation, the application of which is subject to federal-court review."); *Rodriguez II*, 715 F.3d at 1133 ("[T]he canon of constitutional avoidance requires us to construe the government's statutory mandatory detention authority under Section 1226(c) and Section 1225(b) as limited to a six-month period, subject to a finding of flight risk or dangerousness.").

As a threshold matter, Due Process Clause requires that civil detention be reasonably related to a valid governmental purpose. *Zadvydas*, 533 U.S. at 690. In the immigration context, the Supreme Court has recognized only two valid purposes for civil detention: to mitigate the risks of danger to the community and to prevent flight. *Id.* at 690; *Demore*, 538 U.S. at 528. If the government can protect these interests without detention, then detention does not serve a valid purpose and violates the Due Process Clause. Detention ceases to be reasonably related to its purpose where an individual has no opportunity to even request release, for such detention lacks a particularized determination of flight risk or danger to the community. *See id.* at 690; *see also Matter of Patel*, 15 I. & N. Dec. 666, 666 (BIA 1979) (noting that a noncitizen "generally is not and should not be detained or required to post bond except on a finding that he is a threat to the national security, or that he is a poor bail risk") (citation omitted); *accord Matter of Andrade*, 19 I. & N. Dec. at 488, 489 (BIA 1987).

Due process also requires adequate procedures to ensure that detention serves the valid purpose. An individualized hearing before "a neutral administrative official" as to the purpose of detention is a bedrock due process requirement for civil detention. *Zadvydas,* 533 U.S. at 721-23 (Kennedy, J., dissenting). Indeed, the Supreme Court has required hearings before

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neutral decisionmakers for far lesser interests, including for criminals seeking release on parole (despite their having already been sentenced to the full term of their confinement), and even for property deprivations. *See*, *e.g.*, *Morrissey v. Brewer*, 408 U.S. 471 (1972). Defendants' policy as applied to persons in prolonged proceedings violates the Fifth Amendment's protection against arbitrary detention by subjecting class members to civil detention without any procedural safeguards to ensure that their detention serves a valid purpose.

Moreover, the Supreme Court has often recognized the commonsense principle that prolonged deprivations of liberty require greater procedural protections than brief ones. For example, in the criminal context, an individual can be detained solely on a police officer's finding of probable cause, but only for 48 hours. *County of Riverside v. McLaughlin*, 500 U.S. at 44, 55-56 (1991). Further pretrial detention requires a "prompt" judicial hearing by a neutral arbiter both to validate the police officer's probable cause finding and to determine whether the detainee presents too great a flight risk or danger to be released while awaiting trial. *United States v. Salerno*, 481 U.S. 739, 747 (1987). Where trial proceedings become lengthy, still further process is required. See *Hutto v. Finney*, 437 U.S. 678, 685-86 (1978) (holding in Eighth Amendment context that "it is equally plain . . . that the length of confinement cannot be ignored in deciding whether [a] confinement meets constitutional standards").

The basic principle that due process requires more robust procedures when detention becomes prolonged also runs throughout the Supreme Court's civil commitment doctrine. An individual found incompetent to stand trial may initially be held to attempt restoration, but only for a "reasonable period of time." *Jackson v. Indiana*, 406 U.S. 715, 733 (1972). Detention beyond the "initial commitment" requires additional safeguards, including individualized consideration of dangerousness. *Id.* at 736. A state may commit a convicted prisoner to a

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mental institution "for observation limited in duration to a brief period" without additional procedures, but only because "lesser safeguards may be appropriate" for "shortterm confinement." *McNeil*, 407 U.S. at 249-50. Similarly, "insanity acquittees may be initially held" on procedures less rigorous than those applicable to civil committees, but when detention becomes prolonged they must be afforded individualized hearings concerning flight risk or danger. *Foucha v. Louisiana*, 504 U.S. 71, 76 n.4 (1992) (emphasis added).

The Supreme Court has also applied these principles to the immigration context in *Zadvydas*. 533 U.S. at 690-91. *Zadvydas* examined the constitutional concerns raised by the government's detention of individuals who had lost their cases and were awaiting removal. The *Zadvydas* court presumed the validity of such detention for 90 days, but required greater justification for those detained more than six months. *Id.* at 701 (recognizing "six months" as the "presumptively reasonable period of detention" and explaining that the constitutionality of the detention changes "as the period of . . . confinement grows."); *see also Demore*, 538 U.S. at 529 (explaining this aspect of *Zadvydas*). Under *Zadvydas*, post-order detentions beyond six months require more scrutiny to ensure that they remain reasonable in relation to their purpose.

While the Supreme Court upheld a "brief period" of mandatory detention in *Demore*, 538 U.S. at 513, it did so upon the understanding that "the detention at stake under § 1226(c) lasts roughly a month and a half in the vast majority of cases . . . and about five months in the minority of cases." *Id.* at 529. *Demor*e also involved the detention of noncitizens with qualifying convictions who had conceded their deportability, making entry of a removal order within a short period of time virtually inevitable. 538 U.S. at 522 n.6, 528. Class members, by contrast, face prolonged detention. Every one of them, by definition, have been found *by Defendants* to have a reasonable fear of persecution or torture, demonstrating a strong claim for

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relief and entitling them to full proceedings before IJs where they apply for withholding of removal or relief under the Convention Against Torture. 8 C.F.R. 208.31(e). Due process thus requires individualized custody hearings for class members in order to ensure that their detention is justified by a sufficient flight risk or danger to the community.

Like other forms of civil detention, immigration detention that is unnecessary violates due process. If an individual does not present a flight risk or danger that warrants continued detention, the Constitution forbids it. While Congress may be justified in ordering that persons subject to summary proceedings are detained throughout that process, this reasoning does not apply to class members, all who have been found to have a reasonable fear of persecution or torture and thus entitled to full withholding only proceedings before the immigration judge. And because prolonged detention requires more rigorous procedures to ensure that detention remains reasonable in relation to its purpose, due process requires Defendants to provide class members with individualized custody hearings before an IJ in order to determine whether their continued detention is justified by sufficient risk of danger or flight.

D. Class members are entitled to immediate declaratory and injunctive relief regardless of any appeal or potential future changes in the law.

The Ninth Circuit has repeatedly made clear—and in addition, the decisions from this district have uniformly held—that all individuals are entitled to bond hearings when their detention becomes prolonged. *See* Dkt. 22 at 3-4 (recognizing previous decisions on point by courts in this district). Yet Defendants continue to deny individualized custody hearings to class members, justifying their actions by finding trivial ways to distinguish from *Diouf II* and other cases. Defendants seek to avoid their obligations under clear controlling caselaw with the hope that the Supreme Court will change the law in a way that will provide them with a defense in this case. *See, e.g.*, Dkt. 5 at 3-4 (moving to stay this lawsuit pending the Supreme Court's

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review of *Rodriguez III*) (citing *Jennings v. Rodriguez*, 136 S.Ct. 2489); Dkt. 68 at 4-5 (arguing Plaintiff Flores's prolonged detention claim should be dismissed because "the very legal issue" is being reviewed by the Supreme Court in *Jennings v. Rodriguez*).

Defendants may not choose to "consider[] and cast aside" binding authority, for "caselaw on point *is* the law." *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001) (emphasis). Defendants also may not refuse to comply with the law simply because they hope the law will change at some point in the future. Such conduct finds no legal support, as pending appeals before the Supreme Court do not diminish the binding nature of circuit precedent. *See Yong v. I.N.S.*, 208 F.3d 1116, 1119 n. 2 (9th Cir. 2000) ("[O]nce a federal circuit court issues a decision, the district courts within that circuit are bound to follow it and have no authority to await a ruling by the Supreme Court before applying the circuit court's decision as binding authority."); *Hart v. Massanari*, 266 F.3d at 1170 ("Binding authority must be followed unless and until overruled by a body competent to do so."). Class members thus seek declaratory and injunctive relief from this Court reinforcing Defendants' obligation to abide by controlling caselaw, and rejecting their policy and practice of nonacquiescence.

IV. CONCLUSION

Class members respectfully request that the Court grant this motion and enter summary judgment in their favor, declaring Defendants' policy and practice unlawful and in violation of Ninth Circuit caselaw. The Court should order Defendants to provide all class members automatic individualized custody hearings before the IJ and require that the government bear the burden of justifying each class member's detention by clear and convincing evidence.

Dated this 14th day of December, 2017.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Matt Adams, hereby certify that on December 14, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system.

Dated: December 14, 2017

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