No. 18-35460

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Arturo Martinez Baños, *et al.*,

Plaintiffs-Appellees,

v.

Elizabeth Godfrey, Acting Field Office Director, United States Immigration and Customs Enforcement, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Washington
No. 2:16-cv-01454-JLR
Hon. James L. Robart

PLAINTIFFS-APPELLEES' ANSWERING BRIEF

Matt Adams
Leila Kang
Aaron Korthuis
Northwest Immigrant Rights Project
615 Second Avenue, Suite 400
Seattle, WA 98104
(206) 957-8611
leila@nwirp.org
matt@nwirp.org
aaron@nwirp.org

Attorneys for Plaintiffs-Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Federal Regulations

Constitutional Provisions

INTRODUCTION

Defendants-Appellants' policy subjects class members to prolonged detention without providing a bond hearing to ensure that the continued detention is reasonably related to its purpose, in direct contravention of controlling caselaw. Plaintiffs-Appellees and the class they represent (collectively, "Plaintiffs") are individuals who were subjected to reinstatement of removal under 8 U.S.C. § 1231(a)(5) but subsequently placed in withholding of removal proceedings after an asylum officer or immigration judge found that they have a reasonable fear of persecution or torture. Yet Defendants' policy and practice was to detain class members throughout the lengthy immigration proceedings, regardless of whether they present a flight risk or threat to the community.

In *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011) (*Diouf II*), this Court made clear that noncitizens with final orders of removal are entitled to a bond hearing when their detention becomes prolonged. *Diouf II* followed the Supreme Court's analysis in *Zadvydas v. Davis*, 533 U.S. 678 (2001), which held that 8 U.S.C. § 1231(a)(6) must be interpreted as setting limits on the government's ability to indefinitely detain individuals, in order to ensure that the civil detention remains reasonably related to its purpose. *Zadvydas*, 533 U.S. at 689-91.

Defendants would have this Court ignore its prior holding in *Diouf II*, but it remains binding precedent. And because this Court has recently determined that

noncitizens in withholding of removal proceedings, like Plaintiffs, are detained pursuant to 8 U.S.C. § 1231(a)(6), *Padilla-Ramirez v. Bible*, 882 F.3d 826 (9th Cir. 2018), it is clear that Plaintiffs and class members are entitled to the bond hearings and procedural protections laid out in *Diouf II*. Nor can Defendants demonstrate that *Diouf II* is irreconcilable with the Supreme Court's recent holding in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), particularly since that decision explicitly distinguished prior case law interpreting 8 U.S.C. § 1231(a)(6). As such, the district court followed binding precedent in granting Plaintiffs declaratory and injunctive relief, requiring Defendants to provide bond hearings after six months in detention and placing the burden of justifying the continued detention on the government. This Court should affirm the district court's order.

JURISDICTIONAL STATEMENT

This case arises under the Constitution of the United States, the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq*., and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*. The district court had jurisdiction to review Plaintiffs' claims under the Suspension Clause, U.S. Const. art. I, § 9, cl. 2, and 28 U.S.C. §§ 2241, 1331, 1361, and 1651.

Defendants timely appealed the district court's order on the parties' motions for summary judgment, dated April 4, 2018. This Court has jurisdiction to review the district court's final order pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the district court correctly hold that this Court's decision in *Diouf II* controls Plaintiffs' challenge to prolonged detention under 8 U.S.C. § 1231(a)(6)?

2. Does this Court's decision in *Diouf II* require Defendants to provide class members with bond hearings in which the government bears the burden of proof to justify their continued detention?

3. Even if Defendants were permitted to re-litigate this Court's holding in *Diouf II*, is that holding inconsistent with the Supreme Court's prior decision in *Zadvydas*?

4. Is this Court's holding in *Diouf II* clearly irreconcilable with the Supreme Court's decision in *Jennings*?

5. If this Court finds *Jennings* supersedes the statutory interpretation in *Diouf II*, should this case be remanded to the district court to resolve the constitutional claims presented below?

STATUTORY AND REGULATORY AUTHORITIES

8 U.S.C. § 1231(a), entitled "Detention, release, and removal of aliens ordered removed," provides, in relevant part:

> (1) Removal period
>
> > (A) In general
> >
> > Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").
> >
> > (B) Beginning of period
> >
> > The removal period begins on the latest of the following:
> >
> > > (i) The date the order of removal becomes administratively final.
> > >
> > > (ii) 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.
> > >
> > > (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.
>
> . . . .
>
> (2) Detention
>
> During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

> . . . .
>
> (5) Reinstatement of removal orders against aliens illegally reentering
>
> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.
>
> (6) Inadmissible or criminal aliens
>
> 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).

8 C.F.R. § 241.8(e), creating an exception to reinstatement of removal for noncitizens who express a fear of persecution or torture, provides:

> (e) Exception for withholding of removal.
>
> If an alien whose prior order of removal has been reinstated under this section expresses a fear of returning to the country designated in that order, the alien shall be immediately referred to an asylum officer for an interview to determine whether the alien has a reasonable fear of persecution or torture pursuant to § 208.31 of this chapter.

8 C.F.R. § 208.31(e), referring noncitizens who establish a reasonable fear of persecution or torture to withholding of removal proceedings, provides:

> (e) Referral to Immigration Judge.
>
> If an asylum officer determines that an alien described in this section has a reasonable fear of persecution or torture, the officer shall so inform the alien and issue a Form I-863, Notice of Referral to the Immigration Judge, for full consideration of the request for withholding of removal only. Such cases shall be adjudicated by the immigration judge in accordance with the provisions of § 208.16. Appeal of the immigration judge's decision shall lie to the Board of Immigration Appeals.

STATEMENT OF THE CASE

I. Statutory Framework

A. Reinstatement of Removal and Withholding Only Proceedings

A noncitizen who unlawfully reenters the United States after having previously been ordered removed is potentially subject to a summary administrative removal process under 8 U.S.C. § 1231(a)(5) known as reinstatement of removal. Pursuant to § 1231(a)(5)'s implementing regulations, a person subject to reinstatement of removal is not provided an opportunity to appear in front of an immigration judge (IJ). 8 C.F.R. § 241.8(a). Instead, they undergo an expedited process whereby a Department of Homeland Security (DHS) officer issues a notice of intent to reinstate the previous removal order, provides the noncitizen with an opportunity to make a statement, and summarily signs off on the reinstated removal order. *Id.* § 241.8(b). The noncitizen is then physically removed from the country. *Id.* § 241.8(c).

The regulations create an "[e]xception" to this summary process, however, if the person in reinstatement proceedings "expresses a fear of returning to the country designated in th[e] [prior removal] order." *Id*. § 241.8(e); *see also Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 35 n.4 (2006) ("Notwithstanding the absolute terms in which the bar on relief is stated, even [a noncitizen] subject to [8 U.S.C. § 1231(a)(5)] may seek withholding of removal under 8 U.S.C. § 1231(b)(3)(A) . . . or under 8 CFR §§ 241.8(e) and 208.31 . . . ."). A noncitizen who expresses such a fear of persecution or torture is then interviewed by an asylum officer "to determine whether the [noncitizen] has a reasonable fear of persecution or torture." 8 C.F.R. § 241.8(e). If the asylum officer determines that the noncitizen "has a reasonable fear of persecution or torture," they are no longer subject to the summary reinstatement process; instead, their case is transferred to an IJ for "full consideration" of their request for protection. *Id.* § 208.31(e).[1]

These proceedings are commonly referred as "withholding only proceedings" because their scope is limited to applications for withholding of removal pursuant to 8 U.S.C. § 1231(b)(3) and for withholding or deferral of removal under the Convention Against Torture (CAT). 8 C.F.R. §§ 208.31(e),

[1] Similarly, if a noncitizen requests that the IJ review a negative reasonable fear determination by an asylum officer, and the IJ finds that the individual does have a reasonable fear, they are then placed into withholding only proceedings. 8 C.F.R. § 208.31(g)(2).

208.16, 208.17. However, the proceedings are "conducted in accordance with the same rules of procedure as proceedings conducted under 8 CFR part 240, subpart A." *Id*. § 208.2(c)(3)(i); *see also id*. § 208.2(c)(2)(i). A noncitizen in withholding only proceedings is thus entitled to the same procedural protections afforded in standard removal proceedings pursuant to 8 U.S.C. § 1229a, including the right to present evidence in support of any application for relief as well as the right to examine and cross-examine evidence presented by the government. 8 U.S.C. § 1229a(b)(4). If an IJ grants an application for withholding of removal, the government may not execute the reinstatement order. *Id*. § 1231(b)(3)(A). The noncitizen is then eligible to remain in the United States with employment authorization. 8 C.F.R. § 274a.12(a)(10). If the IJ denies the application for protection, the noncitizen has the right to file an administrative appeal to the Board of Immigration Appeals (BIA). *Id*. § 208.31(e). Thereafter, if the BIA denies the administrative appeal, the noncitizen may file a petition for review challenging the final agency decision pursuant to 8 U.S.C. § 1252(a). *See Ortiz-Alfaro v. Holder*, 694 F.3d 955, 958 (9th Cir. 2012); *Andrade-Garcia v. Lynch*, 828 F.3d 829, 833 (9th Cir. 2016).

B. Detention of Individuals in Withholding Only Proceedings

The INA contains three general detention provisions, two of which—8 U.S.C. §§ 1226 and 1231—are relevant to this case. The difference between

these sections is critical, as "[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.").

Section 1226(a) provides for discretionary detention "pending a decision on whether the [noncitizen] is to be removed from the United States." A noncitizen detained under § 1226(a) has the right to an individualized custody hearing before an IJ when their detention commences and at any time before their removal order becomes final. 8 C.F.R. § 1236.1(d)(1); *see also id.* § 1236.1(d)(3)(i).

Section 1231(a)(6), by contrast, authorizes detention for noncitizens who are subject to a final order of removal. A removal order becomes administratively final after the BIA issues a decision affirming an IJ's order, or upon the expiration of the time period for filing an appeal, if the person does not file a timely appeal to the BIA. 8 U.S.C. § 1101(a)(47)(B). The statute instructs that when the order becomes final, the "Attorney General shall remove the [noncitizen] from the United States within a period of 90 days (in this section referred to as the 'removal period')." *Id.* § 1231(a)(1)(A). To facilitate this removal, the statute requires

mandatory detention during the removal period. *Id*. § 1231(a)(2) ("During the removal period, the Attorney General shall detain the [noncitizen]"). The removal period begins on the "latest" of one of three events described in the statute:

> (i) The date the order of removal becomes administratively final.
>
> (ii) 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.
>
> (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

Id. § 1231(a)(1)(B). If removal is not effectuated during the removal period, the statute provides for discretionary detention thereafter. *Id*. § 1231(a)(6) (the noncitizen "may be detained beyond the removal period").

II. Plaintiffs' Detention by Immigration Authorities

Plaintiffs are a class of noncitizens who have been placed in withholding only proceedings after being subject to reinstatement of removal. *See supra* pp. 6-8. All have been detained for at least 180 days as they pursue applications for protection in withholding only proceedings before the immigration court or BIA. E.R. 28. Although they face months and even years in detention, Defendants refuse to provide them individualized custody hearings to determine if their detention

remains justified. E.R. 33. The named plaintiffs[2] in this case were each subject to Defendants' policy and practice of refusing to provide bond hearings for noncitizens facing prolonged detention—i.e., detention that lasts for more than six months—while in withholding only proceedings.

Plaintiff Arturo Martinez Baños is a noncitizen from Mexico who was first ordered removed in 2009. E.R. 308 ¶¶ 57, 59. He reentered the United States without inspection and was later convicted of misprision of a felony in Washington State. *Id.* ¶ 59. After completing his sentence in 2013, Immigration and Customs Enforcement (ICE) removed him. Back in Mexico, Mr. Martinez was kidnapped, beaten, sodomized, and psychologically tortured by police officers who held him until his former employers in Washington State paid a ransom. *Id.* ¶ 60. He then fled to the United States and reentered the United States in mid-2013 without inspection. *Id.* ¶ 61.

Mr. Martinez was again apprehended by ICE in March 2015. E.R. 309 ¶ 62. ICE served him a Notice of Intent to Reinstate his 2009 removal order, and detained him at the Northwest Detention Center in Tacoma, Washington. *Id*. Because of his horrific experience in Mexico, Mr. Martinez expressed a fear of return, and an asylum officer determined that he had a significant possibility of

[2] The district court only named Edwin Flores Tejada as class representative in its decision certifying the class, E.R. 156-57, 129-31, but all three named plaintiff brought this case together, *see* E.R. 293-318.

establishing a reasonable fear in a proceeding before an IJ. *Id.* Accordingly, he was referred to withholding only proceedings in immigration court. *Id.* ¶¶ 62, 64, 66.

Over six months after entering detention, the immigration court held a bond hearing in Mr. Martinez's case. *Id.* ¶ 63. The immigration court determined that it had jurisdiction and issued a $10,000 bond. *Id.* ¶ 64. Mr. Martinez paid the bond and was released, but DHS appealed. *Id.* ¶ 65. On appeal to the BIA reversed the IJ's finding that she did not have jurisdiction. E.R. 310 ¶ 67. Mr. Martinez remains out of ICE custody, and the merits hearing for his withholding only proceedings will take place on December 30, 2020. Defendants' Opening Brief (Op. Br.) at 6.

Plaintiff Edwin Flores Tejada entered the United States without inspection in 2001, after fleeing from El Salvador to Mexico in 1999 when gang members attempted to violently recruit him. E.R. 311 ¶¶ 73-74. In 2005, he was placed in removal proceedings following a DUI conviction, and ordered removed the next year. E.R. 311-12 ¶ 75. Mr. Flores did not depart the country until January 2014, but upon returning to El Salvador, he was told that gang members were investigating him. E.R. 312 ¶ 76. He fled a second time to Mexico, but was attacked and kidnapped there, leading him to eventually return to the United States after his release. *Id.* He was removed a second time after being apprehended by Customs and Border Protection (CBP) officers and prosecuted for illegal reentry. *Id.*

Mr. Flores then entered the United States without inspection and began living again with his family in Washington State. *Id.* In December 2015, ICE arrested him and detained him at the Northwest Detention Center. *Id.* ¶ 77. An asylum officer determined that he had a reasonable fear of returning to El Salvador because of the gang violence he faced there, and he was placed in withholding only proceedings. *Id.* In August 2016, over eight months after Mr. Flores was detained, he appeared before the immigration court for a bond hearing. *Id.* ¶ 77. However, the IJ denied his request for a bond hearing on the basis that she lacked jurisdiction to order his release because he is in withholding only proceedings. *Id*. In February 2017—after Mr. Flores joined this lawsuit, E.R. 293—Mr. Flores received a bond hearing, but was denied bond because the IJ determined he presented a flight risk. E.R. 138. Shortly after that, an IJ denied his request for withholding of removal, which the BIA affirmed in July 2017. *Id.* ICE subsequently removed him to El Salvador. Op. Br. at 9.

Plaintiff German Ventura Hernandez entered the United States without inspection in early 2016, was immediately removed to Mexico, and subsequently reentered without inspection. E.R. 313 ¶ 82. On June 1, 2016, Mr. Ventura was convicted of a DUI offense in Oregon and sentenced to a twelve-month diversionary program. *Id.* ¶ 83. ICE then arrested him in October 2016 and detained him at the Northwest Detention Center. *Id.* ¶ 84. Like Mr. Martinez and

Mr. Flores, Mr. Ventura passed a reasonable fear interview with an asylum officer and was placed in withholding only proceedings. *Id.* On March 14, 2017, an IJ denied his request for withholding of removal, and Mr. Ventura did not appeal this determination to the BIA. E.R. 138. He was thereafter removed to Mexico. *Id.*

III. District Court Proceedings

Plaintiff Martinez filed his original complaint on September 14, 2016, presenting three claims on behalf of himself and putative class members. E.R. 521. First, Plaintiffs asserted that Defendants' failure to provide custody hearings to individuals initially placed in withholding only proceedings violates the INA. Plaintiffs alleged that their detention is governed by 8 U.S.C. § 1226 and its implementing regulations, which entitle them to initial custody redetermination hearings before an IJ pending removal proceedings (except as provided in § 1226(c), which requires mandatory detention for those with enumerated offenses). E.R. 540-41 ¶¶ 74-77.

Second, Plaintiffs asserted that Defendants' failure to provide automatic custody redeterminations at six months of detention, when class members' detention is deemed prolonged, violates the INA. E.R. 541 ¶¶ 78-80. Plaintiffs alleged that prolonged detention is authorized by neither §§ 1226 nor 1231, and that individuals detained for six months or longer under either statute are entitled to bond hearings before an IJ in which the government bears the burden of justifying

their detention. E.R. 533-35 ¶¶ 45-51. Finally, Plaintiffs challenged Defendants' failure to provide custody determinations as violating the Due Process Clause of the United States Constitution, which requires that civil immigration detention be reasonably related to its purpose. E.R. 541-42 ¶¶ 81-84.

Plaintiffs filed an amended complaint on January 31, 2017, adding Mr. Flores and Mr. Ventura as named plaintiffs. *See* E.R. 297 ¶¶ 14-15. Almost six months after the filing of the amended complaint, this Court issued an intervening decision holding that individuals in withholding only proceedings following reinstatement orders are subject to the detention authority of 8 U.S.C. § 1231(a). *Padilla-Ramirez v. Bible*, 862 F.3d 881, 886 (9th Cir. 2017), *amended and superseded on other grounds*, 882 F.3d 826 (9th Cir. 2018). The district court accordingly found that *Padilla-Ramirez* forecloses Plaintiffs' first claim that they are detained under § 1226. E.R. 182. However, the district court denied without prejudice Plaintiffs' claim that they are entitled to individualized custody hearings when their detention becomes prolonged. *Id.* (directing Plaintiffs to "file a new motion addressing this issue" after the court rules on class certification).

The district 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.

E.R. 148 (recommending that class certification be granted based on amended definition); E.R. 131 (adopting report and recommendation). The district court also rejected Defendants' motion to dismiss class members' prolonged detention claim. *See* E.R. 146 ("[T]here is no serious dispute that the amended petition survives Rule 12(b)(6) review.").

Plaintiffs then moved for summary judgment, E.R. 104, asking that the district court to "declar[e] Defendants' policy and practice unlawful, and order[] 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," E.R. 109. Defendants cross-moved for summary judgment, E.R. 83, arguing Plaintiffs are not entitled to such hearings and that their claims should be denied, E.R. 88.

On January 23, 2018, Judge Tsuchida issued a report and recommendation granting Plaintiffs' motion for summary judgment on statutory grounds, E.R. 27, finding that 8 U.S.C. § 1231(a)(6) must be construed to require bond hearings before an IJ when detention becomes prolonged, E.R. 33-37. Judge Tsuchida found that the Ninth Circuit's holding in *Diouf II*, requiring bond hearings for noncitizens detained for six months or longer under § 1231(a)(6), was controlling authority. E.R. 36 (citing *Diouf II*, 634 F.3d at 1084). The report and recommendation

additionally found that the district court need not reach Plaintiffs' due process claim because the statute afforded them relief. E.R. 37.

On February 27, 2018, while the report and recommendation was pending review before the district court, the Supreme Court issued *Jennings v. Rodriguez*, which addressed the issue of whether individuals initially subject to mandatory detention and detained under §§ 1225(b), 1226(a), and 1226(c) were entitled to bond hearings when their detention reached six months. 138 S.Ct. at 838 ("The primary issue is the proper interpretation of §§ 1225(b), 1226(a), and 1226(c)."). The parties each submitted a notice of supplemental authority before the district court, discussing the impact *Jennings* might have on their pending cross-motions for summary judgment. E.R. 59, 63.

On April 4, 2018, the district court adopted the report and recommendation in its entirety, E.R. 26, and granted Plaintiffs' request for injunctive relief, E.R. 21. In doing so, the district court rejected Defendants' argument "that *Jennings* calls into question *Diouf II*, and consequently, the Report and Recommendation," E.R. 24, holding instead that "*Diouf II* remains binding law," E.R. 25.

SUMMARY OF THE ARGUMENT

The District Court below correctly applied controlling precedent from this Court that requires bond hearings for persons subject to discretionary detention

under 8 U.S.C. § 1231(a)(6) where that detention becomes prolonged—avoiding the grave and serious constitutional concerns that detention without such hearings would present. Defendants brush aside those constitutional issues, and contend that the prior case law at issue, *Diouf II*, should no longer apply to noncitizens in withholding only proceedings detained under 8 U.S.C. § 1231(a)(6). To make that argument, they cite to Supreme Court decisions decided *before* the case they now wish to overturn, as well as the Supreme Court's recent decision in *Jennings v. Rodriguez*.

All of those attacks fail. First, *Diouf II* unequivocally applies to class members. Defendants agree Plaintiffs are detained under § 1231(a)(6), but nevertheless seek to avoid the limitations on detention that the statute requires. In *Diouf II*, this Court applied the canon of constitutional avoidance to require bond hearings for noncitizens similarly situated to the class members in this case, given the prolonged detention such noncitizens routinely face. Nothing about the statute has changed since then, and this Court's concern over the constitutionality of prolonged immigration detention has only grown. Indeed, this Court most recently expressed "grave doubts that any statute that allows for arbitrary prolonged detention without any process is constitutional or that those who founded our democracy precisely to protect against the government's arbitrary deprivation of liberty would have thought so. Arbitrary civil detention is not a feature of our

American government." *Rodriguez v. Marin*, 909 F.3d 252, 256 (9th Cir. 2018). *Diouf II* properly applied that concern to alleviate the constitutional issues that prolonged detention under § 1231(a)(6) poses.

Second, faced with this reality, Defendants' brief simply resorts to assailing *Diouf II* based on case law decided long before that decision—arguments that this Court has thus already rejected. Specifically, Defendants claim that *Diouf II* is inconsistent with the Supreme Court's decisions in *Zadvydas* and *Clark v. Martinez*, 543 U.S. 371 (2005), erroneously suggesting that this Court has interpreted § 1231(a)(6) in more than one way. To the contrary, *Diouf II* ensured that the protections articulated in *Zadvydas* against arbitrary, prolonged civil detention without protections apply to *all* those detained under § 1231(a)(6). And as a result, this Court remained faithful to *Clark*, which requires courts to interpret statutes consistently. Indeed, after the Supreme Court's decision in *Zadvydas*, the government itself interpreted § 1231(a)(6) to require a hearing where the government bears the burden for certain noncitizens facing continued detention. That interpretation only underscores that this Court remained faithful to the statute and Supreme Court precedent in *Diouf II*.

Finally, *Diouf II* is not "clearly irreconcilable" with *Jennings*, as Defendants claim. In *Jennings*, the Supreme Court held that the detention provisions of 8 U.S.C. §§ 1225(b) and 1226 could not be read to require bond hearings after six

months of detention. But critically, the *Jennings* court directly contrasted the text of those sections with § 1231(a)(6) and the Court's holding in *Zadvydas*. In other words, the Court reaffirmed that the ambiguity in § 1231(a)(6) permits interpreting the statute to limit the prolonged and indefinite detention that the statute otherwise authorizes. In addition, *Jennings* left untouched the constitutional principles animating this Court's interpretation of § 1231(a)(6) in *Diouf II*, further demonstrating that *Diouf II*'s holding remains good law. Accordingly, this Court should conclude that *Diouf II* remains binding law and affirm that the government must continue to provide bond hearings to noncitizens facing prolonged detention under § 1231(a)(6).

STANDARD OF REVIEW

This Court reviews issues of statutory interpretation *de novo*. *United States v. Yossef*, 547 F.3d 1090, 1093 (9th Cir. 2008). The framework for evaluating an agency interpretation of a statute is set forth by *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984). "When reviewing a challenge to an agency's statutory authority, [the Court's] inquiry must begin by examining the statutory language." *Pacific Nw. Generating Co-op. v. Dep't of Energy*, 580 F.3d 792, 806 (9th Cir. 2009) (internal quotation marks, citation, and alteration omitted). Where congressional intent is clear, the Court affords no

deference to the agency's interpretation. *Chevron*, 467 U.S. at 842-43. A statute is "ambiguous" only if the Court cannot determine its meaning via its plain text and the ordinary tools of statutory construction. *Id.* Even here, only a reasonable agency construction is entitled to deference. *Id*. at 844. The Court must "reject administrative constructions of a statute that are inconsistent with the statutory mandate or that frustrate the policy Congress sought to implement." *Pacific Nw. Generating Co-op.*, 580 F.3d at 806 (citation omitted).

There is no dispute as to the material facts that gave rise to this case. As the district court explained, 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." E.R. 132. 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.*, E.R. 203-206 (arguing that Ninth Circuit caselaw does not afford the right to custody hearings for individuals in withholding only proceedings). Accordingly, the only questions for this Court to resolve are legal ones.

ARGUMENT

I. The District Court Correctly Applied This Court's Controlling Precedent in *Diouf II*.

A. *Diouf II* Applies to Class Members.

Throughout this lawsuit, Defendants have adopted the untenable position that Plaintiffs' detention is governed by § 1231(a)(6), E.R. 345-54, but that nonetheless, *Diouf II* is inapposite. *See, e.g.*, E.R. 204 (asserting that this case presents "a qualitatively different set of circumstances and government interests from those examined in *Diouf II*"). Defendants' opening brief continues that line of argument, repeatedly asserting that the district court erred in "extending *Diouf II*" by "reapplying the canon of constitutional avoidance to 8 U.S.C. § 1231(a)(6)." Op. Br. at 2-3, 13-14, 20. This Court should reject those arguments, as they seek to avoid the fact that Ninth Circuit precedent squarely controls the questions presented in this case. Instead of "extending *Diouf II*" or "reapplying the canon of constitutional avoidance," the district court correctly applied binding precedent in *Diouf II*, which requires Defendants to provide bond hearings for persons detained for six months or more under 8 U.S.C. § 1231(a)(6).

Indeed, Defendants ultimately acknowledge that what they are attacking is this Court's holding in *Diouf II*. *See* Op. Br. at 15 (arguing that "the district court further adopted *Diouf II*'s mistaken re-application of the canon of constitutional avoidance which read section 1231(a)(6) 'as requiring individualized bond

hearings, before an immigration judge.'" (quoting *Diouf II*, 634 F.3d at 1086)). However, the court below correctly held that pursuant to *Diouf II*, noncitizens detained under 8 U.S.C. § 1231(a)(6) are entitled to a bond hearing when they have been detained for six months. The district court reached this conclusion after this Court's decision in *Padilla-Ramirez v. Bible*, which held that detained noncitizens placed in withholding only proceedings are detained under 8 U.S.C. § 1231(a)(6), and not § 1226(a).[3] 882 F.3d at 832-33; *see also* E.R. 182. *Padilla-Ramirez* thus concluded that individuals like the class members in this case are not entitled to an initial bond hearing when placed in withholding only proceedings. Accordingly, the district court followed clear, controlling precedent in both *Padilla-Ramirez* and *Diouf II* when it ordered that even though class members are not entitled to a bond hearing when first detained, they must be provided a bond hearing at the point their detention reaches six months.

[3] Specifically, this Court's opinion in *Padilla-Ramirez* held that individuals who (1) are issued reinstatement orders under 8 U.S.C. § 1231(a)(5) and who (2) are subsequently transferred for hearings before the immigration court to apply for withholding of removal and relief under the Convention Against Torture are considered to be detained under 8 U.S.C. § 1231(a). Nonetheless, Plaintiffs-Appellees preserve their argument that class members, who are in administrative proceedings seeking relief from their final orders of removal on protection-related grounds, are subject to detention under 8 U.S.C. § 1226, as opposed to § 1231(a)(6). E.R. 315-16 ¶¶ 92-95; *see also Guerra v. Shanahan*, 831 F.3d 59 (2d Cir. 2016).

B. Diouf II Requires that the Government Justify Class Members' Prolonged Detention in Bond Hearings Before an Immigration Judge.

As this Court explained in *Diouf II*, 8 U.S.C. § 1231(a)(2) requires mandatory detention during the ninety day "removal period." 634 F.3d at 1085 ("Detention during the relatively brief removal period is mandatory."). If DHS is unable to execute the removal order during that "removal period," the statute thereafter allows for discretionary detention. *Id.*; *see also* 8 U.S.C. § 1231(a)(6) (providing that a noncitizen "*may* be detained beyond the removal period, and if released, shall be subject to the terms of supervision in paragraph (3)." (emphasis added)).

According to Defendants, this discretionary detention under § 1231(a)(6) permits them to subject Plaintiffs to prolonged detention without an individualized hearing before a neutral decision-maker that assesses whether such detention remains related to its purpose. Defendants' position raises serious due process concerns, as it advocates detention regardless of whether the noncitizen's prolonged detention remains tethered to a valid purpose. *See Zadvydas*, 533 U.S. at 690-91 (detention under § 1231(a)(6) must ensure the noncitizen's appearance at future hearings or prevent danger to the community to remain constitutional).

Under the canon of constitutional avoidance, a court must reject any interpretation of a statute that raises serious constitutional problems so long as an alternative construction is "fairly possible." *Nadarajah v. Gonzales*, 443 F.3d

1069, 1076 (9th Cir. 2006) (citation omitted). This canon "is not a method of adjudicating constitutional questions" but rather one of statutory interpretation—"a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark*, 543 U.S. at 381. As this Court has explained, the avoidance canon "applies at *Chevron* step one, because it is 'a means of giving effect to congressional intent.'" *Diouf II*, 634 F.3d at 1090 n.11 (quoting *Clark*, 543 U.S. at 382). Thus, *Chevron* deference does not apply "where a substantial constitutional question is raised by an agency's interpretation of a statute." *Id*. at 1090; *see also DeBartolo Corp. v. Florida Gulf Coast Bldg*., 485 U.S. 568, 574-75 (1988) (applying constitutional avoidance at *Chevron* step one); *Solid Waste Agency of N. Cook Cty. v. U. S. Army Corps of Eng'rs*, 531 U.S. 159, 173-74 (2001) (same).

"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. Thus, the Supreme Court has made clear that civil detention violates due process when it is not reasonably related to its purpose and accompanied by "strong" procedural protections to guard against unjustified deprivations. *Id*. at 690-91. In *Zadvydas*, the Supreme Court

concluded that these principles required imposing a limit on the detention that § 1231(a)(6) authorizes. *Id.* at 690-91, 700-01.

Consistent with that conclusion, this Court ruled in *Diouf II* that § 1231(a)(6) must be interpreted to require a bond hearing before an IJ when detention becomes prolonged to ensure that § 1231(a)(6) detention remains related to its purpose. 634 F.3d at 1091-92. In reaching this conclusion, the Court also emphasized that the agency regulations implementing the statute "do not afford adequate procedural safeguards because they do not provide for an in-person hearing, they place the burden on the [noncitizen] 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). In sum, *Diouf II* 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 released from detention unless the government establishes that the [noncitizen] poses a risk of flight or a danger to the community." *Id.* at 1092.

Notably, in *Diouf II* this Court defined "prolonged" detention as detention that reaches 180 days, or six months. *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."). Accordingly, where the Court has already determined that class members are subject to detention under § 1231(a)(6) under *Padilla-Ramirez*, Defendants cannot seriously dispute that *Diouf II* requires

that class members be granted a bond hearing at the point their detention becomes prolonged—in other words, when it reaches 180 days.

II. *Diouf II* is Consistent with *Zadvydas* and *Clark*.

While Defendants may disagree with this Court's holding in *Diouf II*, it remains binding law. Defendants argue that *Diouf II* is inconsistent with the Supreme Court's prior decision in *Zadvydas*. In doing so, they improperly seek to re-litigate the issues that this Court already resolved in *Diouf II*. Op. Br. at 20-24. In particular, Defendants challenge this Court's interpretation of 8 U.S.C. § 1231(a)(6) by arguing that it diverges from the Supreme Court's interpretation in *Zadvydas*, contrary to the principle that a court cannot give "the same words in the same statute a different meaning." Op. Br. at 23. However, this Court's decision in *Diouf II* relies extensively on *Zadvydas* and *Clark* in reaching its conclusion. Indeed, that decision corrected the misguided limitations that Defendants had placed on *Zadvydas*'s protections with regulations that do not offer protection to class members. As such, the Court must continue to adhere to its interpretation of the statute as laid out in *Diouf II*, including how it implemented the Supreme Court's decision in *Zadvydas*.

A. *Zadvydas* Limited Detention under § 1231(a)(6), But Defendants Only Apply that Decision for a Subset of § 1231(a)(6) Detainees.

As noted above, in *Zadvydas* the Supreme Court held that a "statute permitting indefinite detention . . . would raise a serious constitutional problem."

533 U.S. at 690. *Zadvydas* made clear that the purpose of civil immigration detention is to ensure the noncitizen's appearance for removal (or at future immigration proceedings) and to prevent danger to the community. *Id.* at 699-700.

Accordingly, the Supreme Court "limit[ed] . . . post-removal-period detention to a period reasonably necessary" to effectuate the statute's purpose: "bring[ing] about that [noncitizen's] removal from the United States." 533 U.S. at 689. *Zadvydas* interpreted the statute as creating a presumptive limit of six months of discretionary detention to guarantee "uniform administration," rather than leaving habeas courts to deal with each case on their own. 533 U.S. at 701. As a result, if the government wishes to detain a noncitizen with a final removal order beyond six months, and the person demonstrates that there is no significant likelihood of removal in the reasonably foreseeable future, the person must be released. *Id.*; *see also* 8 C.F.R. § 241.13(g)(1). But notably, *Zadvydas* found that even where "removal is reasonably foreseeable" the government must still demonstrate that such prolonged detention remains justified. 533 U.S. at 700 ("[I]f removal is reasonably foreseeable, the habeas court should consider the risk of the [noncitizen's] committing further crimes as a factor potentially justifying confinement within that reasonable removal period.").

Following *Zadvydas*, the Immigration and Naturalization Service (INS) and Executive Office for Immigration Review (EOIR) issued new regulations to

comply with the decision. *See* Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56967 (Nov. 14, 2001). The centerpiece of those new regulations was 8 C.F.R. § 241.13, which provides for the release of noncitizens whose removal is not substantially likely to occur, absent special circumstances. 8 C.F.R. § 241.13(g)(1). "Special circumstances" include cases in which DHS concludes that a noncitizen should continue to be detained after six months of detention due to the danger the noncitizen allegedly presents. *Id.* § 241.14(f). In such cases, DHS interpreted 8 U.S.C. § 1231(a)(6) to require a hearing before an IJ where the government bears the burden of proof by clear and convincing evidence. *Id.* § 241.14(i)(1).

Notably, the government does not release class members pursuant to 8 C.F.R. § 241.13. Instead, and as this Court explained in *Diouf II*, the government applies only the provisions of 8 C.F.R. § 241.4 to noncitizens who have a pending application for relief like a motion to reopen or an application for withholding of removal. *Id.* § 241.4(b)(1). Under § 241.4, DHS conducts a custody review before the end of the 90-day removal period, three months after the 90-day removal period ends, and one year after that second custody review. *Diouf II*, 634 F.3d at 1089-90; *see also* 8 C.F.R. § 241.4(k)(1)-(2).

However, these procedures "place the burden on the [noncitizen] rather than the government and they do not provide for a decision by a neutral arbiter such as

an immigration judge." *Diouf II*, 634 F.3d at 1091. Moreover, 8 C.F.R. § 241.4 does not expressly address the situation of class members in this case: those subject to a reinstated order of removal who are re-detained and seeking withholding of removal or protection under CAT in proceedings before the immigration court. In contrast, § 241.4(b)(1) covers persons with final orders who have filed motions to reopen, while (b)(3) addresses persons who have already been granted withholding of removal or protection under CAT. Yet the regulations are silent as to class members. But what is clear is that DHS does not release such noncitizens pursuant to § 241.13.

In short, the government treats noncitizens who are (1) held past the removal period and (2) do not have a pending application for relief (like the petitioner in *Zadvydas*) differently than noncitizens like the petitioners in *Diouf II* and Plaintiffs and class members in this case. That is true even though they all are subject to the same detention scheme under § 1231(a)(6). *Padilla-Ramirez*, 882 F.3d at 832. Under the regulatory scheme, noncitizens subject to a final order of removal without any pending applications for relief are released after six months unless removal is imminent. By contrast, under Defendants' policy, individuals like Plaintiffs are not entitled to this presumption and are denied even the opportunity for a custody hearing before a neutral arbiter. Instead, they receive only administrative custody reviews—a process that this Court deemed constitutionally

inadequate. *Diouf II*, 634 F.3d at 1089 ("We also disagree with the government's contention that DHS regulations provide sufficient safeguards to protect the liberty interests of § 1231(a)(6) detainees . . . ."); *id.* at 1091 ("The regulations do not afford adequate procedural safeguards. . . .").

B. *Diouf II* Ensured *Zadvydas*'s Protections Apply to All § 1231(a)(6) Detainees, Faithfully Applying Supreme Court Precedent.

Faced with the discrepancy in how the government treated § 1231(a)(6) detainees with different procedural postures, *Diouf II* clarified the detention framework for noncitizens with an application for relief from removal like withholding of removal or a motion to reopen. In doing so, *Diouf II* was faithful to both *Zadvydas* and *Clark* by making clear that *Zadvydas*'s underlying principles were applied to the other classes of individuals detained pursuant to § 1231(a)(6). *Diouf II* thus does for all persons detained under § 1231(a)(6) what *Zadvydas* did for a subset: ensure that after six months of detention, the government justifies continued detention by showing that detention remains related to its purpose. While class members are not released at six months the way to the regulations guarantee release for persons with final orders and no pending applications for relief, *Diouf II* does guarantee that they receive a bond hearing where the immigration court can determine if their detention remains reasonably related to its purpose.

Defendants attempt to re-litigate *Diouf II* by arguing that this Court erred by "reapplying the canon of constitutional avoidance to 8 U.S.C. § 1231(a)(6) where the Supreme Court already had applied it in *Zadvydas*." Op. Br. at 13. Specifically, Defendants argue this "reapplication" violates *Clark*. But in *Clark*, the Supreme Court held that the § 1231(a)(6) "6-month presumptive detention" applies to *all* noncitizens held under that section, regardless of what constitutional rights any individual noncitizen possesses. 543 U.S. at 386. This Court's holding in *Diouf II* does not create any tension with this principle. Indeed, to the contrary, it ensures that the presumption actually applies to everyone detained under § 1231(a)(6).

Thus, rather than violate *Clark*, this Court followed its mandate by correctly applying this six-month presumption to noncitizens detained under § 1231(a)(6) with pending applications for relief like motions to reopen or withholding of removal. This Court applied *Zadvydas* to conclude that "[w]hen detention crosses the six-month threshold and release or removal is not imminent, the private interests at stake are profound." *Diouf II*, 634 F.3d at 1091-92. Similarly, the Court observed even though the detained noncitizen in *Diouf II* had a pending motion to reopen or appeal of that motion, their interests under the statute remained the same: "Regardless of the stage of the proceedings, the same important interest is at stake—freedom from prolonged detention." *Id.* at 1087. The same is true for the class here. Thus the district court did not err when it held that the six-month

presumption, which is grounded in *Zadvydas*, also applies to those seeking withholding of removal or protection under CAT.

Moreover, *Diouf II*'s holding that the government must bear the burden to justify continued detention in a hearing before an IJ is also consistent with *Zadvydas*. Most notably, *Zadvydas* criticized the existing regulatory scheme at the time for placing the burden on the noncitizen to demonstrate release was justified. In analyzing those regulations, the Court noted that the long-term detention at issue in *Zadvydas* might be justified for "specially dangerous individuals." 533 U.S. at 691. But the Court observed that such detention could only be constitutional where "strong procedural protections" exist. *Id.*; *see also* 66 Fed. Reg. 56967-01 at 56974. Turning to the detention framework before it, the Court then criticized that system because "the sole procedural protections available to the [noncitizen] are found in administrative proceedings, where the [noncitizen] bears the burden of proving he is not dangerous, without . . . significant later judicial review." 533 U.S. at 692. Thus, the Court made clear that placing the burden on the noncitizen presented a serious constitutional problem.

Zadvydas made clear that once the noncitizen "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." *Id.* at 701; *see also Singh v. Holder*, 638 F.3d 1196, 1203-05 (9th

Cir. 2011) (holding that Constitution requires government to justify noncitizen's continued detention by clear and convincing evidence). Indeed, in *Zadvydas*, the Supreme Court went further—explaining that in cases of prolonged detention, even where removal "is foreseeable, the habeas court should consider the risk of the [noncitizen's] committing further crimes as a factor potentially justifying continued confinement." 533 U.S. at 700. In making that observation, the Court underscored that continued detention is only appropriate where a noncitizen's dangerousness outweighs their strong interest in freedom from continued detention. With this criticism in mind, the *Diouf II* court held that the government bears the ultimate burden to justify continued detention under § 1231(a)(6). 634 F.3d at 1091-92. Accordingly, neither this Court in *Diouf II* nor the district court here erred in placing the burden to justify continued detention on the government after a noncitizen's detention becomes prolonged.

Similarly, the bond hearing requirement does not run afoul of *Zadvydas*. In *Zadvydas*, the Supreme Court recognized that "habeas courts" would deal with how to implement the presumption that the Court articulated. *Id.* at 700; *see also id.* ("We realize that recognizing this necessary Executive leeway will often call for difficult judgments."). The Court's six-month presumption provided guidance to lower courts on how to approach such cases, but did not purport to delineate all the contours of that protection. Defendants then implemented regulations that in

practice result in most individuals like the petitioner in *Zadvydas* being released after six months' detention without the need for filing a habeas petition. 8 C.F.R. § 241.13. But for others like the petitioner in *Diouf* and class members in this case—who have pending applications for relief—Defendants' failure to provide similar protection mandated the need for further guidance. *Diouf II* helped fill this void, implementing a process that (1) reviews whether detention remains reasonably related to its purpose after six months—as *Zadvydas* requires, and (2) provides a practical and constitutionally sufficient mechanism for obtaining release where the statute so requires. *Cf. Doe v. Gallinot*, 657 F.3d 1017, 1023 (9th Cir. 1981) (observing that habeas corpus "protection is illusory when a large segment of the protected class cannot realistically be expected to set the proceedings into motion in the first place").

Moreover, in arguing that the statute cannot be read to require bond hearings, Op. Br. at 14, Defendants fail to acknowledge that they themselves interpreted the statute in this very way, reading the statute to require a hearing to address constitutional concerns, 8 C.F.R. § 214.14(a)(2). As noted above, the government drafted new regulations following *Zadvydas* to implement that decision and address its constitutional concerns. *See* 66 Fed. Reg. at 56967. Under those regulations, the government interpreted § 1231(a)(6) to require "specific procedural protections" for noncitizens deemed "specially dangerous." 66 Fed.

Reg. at 56974. Such noncitizens are those DHS continues to detain because of the alleged danger they present, even though (1) six months have passed, (2) the noncitizen has no pending applications for relief, and (3) removal is *not* reasonably foreseeable reasonable. 8 C.F.R. § 241.14(a). The government concluded that in such situations, *Zadvydas* requires the agency to provide a hearing where the agency bears the burden to justify detention by clear and convincing evidence. 66 Fed. Reg. at 56974.[4] That protection remains in place today and is codified at 8 C.F.R. § 214.14(a)(2), (i). Thus, even Defendants recognize that the statute can be read to provide for bond hearings to alleviate the constitutional concerns that detention authorized by § 1231(a)(6) presents. The hearings the agency requires—and which *Diouf II* and the district court also mandated—ensure that detention remains reasonably related to its purpose after six months. And that is exactly how *Zadvydas* says the statute must be read. 533 U.S. at 689-92, 701.

[4] Specifically, the new regulations "recognize[ed] that freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause." 66 Fed. Reg. at 56974. The Immigration and Naturalization Service—the agency charged with enforcing immigration law at the time—"[a]ccordingly . . . decided that it is necessary to provide specific procedural protections to [noncitizens] who may be considered for detention under th[e] ["specially dangerous"] standard. Such cases will be referred for a hearing under appropriate standards, where an immigration judge will conduct a full hearing, limited to reviewing the Service's determination regarding dangerousness, and where the Service has the burden of proof by clear and convincing evidence." *Id.* (internal citation omitted).

III. *Diouf II* Is Not Irreconcilable with *Jennings*.

A. *Jennings* Does Not Undermine this Court's Interpretation of 8 U.S.C. § 1231(a)(6).

The district court also correctly found that "*Diouf II* remains binding law" after the Supreme Court issued *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). E.R. 25. As the district court recognized, E.R. 24, a decision of this Court continues to be binding in this Circuit unless it is "clearly irreconcilable" with subsequent authority. *United States v. Orona*, --- F.3d ---, 2019 WL 2063560, at *2 (9th Cir. May 10, 2019); *see also Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (holding that in order for a higher court's decision to be controlling it "must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable"). Therefore, this Court must continue to apply *Diouf II* as long as it can do so "without 'running afoul' of the intervening authority." *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012); *see also*, *e.g.*, *Orona*, 2019 WL 2063560, at *5 ("Although we acknowledge that an intervening case need not involve the exact same issue to implicitly overrule prior authority, the distinctions here make it possible to 'apply our prior circuit precedent without running afoul of the intervening authority.'" (citation omitted)). As the district court noted, "*Jennings* concerns statutes—§§ 1225 and 1226—that were not at issue in *Diouf II* and are not at issue here," E.R. 24, and thus did not clearly overrule *Diouf II*.

Importantly, *Jennings* did not undercut the statutory analysis in *Diouf II*, which construed 8 U.S.C. § 1231(a)(6) to require a bond hearing when detention reaches six months. To the contrary, *Jennings* cited to § 1231(a)(6) and *Zadvydas* in order to contrast the statutes the Court was called on to interpret: unlike § 1231(a)(6), the Court found that the canon of constitutional avoidance cannot be used "to graft a [six-month] time limit onto the text of § 1225(b)," which provides for the mandatory detention of certain applicants for admission. 138 S. Ct. at 843. To reach this conclusion, the Court expressly distinguished § 1225(b)(1) and (b)(2) from § 1231(a)(6), explaining that in *Zadvydas* the Court could apply the canon of constitutional avoidance to § 1231(a)(6) because the phrase "may be detained" is ambiguous, whereas § 1225(b)(1) and (b)(2) unequivocally provide for mandatory detention through the use of the word "shall." *Id.* at 844 ("That requirement of detention precludes a court from finding ambiguity here in the way that *Zadvydas* found ambiguity in § 1231(a)(6)."); *see also id.* at 846-47 (finding § 1226(c) to be unambiguous and thus holding it could not be read to require a bond hearing at six months of detention).

In addition, *Jennings* pointed to two other differences that support applying the constitutional avoidance canon to § 1231(a)(6). First, § 1225(b)(1) and (b)(2) both "provide for detention for a specified period of time," whereas the "the permissible length of detention under § 1231(a)(6) [is] unclear." *Id.* at 844.

Second, the Court observed that 8 U.S.C. § 1182(d)(5) specifically authorizes release under parole from detention under § 1225(b), while no similar provision exists for § 1231(a)(6) detention. Applying the negative-implication canon of statutory interpretation, the Court found that because the statute authorized release under § 1182(d)(5), "there are no *other* circumstances under which [noncitizens] detained under § 1225(b) may be released." *Id.* In sum, the *Jennings* Court affirmed the propriety of applying the constitutional avoidance canon to determine the circumstances in which noncitizens detained under § 1231(a)(6) may be released.

Jennings itself thus provides ample support for the district court's conclusion that *Diouf II* remains controlling, as it followed *Zadvydas* in applying the canon of constitutional avoidance to interpret § 1231(a)(6) and requiring a bond hearing at six months of detention. *See supra* p. 31. Nonetheless, Defendants argue that the analysis in *Jennings* only shows that § 1231(a)(6) can be read to contain a presumptive limit to the length of detention, not whether it can be construed to require bond hearings. Op. Br. at 32. But *Diouf II* applied the canon of constitutional avoidance in the same way as *Zadvydas*, for the very purpose of delineating parameters to ensure that prolonged detention remains lawfully related to its purpose under § 1231(a)(6). *See supra* pp. 34-35. As Defendants acknowledge, Op. Br. at 31-32, numerous other courts within this Circuit have

agreed that because *Jennings* affirms the analysis in *Zadvydas*, it does not foreclose bond hearings required by *Diouf II*. *See, e.g. Ramos v. Sessions*, 293 F. Supp. 3d 1021, 1026-27 (N.D. Cal. 2018) ("[G]iven the Supreme Court's explicit carve-out, *Diouf* remains good law and is binding on this Court."); *Cortez v. Sessions*, 318 F. Supp. 3d 1134, 1144-45 (N.D. Cal. 2018) ("*Jennings* left in place the application of the canon of constitutional avoidance to section 1231(a)(6), the same provision at issue in *Diouf II*); *Hoang Trinh v. Homan*, 333 F. Supp. 3d 984, 995-96 (C.D. Cal. 2018) (finding that *Diouf II* is not clearly irreconcilable with *Jennings* given "the Supreme Court's express distinguishing of section 1231(a)(6)"); *Borjas-Calix v. Sessions*, No. CV-16-00685-TUC-DCB, 2018 WL 1428154, at *6 (D. Ariz. Mar. 22, 2018) ("*Jennings* was specifically directed to § 1225, et seq."); *Mercado-Guillen v. Nielsen*, No. 18-CV-00727-HSG, 2018 WL 1876916, at *3 (N.D. Cal. Apr. 19, 2018) ("*Jennings* therefore left in place the *Zadvydas* ruling with respect to section 1231(a)(6), which serves as a legal basis for the holding of *Diouf II*."). As these courts have found, Defendants are unable to demonstrate that *Diouf II* is clearly irreconcilable with *Jennings* in light of the Supreme Court's express language distinguishing § 1231(a)(6), and its prior analysis in *Zadvydas*.

Additionally, *Jennings* does not foreclose class members' entitlement to bond hearings that (1) occur periodically, and (2) require the government to justify any continued detention by clear and convincing evidence. *Jennings* held that

"[n]othing in § 1226(a)'s text . . . supports the imposition of either" of these requirements, 138 S. Ct. at 847, but did not discuss any procedural requirements applicable to individuals detained under § 1231(a)(6). *See Cortez*, 318 F. Supp. 3d at 1146 (finding that the *Jennings* Court "did not engage in any discussion of the specific evidentiary standard applicable to bond hearings, and there is no indication that the Court was reversing the Ninth Circuit as to that particular issue"). *Jennings* also left untouched the constitutional principles and analysis in *Zadvydas*. That analysis (1) expressly instructed lower courts to consider the impact of the growing "period of prior postremoval confinement" in determining the reasonableness of detention under § 1231(a)(6), 533 U.S. at 701, and (2) found that prolonged detention under § 1231(a)(6) raises serious constitutional concerns because "the sole procedural protections available to the [noncitizen] are found in administrative proceedings, where the [noncitizen] bears the burden of proving he is not dangerous, without . . . significant later judicial review," *id*. at 692. Both of these considerations support the requirement of periodic bond hearings at which the government bears the burden of proof, as *Diouf II* requires, and as the district court ordered. E.R. 36-37 (citing *Diouf II*, 634 F.3d at 1086, 1092); *see also, e.g.*, *Ramos*, 293 F. Supp. 3d at 1027 ("Immigrants detained under § 1231(a)(6) . . . remain entitled to bond hearings every six months to determine whether the Government showed they are a flight risk or danger by clear and convincing

evidence."); *see also supra* p. 33 (discussing inadequate regulatory scheme for class members).

B. The District Court Did Not Address Class Members' Constitutional Claims.

If this Court were to conclude that any of the protections provide in *Diouf II* are irreconcilable with *Jennings*, the case should be remanded to the district court to resolve the constitutional claims presented below. The district court denied class members' constitutional claims solely because it could grant relief on statutory grounds and did not need to address the constitutional questions. E.R. 37. However, as class members asserted below, E.R. 317 ¶¶ 99-102, the Due Process Clause provides an independent basis for granting relief to class members.

As detailed above, civil immigration detention must be reasonably related to one of two governmental purposes: mitigating the risks of danger to the community and preventing flight. *Zadvydas*, 533 U.S. at 690. For this reason, "[i]n the context of immigration detention, it is well-settled 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.'" *Hernandez v. Sessions*, 872 F.3d 976, 990 (9th Cir. 2017) (quoting *Singh*, 638 F.3d at 1203). Courts balance the following factors to determine what procedural protections are required:

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

As to the first factor, class members all have a substantial interest in securing freedom from physical restraint. *See Zadvydas*, 533 U.S. at 690 ("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." (citation omitted)); *Hernandez*, 872 F.3d at 993 ("[T]he private interest at issue here is 'fundamental': freedom from imprisonment is at the 'core of the liberty protected by the Due Process Clause.'" (citation omitted). This substantial liberty interest must be weighed to assess each procedural safeguards class members request: (1) an individualized bond hearing before a neutral decisionmaker; (2) the requirement that the government justify the continuing detention by clear and convincing evidence; and (3) the requirement that the government provide periodic bond hearings every six months.

Each of these procedural safeguards plays a significant role in ensuring that the government does not erroneously deprive noncitizen of their liberty interest. First, due process requires a bond hearing before an IJ because "the risk of an

erroneous deprivation of liberty in the absence of a hearing before a neutral decisionmaker is substantial." *Diouf II*, 634 F.3d at 1092. Second, "the risk of erroneous deprivation of a fundamental right may not be placed on the individual because "when a fundamental right, such as individual liberty, is at stake, the government must bear the lion's share of the burden." *Tijani v. Willis*, 430 F.3d 1241, 1245 (9th Cir. 2005) (Tashima, J., concurring). As this Court has previously found, because "the risk of error when the possible injury to the individual—deprivation of liberty—is so significant, a clear and convincing burden of proof provides the appropriate level of procedural protection." *Singh*, 638 F.3d at 1204. Third, periodic bond hearings must be provided because "the due process analysis changes as the period of . . . confinement grows." *Diouf II*, 634 F.3d at 1091 (internal quotation marks and citations omitted); *see also id.* ("When the period of detention becomes prolonged, 'the private interest that will be affected by the official action' . . . is more substantial; greater procedural safeguards are therefore required." (internal citation omitted)).

As noted above, the district court did not squarely consider these constitutional claims because it did not need to reach them. Therefore, if this Court concludes that review of the constitutional claims is warranted, it should first remand those issues to the district court "to consider them in the first instance." *Rodriguez*, 909 F.3d at 255 (quoting *Jennings*, 138 S. Ct. at 851); *see id.* at 255-56

(remanding to district court with instructions to consider "the minimum requirements of due process," including "both the clear and convincing evidence standard and the six-month bond hearing requirement"); *see also Shirk v. U.S. ex rel. Dep't of Interior*, 773 F.3d 999, 1007 (9th Cir. 2014) ("As a federal court of appeals, we must always be mindful that 'we are a court of review, not first view.'" (citation omitted)).

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's decision requiring bond hearings to ensure that the prolonged detention of class members remains reasonably related to its purpose.

Respectfully submitted this 24th day of May, 2019.

s/ Matt Adams
Matt Adams, WSBA No. 28287

s/ Leila Kang
Leila Kang, WSBA No. 48048

s/ Aaron Korthuis
Aaron Korthuis, WSBA No. 53974

Attorneys for Plaintiffs-Appellees

STATEMENT OF RELATED CASES

Plaintiffs-Appellees are unaware of any related cases currently pending in this Court other than the cases identified in the initial brief filed by Defendants-Appellants.

Signature: s/ Leila Kang
Leila Kang

Date: May 28, 2019

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limits permitted by Ninth Cir. R. 32-1. The brief is 10,430 words, excluding the portions the exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (a)(6).

Signature: s/ Leila Kang Date: May 24, 2019
Leila Kang

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 24, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature: s/ Leila Kang Date: May 24, 2019
Leila Kang