No. 20-322

In the Supreme Court of the United States

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

ESTEBAN ALEMAN GONZALEZ, ET AL.

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

EDWIN OMAR FLORES TEJADA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
EDWIN S. KNEEDLER
Deputy Solicitor General
VIVEK SURI
Assistant to the Solicitor General
AUGUST E. FLENTJE
Special Counsel
JESSICA W. D'ARRIGO
MATTHEW P. SEAMON
GLADYS STEFFENS GUZMÁN
CARA E. ALSTERBERG
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether an alien who is detained under 8 U.S.C. 1231 is entitled by statute, after six months of detention, to a bond hearing at which the government must prove to an immigration judge that the alien is a flight risk or a danger to the community.

PARTIES TO THE PROCEEDING

Petitioners were appellants in the court of appeals. William P. Barr, Attorney General; Chad F. Wolf, Acting Secretary of Homeland Security; and James McHenry, Director of the Department of Justice Executive Office for Immigration Review (EOIR), were appellants in *Aleman Gonzalez* v. *Barr* and *Flores Tejada* v. *Godfrey*. David W. Jennings, San Francisco Field Office Director, U.S. Immigration and Customs Enforcement (ICE); Tracy Short, Chief Immigration Judge, EOIR; David O. Livingston, Sheriff, Contra Costa County; and Kristi Butterfield, Facility Commander, West County Detention Facility, Contra Costa County, were appellants in *Aleman Gonzalez*. Tony H. Pham, Senior Official Performing the Duties of the Director of ICE; Elizabeth Godfrey, Seattle Field Office Director, ICE; and Lowell Clark, Warden, Northwest Detention Center, were appellants in *Flores Tejada*.*

Respondents were appellees in the court of appeals. Esteban Aleman Gonzalez and Eduardo Gutierrez Sanchez, for themselves and on behalf of a class of similarly situated individuals, were appellees in *Aleman Gonzalez*. Edwin Omar Flores Tejada and German Ventura Hernandez, for themselves and on behalf of a class of similarly situated individuals, were appellees in *Flores Tejada*.

Arturo Martinez Baños was a plaintiff in the district court in *Baños* v. *Asher*.

---

* Chief Immigration Judge Tracy Short is substituted for Acting Chief Immigration Judge Christopher A. Santoro. Senior Official Performing the Duties of the Director of ICE Tony H. Pham is substituted for Acting Director of ICE Matthew T. Albence. See Sup. Ct. R. 35.3.

RELATED PROCEEDINGS

United States District Court (N.D. Cal.):

Aleman Gonzalez v. *Whitaker*, No. 18-cv-1869 (June 19, 2020)

United States District Court (W.D. Wash.):

Baños v. *Asher*, No. 16-cv-1454 (Apr. 4, 2018)

United States Court of Appeals (9th Cir.):

Aleman Gonzalez v. *Barr*, No. 18-16465 (Apr. 7, 2020)

Flores Tejada v. *Godfrey*, No. 18-35460 (Apr. 7, 2020)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Treaty, statutes, regulations, and rule:

Statutes, regulations, and rule—Continued: Page

In the Supreme Court of the United States

No. 20-322

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

ESTEBAN ALEMAN GONZALEZ, ET AL.

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

EDWIN OMAR FLORES TEJADA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the federal parties, respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these cases. In accordance with this Court's Rule 12.4, the Acting Solicitor General is filing a "single petition for a writ of certiorari" because the "judgments * * * sought to be reviewed" are from "the same court and involve identical or closely related questions." Sup. Ct. R. 12.4.

OPINIONS BELOW

The opinion of the court of appeals in *Aleman Gonzales* (App., *infra*, 1a-66a) is reported at 955 F.3d 762. The order of the district court (App., *infra*, 67a-93a) is reported at 325 F.R.D. 616.

The opinion of the court of appeals in *Flores Tejada* (App., *infra*, 94a-105a) is reported at 954 F.3d 1245. The order of the district court (App., *infra*, 106a-110a) is not published in the Federal Supplement but is available at 2018 WL 1617706. The report and recommendation of the magistrate judge (App., *infra*, 111a-125a) is not published in the Federal Supplement but is available at 2018 WL 3244988. An additional order of the district court (App., *infra*, 126a-128a) is not published in the Federal Supplement but is available at 2017 WL 9938446. An additional report and recommendation of the magistrate judge (App., *infra*, 129a-157a) is unreported.

JURISDICTION

The judgments of the court of appeals in *Aleman Gonzales* and *Flores Tejada* were entered on April 7, 2020. On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower court judgment. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 158a-163a.

STATEMENT

A. Detention Under Section 1231(a)

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, contains a series of provisions authorizing the detention of aliens in connection with their removal from the United States.[1] The provision at issue in this case, 8 U.S.C. 1231(a), authorizes the detention of aliens who have been "ordered removed" from the country. 8 U.S.C. 1231(a)(1)(A). Section 1231(a) establishes a 90-day "removal period" during which the government ordinarily secures the removal of an alien who has been ordered removed. *Ibid.* The paragraph that governs detention *during* the removal period, 8 U.S.C. 1231(a)(2), provides:

> During the removal period, the [Secretary of Homeland Security] shall detain the alien. Under no circumstance during the removal period shall the [Secretary] release an alien who has been found inadmissible [on certain criminal or terrorism grounds] or deportable [on certain criminal or terrorism grounds].

The paragraph that governs detention of an alien *after* the removal period, 8 U.S.C. 1231(a)(6), provides:

> An alien ordered removed who is inadmissible[,] * * * removable [on certain criminal, national security, or other grounds,] or who has been determined by the [Secretary of Homeland Security] to be a risk

---

[1] Many of the provisions at issue in these cases refer to the Attorney General, but Congress has separately transferred the enforcement of those provisions to the Secretary of Homeland Security. *Nielsen* v. *Preap*, 139 S. Ct. 954, 959 n.2 (2019); see 6 U.S.C. 202(3), 251, 271(b), 542 note, 557; 8 U.S.C. 1103(a)(1) and (g), 1551 note.

> to the community or unlikely to comply with the order of removal, may be detained beyond the removal period.

The Department of Homeland Security (DHS) has adopted regulations governing the process that U.S. Immigration and Customs Enforcement (ICE) follows in making the discretionary decision whether to detain an alien beyond the removal period under Section 1231(a)(6). See 8 C.F.R. 241.4. The regulations accord the alien an opportunity to submit information that he believes provides a basis for release and to have the assistance of an attorney or other representative. See 8 C.F.R. 241.4(h)(2).

2. In *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), this Court considered how long discretionary detention of a former lawful permanent resident alien beyond the initial 90-day period could last while the government attempted to find a country that would accept the return of the alien. The Court acknowledged that Section 1231 "literally" sets no time limit for such detention. *Id.* at 689. The Court stated, however, that a "statute permitting indefinite detention" of such an alien "would raise a serious constitutional problem." *Id.* at 690. The Court also reasoned that the "basic purpose" of detention under Section 1231 is "effectuating an alien's removal," and that once that basic purpose can no longer be served because the designated country of removal will not accept the alien's return, "continued detention is no longer authorized by statute." *Id.* at 697, 699.

The Court accordingly "read an implicit limitation into the statute" for the detention of such aliens. *Zadvydas*, 533 U.S. at 689. Specifically, the Court concluded that discretionary detention beyond the initial 90-day period may last only for "a period reasonably

necessary to bring about that alien's removal from the United States." *Ibid.* The Court identified a six-month period as presumptively reasonable. *Id.* at 701. The Court held that, after that time, "once the alien 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," or else release the alien. *Ibid.*; see *Clark* v. *Martinez*, 543 U.S. 371, 377-386 (2005) (applying *Zadvydas*'s statutory interpretation to an alien who had not been admitted to the United States).

The Government has adopted regulations implementing *Zadvydas*. See 8 C.F.R. 241.13. Under those regulations, an alien whose detention under Section 1231(a) has continued for six months "may submit a written request" containing "the basis for the alien's belief that there is no significant likelihood that the alien will be removed in the reasonably foreseeable future." 8 C.F.R. 241.13(d)(1). Officials in the Headquarters Post-Order Detention Unit of ICE then determine whether, as the alien claims, there is no significant likelihood of removal in the reasonably foreseeable future. 8 C.F.R. 241.13(e)-(g).[2]

3. In *Diouf* v. *Napolitano* (*Diouf II*), 634 F.3d 1081 (2011), the Ninth Circuit read a further requirement into Section 1231(a). In the court's view, "prolonged detention under § 1231(a)(6), without adequate procedural protections, would raise 'serious constitutional concerns.'" *Id.* at 1086 (citation omitted). "To address

---

[2] The Court stated in *Zadvydas* that it was not considering "terrorism" or other "special circumstances" that may call for "heightened deference to the judgment of the political branches with respect to matters of national security." 533 U.S. at 696; see 8 C.F.R. 241.14(d).

those concerns," the court "appl[ied] the canon of constitutional avoidance and construe[d] § 1231(a)(6) as requiring an individualized bond hearing, before an immigration judge [(IJ)], for aliens facing prolonged detention." *Ibid.* In particular, the court held that aliens detained for more than 180 days are generally "entitled to release on bond unless the government establishes that the alien is a flight risk or will be a danger to the community." *Ibid.* The court recognized a narrow exception to that holding: "If the 180-day threshold has been crossed, but the alien's release or removal is imminent, DHS * * * [is not] required to afford the alien a [bond] hearing." *Id.* at 1092 n.13.

In reaching that conclusion, the Ninth Circuit acknowledged that Section 1231(a)(6) does not "*expressly*" refer to "release on bond." *Diouf II*, 634 F.3d at 1089. The court explained, however, that it had already held that bond is at least "authorized" under Section 1231(a)(6). *Ibid.*; see *Diouf* v. *Mukasey* (*Diouf I*), 542 F.3d 1222, 1234 (9th Cir. 2008). The court concluded that, because the text implicitly *authorized* bond, the court could properly invoke constitutional avoidance to *require* a bond hearing before an IJ after six months of detention. *Diouf II*, 634 F.3d at 1089.

B. Detention During Withholding-Only Proceedings

The INA provides that, if an alien reenters the United States illegally after previously having been removed under an order of removal, DHS may reinstate the prior removal order. See 8 U.S.C. 1231(a)(5). The reinstated order "is not subject to being reopened or reviewed," and the alien "is not eligible and may not apply for any relief" from the order. *Ibid.*

Notwithstanding those general restrictions, an alien subject to a reinstated removal order may seek withholding of removal under 8 U.S.C. 1231(b)(3) and withholding or deferral of removal under regulations implementing the United States' obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. See *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 35 n.4 (2006). A request for those forms of protection does not challenge the validity of the underlying order of removal, but rather seeks to prevent the United States from executing that order of removal to a specific country where the alien claims a risk of persecution or torture. See *ibid.* For an alien whose final order of removal has been reinstated but who is found to have a reasonable fear of persecution based on protected grounds or of torture, the determination whether that alien is entitled to those forms of protection is made in "withholding-only" proceedings before an IJ, with a right of appeal to the Board of Immigration Appeals. See 8 C.F.R. 208.16, 1208.16.

On June 15, 2020, this Court granted a petition for a writ of certiorari in *Albence* v. *Guzman Chavez*, No. 19-897, in order to resolve a circuit conflict about which provision of the INA governs the detention of an alien whose removal order has been reinstated and who has been placed in withholding-only proceedings: 8 U.S.C. 1231(a) (the provision discussed above) or 8 U.S.C. 1226 (a separate provision that authorizes the detention of aliens pending decisions on whether they are to be ordered removed). See Pet. at 14-15, *Guzman Chavez*, *supra* (No. 19-897). The Ninth Circuit, the court that

heard these cases, has held—correctly, in the government's view—that Section 1231(a) governs the detention of such aliens. See *Padilla-Ramirez* v. *Bible*, 882 F.3d 826, 829-837 (2017), cert. denied, 139 S. Ct. 411 (2018).

C. *Aleman Gonzalez* v. *Barr*

1. Respondents Esteban Aleman Gonzalez and Jose Eduardo Gutierrez Sanchez are natives and citizens of Mexico. App., *infra*, 70-71a. They were previously removed from the United States under orders of removal, later reentered the United States unlawfully, and then had their prior removal orders reinstated. *Ibid.* They were found to have a reasonable fear of persecution based on protected grounds or torture, were placed in withholding-only proceedings, and were detained under Section 1231(a). *Ibid.* They sought bond hearings, but immigration judges denied their motions. *Ibid.*

Aleman and Gutierrez then brought this suit in the Northern District of California to challenge their detention without bond hearings. The district court certified a class consisting of "all individuals who are detained pursuant to 8 U.S.C. § 1231(a)(6) in the Ninth Circuit by, or pursuant to the authority of, [ICE], * * * and have been or will be denied a prolonged detention bond hearing before an Immigration Judge" (except for certain aliens who are already members of classes certified in two other cases). App., *infra*, 72a; see *id.* at 72a-84a. Notably, that definition covers "all" aliens detained under Section 1231(a)(6)—not just those who, like Aleman and Gutierrez, are subject to reinstated removal orders and have been placed in withholding-only proceedings. *Id.* at 72a.

The government acknowledged that, in *Diouf II*, the Ninth Circuit had held that an alien detained under Section 1231(a) ordinarily is entitled to a bond hearing before an IJ after six months of detention. See App., *infra*, 86a. The government argued, however, that this Court's subsequent decision in *Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018), had superseded *Diouf II*. See App., *infra*, 86a. In *Rodriguez*, this Court reversed the Ninth Circuit's decision that another provision of the INA, 8 U.S.C. 1226(a), required periodic bond hearings after every six months of detention. See 138 S. Ct. at 847. The Court explained that "[n]othing in § 1226(a)'s text * * * even remotely supports the imposition" of that requirement. *Id.* at 847-848. In imposing such a requirement, the Ninth Circuit had invoked the canon of constitutional avoidance, but this Court explained that constitutional avoidance "'comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction,'" and that simply "[s]potting a constitutional issue does not give a court the authority to rewrite a statute as it pleases." *Id.* at 842-843 (citation omitted). The government argued in this case that *Rodriguez*'s reasoning rejecting a six-month bond-hearing requirement under Section 1226 also forecloses a six-month bond-hearing requirement under Section 1231(a). App., *infra*, 89a.

The district court, as relevant here, rejected the government's contention that *Rodriguez* had superseded *Diouf II*. App., *infra*, 86a-91a. The court acknowledged that *Rodriguez* "is in tension with *Diouf II*," but concluded that the two cases are "not clearly irreconcilable" and that *Diouf II* accordingly remained binding on it. *Id.* at 91a. Relying on *Diouf II*, the court issued a

preliminary injunction prohibiting the government "from detaining [respondents] and the class members pursuant to section 1231(a)(6) more than 180 days without * * * providing each a bond hearing before an IJ as required by *Diouf II*." *Id.* at 92a.

2. A divided panel of the court of appeals affirmed. App., *infra*, 1a-66a.

The court of appeals concluded that it remained bound by its previous decision in *Diouf II* because that decision was not "clearly irreconcilable" with *Rodriguez*. App., *infra*, 24a. The court noted that *Diouf II* involved detention under Section 1231(a), while *Rodriguez* involved detention under Section 1226(a). *Id.* at 42a. The court perceived a "material difference" between the two statutes, because *Zadvydas* had already read Section 1231(a)(6) to require certain additional procedures after six months of detention if it is not reasonably likely that the alien can be removed in the reasonably foreseeable future. *Ibid.* The court also distinguished *Diouf II* from *Rodriguez* on the ground that *Rodriguez* rejected a requirement to hold periodic bond hearings after every six months of detention, whereas *Diouf II* merely required a single bond hearing after the first six months of detention. *Id.* at 37a-38a.

In reaching those conclusions, the court of appeals "recognize[d] some tension" between *Diouf II* and *Rodriguez*," App., *infra*, 4a; acknowledged that the government's arguments were "not without some appeal," *id.* at 30a; and stated that some "aspects of *Diouf II*" gave it "pause in light of" *Rodriguez*, *ibid.* In the end, however, the court concluded that it was "not free to overrule the prior decision of a three-judge panel merely because [it] sense[d] some tension [between]

that decision and the decision of an intervening higher authority." *Id.* at 52a.

Judge Fernandez dissented. App., *infra*, 56a-66a. He emphasized this Court's admonition in *Rodriguez* that constitutional avoidance comes into play only "after the application of ordinary textual analysis," when "the statute is found to be susceptible of more than one construction." *Id.* at 59a (quoting *Rodriguez*, 138 S. Ct. at 842). He observed that, in *Diouf II*, the Ninth Circuit identified neither "a textual ambiguity in the statute regarding a bond hearing requirement" nor "any plausible basis in the statutory text for such a hearing." *Ibid.* He therefore concluded that "*Diouf II*'s application of the constitutional avoidance canon without first analyzing the text of the statute or identifying a relevant ambiguity is clearly irreconcilable with [*Rodriguez*]." *Ibid.*

D. *Flores Tejada* v. *Godfrey*

1. Arturo Martinez Baños and German Ventura Hernandez are natives and citizens of Mexico, and Edwin Flores Tejada is a native and citizen of El Salvador. App., *infra*, 130a n.2. Like the named plaintiffs in *Aleman Gonzales*, Martinez, Ventura, and Flores were previously removed from the United States under orders of removal, later reentered the United States unlawfully, and then had their prior removal orders reinstated. *Id.* at 136a-137a; 2017 WL 368338, at *1. They were found to have a reasonable fear of persecution based on protected grounds or of torture, were placed in withholding-only proceedings, and were detained under Section 1231(a). *Ibid.* They alleged that the government had failed to provide them with individualized bond hearings before IJs. App., *infra*, 97a-98a.

Martinez brought this suit in the Western District of Washington to challenge his detention without a bond

hearing. 2017 WL 2983060, at *1. An amended complaint later named Flores and Ventura as additional plaintiffs. *Ibid.* The district court later dismissed Martinez's claims as moot because Martinez had by then been released from custody. *Id.* at *5. Later still, the court also dismissed Ventura's claims as moot because Ventura had by then been removed to Mexico. App., *infra*, 127a-128a, 145a-146a. The court certified a class consisting of "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." *Id.* at 98a-99a (brackets and citation omitted).

The district court, adopting the magistrate judge's report and recommendation, granted the class partial summary judgment. App., *infra*, 106a-110a; see *id.* at 111a-125a. Like the district court in *Aleman Gonzalez*, the district court in *Flores Tejada* rejected the government's contention that *Rodriguez* superseded *Diouf II*. *Id.* at 107a-109a. The court entered a permanent injunction requiring the government to provide class members initial bond hearings before an IJ after six months of detention and periodic bond hearings every six months thereafter. See *id.* at 99a-100a.

2. A divided panel of the court of appeals affirmed in part, vacated in part, and remanded. App., *infra*, 94a-105a.

The court of appeals first explained that its analysis in *Aleman Gonzalez*, decided the same day as *Flores Tejada*, "appl[ies] equally here." App., *infra*, 100a. In particular, the court repeated *Aleman Gonzalez*'s conclusion that "*Diouf II*'s construction of § 1231(a)(6) to

require an individualized bond hearing for an alien subject to prolonged detention is not clearly irreconcilable with [*Rodriguez*]." *Ibid.* The court accordingly "affirm[ed] the judgment and injunction's requirement that the Government must provide class members with an individualized bond hearing after six months of detention." *Id.* at 101a.

The court of appeals then concluded that the district court had erred by requiring not only an initial bond hearing after six months of detention, but "additional statutory bond hearings every six months" thereafter. App., *infra*, 101a. The court of appeals noted that *Diouf II* did not require "additional bond hearings every six months." *Ibid.* And the court found "no support" in "the statutory text" of Section 1231(a)(6) "to plausibly construe the provision as requiring *additional* bond hearings every six months." *Id.* at 103a-104a. The court accordingly "reverse[d] and vacate[d] the judgment and permanent injunction * * * in this regard," and remanded the case for consideration of the class's constitutional claims. *Id.* at 104a.

Judge Fernandez concurred in part and dissented in part. App., *infra*, 105a. He agreed with the court "to the extent that it vacate[d] the judgment and permanent injunction and remand[ed] for further proceedings on Plaintiffs' constitutional claims." *Ibid.* But for the reasons stated in his dissent in *Aleman Gonzalez*, he dissented from the opinion "to the extent that it affirm[ed] the district court's judgment and le[ft] the permanent injunction in place." *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals invoked the canon of constitutional avoidance to hold that Section 1231(a)(6) generally entitles an alien to a bond hearing before an IJ after

six months of detention. That decision lacks a plausible basis in the text of Section 1231(a)(6), which says nothing about IJ bond hearings, or six-month time limits. The decision conflicts with *Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018), in which this Court reversed a decision of the Ninth Circuit invoking constitutional avoidance to impose a bond-hearing requirement on a different statutory provision that likewise said nothing about bond hearings. The question presented also is the subject of a circuit conflict: the Third and Ninth Circuits have both held that Section 1231(a)(6) generally requires a bond hearing after six months of detention, whereas the Sixth Circuit has rejected such a requirement.

In *Albence* v. *Arteaga-Martinez*, No. 19-896 (filed Jan. 17, 2020), the government filed a petition for a writ of certiorari presenting the same question that is presented in these cases. This Court may be holding the petition in that case pending its decision in *Albence* v. *Guzman Chavez*, cert. granted, No. 19-897 (June 15, 2020). As shown below, however, the rationales for holding the petition in *Arteaga-Martinez* do not apply to the petition in these cases. The Court should therefore grant review in these cases now.

A. The Court Of Appeals' Decision Is Wrong

1. Section 1231(a)(6) provides:

> 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 [8 U.S.C. 1231(a)(3)].

8 U.S.C. 1231(a)(6). The court of appeals read that text to require the government to release an alien after six months of detention, unless it accords the alien a bond hearing before an IJ at which it proves that the alien is a flight risk or a danger to the community.

The court of appeals' interpretation adds requirements that the statute does not contain. The statutory text says nothing at all about six-month time limits, bond hearings before IJs, or requirements that the government prove at such bond hearings that the alien poses a risk of flight or a danger to the community. That should be the end of the matter, for a court's task "is to apply the text, not to improve upon it." *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120, 126 (1989).

The court of appeals justified its interpretation by invoking the canon of constitutional avoidance—*i.e.*, the proposition that a court should read a statute, if possible, to avoid serious constitutional doubts. *Diouf* v. *Napolitano*, 634 F.3d 1081, 1086 (9th Cir. 2011). But constitutional avoidance is a tool for choosing "between competing *plausible* interpretations of a statutory text." *Rodriguez*, 138 S. Ct. at 843 (citation omitted). In the absence of statutory ambiguity, constitutional avoidance is "irrelevant." *Nielsen* v. *Preap*, 139 S. Ct. 954, 972 (2019). Section 1231(a)(6) contains no ambiguity on the point in dispute here: it contains no text suggesting that the government must hold a bond hearing before an IJ in order to detain an alien for more than six months. Constitutional avoidance therefore has no application here.

2. The court of appeals' decision not only has no basis in the plain text of the statute, but also conflicts with this Court's decision in *Rodriguez*. In *Rodriguez*, this

Court considered questions of statutory interpretation concerning detention of aliens under multiple provisions of the INA. The Court's decision is complex, but two aspects of the decision are relevant here.

First, in *Rodriguez*, the Ninth Circuit had invoked the principle of constitutional avoidance to read the statutory provisions at issue there to impose a series of "implicit limitations" on detention. 138 S. Ct. at 842. This Court rejected that approach, observing that "[t]hat is not how the canon of constitutional avoidance works." *Id.* at 843. The Court explained that constitutional avoidance "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." *Id.* at 842 (citation omitted). The Court noted that, "[i]n the absence of more than one plausible construction, the canon simply has no application." *Ibid.* (citation and internal quotation marks omitted). "Spotting a constitutional issue," the Court emphasized, "does not give a court the authority to rewrite a statute as it pleases." *Id.* at 843.

Second, in Part III-C of its opinion, the *Rodriguez* Court specifically addressed the Ninth Circuit's holding that Section 1226(a), a statute that authorizes detention of aliens during administrative proceedings to determine whether they are to be ordered removed, requires "periodic bond hearings every six months in which the Attorney General must prove by clear and convincing evidence that the alien's continued detention is necessary." 138 S. Ct. at 847. The Court noted that "[n]othing in § 1226(a)'s text * * * even remotely supports the imposition of either of those requirements." *Ibid.* Nor, the Court added, "does § 1226(a)'s text even hint that the length of detention prior to a bond hearing

must specifically be considered in determining whether the alien should be released." *Id.* at 848.

The court of appeals' decisions in *Diouf II* and the cases that are the subject of this certiorari petition conflict with both of those aspects of *Rodriguez*. Neither in *Diouf II* nor in these cases did the Ninth Circuit engage in "ordinary textual analysis" and find that Section 1231(a)(6) was "susceptible of more than one construction" before turning to constitutional avoidance. *Rodriguez*, 138 S. Ct. at 842 (citation omitted). The court instead treated the constitutional issue it spotted as a license "to rewrite a statute as it please[d]," *id.* at 843—repeating the very error that this Court condemned in *Rodriguez*.

In addition, *Rodriguez*'s reasoning for refusing to read Section 1226(a) to contain an unstated bond-hearing requirement applies to Section 1231(a)(6) as well. In these cases, as in *Rodriguez*, "[n]othing in [Section 1231(a)(6)'s] text * * * even remotely supports the imposition of [bond-hearing] requirements." 138 S. Ct. at 847. In fact, reversal in these cases follows *a fortiori* from *Rodriguez*'s interpretation of Section 1226(a). Section 1226(a) provides that the government "may release the alien on * * * bond." 8 U.S.C. 1226(a)(2)(A). Section 1231(a)(6), by contrast, says nothing at all about bond. If Section 1226(a) cannot plausibly be read to contain a requirement of bond hearings before an IJ, Section 1231(a)(6) certainly cannot be so read.

3. The court of appeals' contrary rationales lack merit. In both *Diouf II* and these cases, the court stated that Section 1231(a)(6) "may be construed to *authorize* release on bond." App., *infra*, 26a (emphasis added); see *Diouf II*, 634 F.3d at 1089. The question in these cases, however, is not whether Section 1231(a)(6)

authorizes DHS to release aliens on bond; the question is whether it *requires* bond hearings before an IJ after six months of detention. Section 1226(a) authorizes release on bond—in fact, it expressly provides that the government "may release the alien on * * * bond," 8 U.S.C. 1226(a)(2)(A)—yet this Court held in *Rodriguez* that it could not plausibly be read to require bond hearings every six months. So too, even granting the court of appeals' premise that Section 1231(a)(6) authorizes release on bond, Section 1231(a)(6) does not require IJ bond hearings after six months of detention.

The court of appeals next sought to distinguish *Rodriguez* on the ground that it involved the imposition of a requirement to hold periodic bond hearings every six months, whereas these cases involve the imposition of a requirement to hold "a single bond hearing" after six months of detention. App., *infra*, 38a. But that distinction makes no legal difference. Section 1231(a)(6) says nothing about periodic bond hearings, initial bond hearings, or any other kind of bond hearings. The text thus provides no foothold for judicial imposition of any kind of bond-hearing requirement, regardless of the frequency of the hearings imposed.

Finally, the court of appeals invoked this Court's decision in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), see App., *infra*, 40a-45a, but *Zadvydas* does not support the decision below. In *Zadvydas*, this Court stated that Section 1231(a)(6) would raise constitutional concerns if read to authorize indefinite or permanent detention of an alien who had previously been admitted to the United States because the country of removal would not accept the alien's return. 533 U.S. at 690-696. In order to address that constitutional concern, the Court read Sec-

tion 1231(a)(6) to allow detention only as long as the detention continued to serve "its basic purpose [of] effectuating an alien's removal." *Id.* at 697. In particular, the Court held that detention under Section 1231(a)(6) must end once "it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701.

The Ninth Circuit did not suggest in either *Diouf II* or these cases that the question presented here raises the constitutional concern identified in *Zadvydas*—namely, open-ended detention because of the refusal of other countries to accept the alien. The court instead believed that it had spotted a *different* constitutional concern than the one identified in *Zadvydas*. See *Diouf II*, 634 F.3d at 1085-1086. In particular, the court believed that, even where detention continues to serve the immigration purpose of ensuring the availability of the alien for removal and of protecting against flight risk and danger to the community in the meantime, the detention might nonetheless violate due process at some point if, in the court's view, it becomes unduly "prolonged." *Id.* at 1086. And the court suggested that *Zadvdydas* authorized it to construe Section 1231(a)(6) to impose whatever procedural requirements it believed were needed to address those concerns.

But *Zadvydas* granted the court of appeals no such authority. The Court in *Zadvydas* analyzed "statutory purpose" and the "implic[ations]" of the text, 533 U.S. at 682, 697, and, after doing so, "detected ambiguity" regarding the permissibility of open-ended detention, *Rodriguez*, 138 S. Ct. at 843. Only after finding such an ambiguity did the Court read the statute to prohibit detention of the aliens there once "it has been determined that there is no significant likelihood of removal in the

reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701. And even that decision, the Court later explained, represented a "notably generous application of the constitutional-avoidance canon." *Rodriguez*, 138 S. Ct. at 843. In *Diouf II* and these cases, by contrast, the court of appeals engaged in no meaningful analysis of the text at all. If they had, they would have been forced to conclude that Section 1231(a)(6) contains nothing—and therefore no ambiguity—with respect to bond hearings before IJs. Put simply, *Zadvydas* does not grant courts a "license to graft [new procedural requirements] onto the text" of Section 1231(a)(6). *Ibid.*

4. Applying Section 1231 as written would not leave aliens unprotected from continued detention with no prospect of release. As an initial matter, Section 1231(a)(6) provides that DHS "may" detain the alien beyond the 90-day removal period. 8 U.S.C. 1231(a)(6). Federal regulations set forth a framework for the exercise of that discretion. See 8 C.F.R. 241.4. Under that framework, ICE may release the alien if the alien demonstrates to the satisfaction of the responsible official that he will not pose a danger to the community or a significant risk of flight pending the alien's removal from the United States. 8 C.F.R. 241.4(d)(1). The relevant DHS field office conducts an initial review at the outset of detention, and a review panel at ICE headquarters periodically conducts further reviews. See 8 C.F.R. 241.4(i)(3), (k)(1)-(2). During those reviews, officials must decide whether to release or detain the alien on the basis of both "[f]avorable factors" (such as "close relatives residing here lawfully") and unfavorable factors (such as the likelihood that "the alien is a significant flight risk" or that he would "[e]ngage in future criminal activity"). 8 C.F.R. 241.4(f)(5), (7), and (8)(iii).

And the alien may submit information that he believes provides a basis for release; may be assisted by an attorney or other representative; and may, if appropriate, seek a government-provided translator. 8 C.F.R. 241.4(h)(2), (i)(3).

Quite apart from those regulations, this Court held in *Zadvydas* that Section 1231 "does not permit indefinite detention." 533 U.S. at 689. It stated that, if detention lasts for more than six months, "once the alien 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. Federal regulations set out a separate set of "special review procedures" in light of *Zadvydas*. 8 C.F.R. 241.13(a). Under those procedures, an eligible alien "may submit a written request for release," together with "whatever documentation" he wishes "in support of the assertion that there is no significant likelihood of removal in the reasonably foreseeable future." 8 C.F.R. 241.13(d)(1). Adjudicators at ICE headquarters must then review the alien's case, allow the alien to respond to the government's evidence, allow the alien to submit additional relevant evidence, allow the alien to be represented by an attorney, and, ultimately, "issue a written decision based on the administrative record." 8 C.F.R. 241.13(g); see 8 C.F.R. 241.13(d)-(e). The regulations expressly provide that those special review procedures supplement rather than supplant the discretionary framework discussed in the preceding paragraph. 8 C.F.R. 241.13(b).

In short, the statute and the regulations already provide extensive protections to aliens detained under Sec-

tion 1231. The Ninth Circuit had no warrant for imposing yet more procedures that neither Congress nor the relevant agencies have adopted.

B. The Question Presented Warrants This Court's Review

1. This Court should grant review because the decision of the court of appeals conflicts with the Court's decision in *Rodriguez*. In *Rodriguez*, the Court reversed a decision of the Ninth Circuit that had invoked constitutional avoidance to interpret Section 1226(a), a provision that expressly refers to bond but that does not expressly require bond hearings, to require bond hearings. In *Diouf II* and in these cases, the Ninth Circuit repeated essentially the same error, but with respect to a different provision of the INA that says nothing at all about bond. The dissent in these cases correctly perceived that *Rodriguez* and *Diouf II* are "clearly irreconcilable." App., *infra*, 56a. And even the panel majority was forced to acknowledge that the two decisions are, at a minimum, in "tension." *Id.* at 52a.

This Court also should grant review because the question presented now is the subject of a circuit conflict. On the one hand, in *Guerrero-Sanchez* v. *Warden York County Prison*, 905 F.3d 208 (2018), the Third Circuit agreed with the Ninth Circuit's decision in *Diouf II* that "an alien detained under § 1231(a)(6) is generally entitled to a bond hearing after six months (*i.e.*, 180 days) of custody." *Id.* at 226. Like the Ninth Circuit, the Third Circuit invoked "constitutional avoidance" to conclude that Section 1231(a)(6) "implicitly requires a bond hearing after prolonged detention." *Id.* at 219, 223.

On the other hand, in *Martinez* v. *LaRose*, No. 19-3908, 2020 WL 4282158 (July 27, 2020), the Sixth Circuit recently declined to "impos[e] a general rule that aliens

detained under § 1231(a) must receive a bond hearing after a specific lapse of time." *Id.* at *7. The court explained that it was "reluctant to graft a bond-hearing requirement onto a statute absent language supporting such a requirement" and that "a bond requirement would be out of place" under *Rodriguez*. *Ibid.* Citing *Diouf II* and *Guerrero-Sanchez*, the court explicitly acknowledged that its decision conflicted with the decisions of "the Third and Ninth Circuits." *Ibid.*

2. The practical importance of the question presented underscores the need for this Court's review. Section 1231 governs the detention of aliens who have been ordered removed from the United States. The question presented affects the procedures available to that substantial population.

In addition, the United States has an overriding interest in protecting its territorial sovereignty through the use of all the tools made available by Congress, including detention of aliens, to address and diminish illegal immigration. See *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155, 163 (1993). The Ninth Circuit's revision of Section 1231 compromises that interest by providing a new mechanism for detained aliens with final orders of removal to obtain release over DHS's objection. Because those released aliens have already been ordered removed from the United States, they would have a strong incentive to abscond in order to avoid removal.

The requirements that the Ninth Circuit has grafted onto the statute have significant operational consequences for the government. DHS and the Department of Justice have explained that "the U.S. immigration system" already faces an "extraordinary," "extreme," and "unsustainable" administrative "strain." *Asylum*

Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,831, 33,838, 33,841 (July 16, 2019). And this Court has recognized that those burdens are currently "overwhelming our immigration system." *DHS* v. *Thuraissigiam*, 140 S. Ct. 1959, 1967 (2020) (citation omitted). The Ninth Circuit has added to those administrative burdens. As detailed above, federal regulations already set forth two separate frameworks for reviewing an alien's continued detention under Section 1231: periodic reviews to determine whether the government should exercise its discretion to continue to detain the alien, and special reviews to determine whether the alien is entitled to release under *Zadvydas*. The Ninth Circuit has layered a third framework atop those two sets of procedures.

Finally, the Ninth Circuit's decision impermissibly intrudes on the responsibility of the political branches. This Court has observed that immigration policy is "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations," and that "[s]uch matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). In these cases, the Legislative Branch has granted the Executive Branch the discretion to detain certain aliens who have been ordered removed from the United States. See 8 U.S.C. 1231(a)(6). And the Executive Branch has adopted regulations governing the exercise of that discretion—regulations under which an alien obtains periodic reviews before immigration officials in DHS rather than a bond hearing before an IJ. See 8 C.F.R. 241.4. The Ninth Circuit articulated no sound justification for imposing further requirements found

neither in the text of the statute nor in the applicable regulations.

C. The Court Should Grant Review Rather Than Hold The Petition For *Guzman Chavez* Or *Arteaga-Martinez*

On January 17, 2020, the government filed petitions for writs of certiorari in two cases relating to detention of aliens under Section 1231: *Arteaga-Martinez*, No. 19-896, and *Albence* v. *Guzman Chavez*, cert. granted, No. 19-897 (June 15, 2020). *Guzman Chavez* presents the question whether the detention of an alien who is subject to a reinstated removal order and who has been placed in withholding-only proceedings is governed by Section 1231(a)(6) or instead by Section 1226. Pet. at I, *Guzman Chavez*, *supra* (No. 19-897). *Arteaga-Martinez*, a case from the Third Circuit, presents essentially the same question as these cases: whether an alien detained under Section 1231 is entitled to a bond hearing before an IJ after six months of detention. Pet. at I, *Arteaga-Martinez*, *supra* (No. 19-896).[3] The Court granted re-

---

[3] The questions presented differ in one respect. The Third Circuit has held as a *statutory* matter that the government bears the burden of proving its case at the bond hearing by clear and convincing evidence, and the question presented in *Arteaga-Martinez* encompasses that issue. See Pet. at I, *Arteaga-Martinez*, *supra* (No. 19-896). The Ninth Circuit, by contrast, has imposed the same burden of proof by clear and convincing evidence as a *constitutional* matter. See App., *infra*, 17a-18a, 36a-37a. The government does not seek review of that separate question at this time, in this certiorari petition. If Section 1231(a)(6) does not require six-month bond hearings in the first place—a conclusion that we submit is compelled by *Rodriguez*—there would be no occasion for this Court to decide whether the Constitution requires a particular standard of proof at such a hearing. In addition, the question whether the Constitution requires the government, rather than the alien, to bear the burden

view in *Guzman Chavez*, but may be holding the petition in *Arteaga-Martinez* pending its decision in *Guzman Chavez*. The potential rationales for holding the petition in *Arteaga-Martinez* do not, however, apply to the present petition.

1. The respondent in *Arteaga-Martinez* argued that, at the time of the government's petition in that case, the question presented was not the subject of any circuit conflict. Br. in Opp. at 8, *Arteaga-Martinez*, *supra* (No. 19-896). That observation was true at that time; only the Third and Ninth Circuits had addressed the question presented, and both of them had read Section 1231(a)(6) to impose a six-month bond-hearing requirement. See Pet. at 14, *Arteaga-Martinez*, *supra* (No. 19-896). Since then, however, the Sixth Circuit has rejected the Third and Ninth Circuits' views and has held that Section 1231(a)(6) does not require bond hearings before an IJ after six months of detention. See pp. 23-24, *supra*. The question presented thus is now the subject of a circuit conflict.

2. Next, the respondent in *Arteaga-Martinez* was subject to a reinstated removal order and had been placed in withholding-only proceedings. See Pet. at 5, *Arteaga-Martinez*, *supra* (No. 19-896). As a result, for him, the question presented in *Guzman Chavez* (whether Section 1231 applies to such aliens) was antecedent to the question presented in *Arteaga-Martinez* (whether, if Section 1231 does apply, an alien detained

---

of proof concerning the alien's flight risk or danger to the community, and to do so by clear and convincing evidence, has arisen more broadly in the lower courts in cases involving constitutional challenges to pre-final-order detention under 8 U.S.C. 1225(b), 1226(a), and (c). At the present time, such a case may be a more appropriate vehicle for consideration of the burden of proof.

under it is entitled to a bond hearing after six months of detention). The respondent in *Arteaga-Martinez* accordingly argued that the Court's resolution of *Guzman Chavez* "might moot the question presented" in *Arteaga-Martinez*. Br. in Opp. at 20, *Arteaga-Martinez*, *supra* (No. 19-896). That contention might have led the Court to hold the *Arteaga-Martinez* petition for the resolution of the antecedent issue in *Guzman Chavez*.

That rationale does not apply to these cases. To be sure, the *named* respondents in these cases were subject to reinstated removal orders and were placed in withholding-only proceedings. This Court has explained time and again, however, that once a district court properly certifies a class, "the class of unnamed persons described in the certification acquire[s] a legal status separate from the interest asserted by the named representative," and their claims may remain live even if the class representatives' claims become moot after certification. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 753 (1976) (brackets and citation omitted); see, *e.g.*, *United States* v. *Sanchez-Gomez*, 138 S. Ct. 1532, 1538-1539 (2018); *Genesis HealthCare Corp.* v. *Symczyk*, 569 U.S. 66, 74-75 (2013); *Sosna* v. *Iowa*, 419 U.S. 393, 399-403 (1975). The certified classes in these cases consist generally of aliens detained under Section 1231(a)(6), and are not limited to aliens who are subject to reinstated removal orders and who have been placed in withholding-only proceedings. See pp. 8-9, 12, *supra*; see also, *e.g.*, *Diouf II*, 634 F.3d at 1082-1084 (addressing the question presented in the context of an alien who had not been placed in withholding-only proceedings). The upshot is that, regardless of how this Court resolves *Guzman Chavez*, and regardless of the effect of that decision on the named respondents' claims, at least

some class members in these cases will continue to have live claims regarding whether Section 1231(a)(6) entitles them to bond hearings before an IJ after six months of detention.

3. Finally, the respondent in *Arteaga-Martinez* argued that the government had not pressed and the lower courts had not passed on the specific contention that reading Section 1231(a)(6) to require bond hearings after six months of detention would contradict *Rodriguez*. See Br. in Opp. at 17-18, *Arteaga-Martinez*, *supra* (No. 19-896). The government explained why that objection lacked force, see Cert. Reply Br. at 8-10, *Arteaga-Martinez*, *supra* (No. 19-896), but in any event, the objection is simply inapplicable here. The government specifically argued in the district courts and the court of appeals in these cases that *Rodriguez* superseded *Diouf II*, and the courts' opinions addressed that argument at length. See App., *infra*, 35a-53a, 86a-92a, 107a-109a.

In sum, none of the potential rationales for holding the petition in *Arteaga-Martinez* applies to this petition. The Court should therefore grant this petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
VIVEK SURI
Assistant to the Solicitor General
AUGUST E. FLENTJE
Special Counsel
JESSICA W. D'ARRIGO
MATTHEW P. SEAMON
GLADYS STEFFENS GUZMÁN
CARA E. ALSTERBERG
Attorneys

SEPTEMBER 2020

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-16465
D.C. No. 3:18-cv-01869-JSC

ESTEBAN ALEMAN GONZALEZ; EDUARDO GUTIERREZ SANCHEZ, PLAINTIFFS-APPELLEES

v.

WILLIAM P. BARR, ATTORNEY GENERAL; CHAD WOLF, ACTING SECRETARY, DEPARTMENT OF HOMELAND SECURITY; JAMES MCHENRY, DIRECTOR, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; DEPARTMENT OF JUSTICE; CHRISTOPHER SANTORO, ACTING CHIEF IMMIGRATION JUDGE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, DEPARTMENT OF JUSTICE; DAVID W. JENNINGS, FIELD OFFICE DIRECTOR FOR THE SAN FRANCISCO FIELD OFFICE OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, DEPARTMENT OF HOMELAND SECURITY; DAVID O. LIVINGSTON, SHERIFF, CONTRA COSTA COUNTY; KRISTI BUTTERFIELD, FACILITY COMMANDER, WEST COUNTY DETENTION FACILITY, CONTRA COSTA COUNTY,[*] DEFENDANTS-APPELLANTS

Argued and Submitted: Nov. 13, 2019
Pasadena, California
Filed: Apr. 7, 2020

---

[*] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Chad Wolf is automatically substituted as the Acting Secretary of the U.S. Department of Homeland Security and Christopher A. Santoro is automatically substituted as the Acting Chief Immigration Judge of the Executive Office for Immigration Review.

Appeal from the United States District Court
for the Northern District of California
Jacqueline Scott Corley, Magistrate Judge, Presiding

OPINION

Before: FERDINAND F. FERNANDEZ, MILAN D. SMITH, JR., and ERIC D. MILLER, Circuit Judges.

M. SMITH, Circuit Judge:

Esteban Aleman Gonzalez and Eduardo Gutierrez Sanchez (Plaintiffs) represent a certified class of individuals who are subject to final removal orders and are detained pursuant to 8 U.S.C. § 1231(a)(6), within our court's jurisdiction for six months or more, and who have been or will be denied an individualized bond hearing before an immigration judge (IJ).

Section 1231(a)(6) authorizes Defendants-Appellants (hereinafter, the Government[1]) to detain aliens subject

[1] We use the term "the Government" to refer collectively to the following Defendants-Respondents who Plaintiffs sued in their official capacities, including as substituted: (1) William P. Barr, United States Attorney General, (2) Chad Wolf, Acting Secretary of the U.S. Department of Homeland Security, (3) James McHenry, Director of the Executive Office for Immigration Review (EOIR), (4) Christopher A. Santoro, Acting Chief Immigration Judge, EOIR, (5) David W. Jennings, Field Office Director for the San Francisco Field Office of U.S. Immigration and Customs Enforcement (ICE), (6) David O. Livingston, Contra Costa County Sheriff, and (7) Kristi Butterfield, Facility Commander, West County Detention Facility, Contra Costa County. Our use of the uncapitalized term "the government" should not be construed as a reference to the Defendants-Respondents.

to final removal orders, or reinstated final removal orders. In *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011) (*Diouf II*), a three-judge panel of our court applied the canon of constitutional avoidance to construe § 1231(a)(6) as requiring an individualized bond hearing before an IJ for an alien detained for six months or longer when the alien's release or removal is not imminent. *Id.* at 1086, 1091-92 & n.13. In this case, Plaintiffs sought a preliminary injunction requiring the Government to provide class members with an individualized bond hearing in accordance with *Diouf II*. Relying on our court's decision in *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011), Plaintiffs also sought for the Government to bear the burden of proof at such a hearing. Concluding that it remained bound by *Diouf II*, the district court granted the preliminary injunction. The Government appeals, urging us to reverse and vacate.

We must decide whether Plaintiffs are likely to succeed on the merits of their claim that § 1231(a)(6) requires the Government to provide class members with an individualized bond hearing. As it argued unsuccessfully to the district court, the Government principally argues that *Diouf II* is clearly irreconcilable with the Supreme Court's decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), a decision that rejected our court's application of the canon of constitutional avoidance to construe different immigration detention statutes. Despite the district court's reliance on our decision in *Diouf II*, the Government further argues that the district court impermissibly "re-applied" the canon to § 1231(a)(6) to grant the preliminary injunction. According to the Government, *Clark v. Martinez*, 543 U.S. 371 (2005), establishes that the Court's construction of § 1231(a)(6) in *Zadvydas v. Davis*, 533 U.S. 678 (2001),

is the single permissible application of the canon to the provision.

The threshold issue we must resolve is whether *Diouf II* is clearly irreconcilable with *Jennings*. As a three-judge panel, we are bound by the prior decision of another three-judge panel. *Miller v. Gammie*, 335 F.3d 889, 893, 899-900 (9th Cir. 2003) (en banc). This rule gives way when, but only when, the earlier decision is clearly irreconcilable with the holding or reasoning of intervening authority from our court sitting en banc or the Supreme Court. *Id.* at 893, 899-900. "The 'clearly irreconcilable' requirement is 'a high standard.'" *United States v. Robertson*, 875 F.3d 1281, 1291 (9th Cir. 2017) (quoting *Rodriguez v. AT & T Mobility Servs. LLC*, 728 F.3d 975, 979 (9th Cir. 2013)). "[I]f we can apply our precedent consistently with that of the higher authority, we *must* do so." *FTC v. Consumer Def., LLC*, 926 F.3d 1208, 1213 (9th Cir. 2019) (emphasis added).

We hold that Plaintiffs are likely to succeed on the merits of their § 1231(a)(6) statutory claim. Although we recognize some tension between *Diouf II* and *Jennings*, we cannot conclude that the decisions are so fundamentally inconsistent that we can no longer apply *Diouf II* without running afoul of *Jennings*. We thus conclude that we remain bound by *Diouf II*. For that reason, we conclude further that the district court did not err in relying on *Diouf II*'s construction of § 1231(a)(6) to require a bond hearing before an IJ after six months of detention for an alien whose release or removal is not imminent. Because *Jennings* did not invalidate our constitutional due process holding in *Singh*,

the district court also properly required the Government to bear a clear and convincing burden of proof at such a bond hearing to justify an alien's continued detention. Our conclusion that *Diouf II* remains controlling compels us to reject the Government's remaining challenges that effectively seek to relitigate *Diouf II*. We conclude further that the preliminary injunction complies with a proper reading of *Clark*. Based on these determinations, we affirm the district court's preliminary injunction in full.

FACTUAL AND PROCEDURAL BACKGROUND

I. Statutory Framework

Various provisions of the Immigration and Nationality Act (INA) authorize the government to detain noncitizens during immigration proceedings. *See* 8 U.S.C. §§ 1225(b), 1226(a), 1226(c), and 1231(a). These statutes are different textually and in their application. "[T]hese statutes apply at different stages of an alien's detention." *Diouf v. Mukasey*, 542 F.3d 1222, 1228 (9th Cir. 2008) (*Diouf I*). "Where an alien 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).

Section 1225(b)(1) and (b)(2) authorize the government "to detain certain aliens seeking admission into the country[.]" *Jennings*, 138 S. Ct. at 838. Pursuant to §§ 1226(a) and (c), the government has the authority to detain "aliens already in the country pending the outcome of removal proceedings." *Id.* Section 1231(a), the detention provision at issue in this case, "authorizes

the detention of aliens who have already been ordered removed from the country." *Id.* at 843.

Pursuant to § 1231(a), the Attorney General "shall remove the alien from the United States within a period of 90 days" when an alien is ordered removed. 8 U.S.C. § 1231(a)(1)(A). "During the removal period, the Attorney General shall detain the alien." 8 U.S.C. § 1231(a)(2). "If the alien does not leave or is not removed during the removal period, the alien . . . shall be subject to supervision under regulations" set by the Attorney General pending removal. *Id.* § 1231(a)(3). Section 1231(a)(6) further provides that "certain categories of aliens who have been ordered removed, namely, inadmissible aliens, criminal aliens, aliens who have violated their nonimmigrant status conditions, and aliens removable for certain national security or foreign relations reasons, as well as any alien 'who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal,'" *Zadvydas*, 533 U.S. at 688, "*may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)*," 8 U.S.C. § 1231(a)(6) (emphasis added).

In this circuit, detention pursuant to § 1231(a)(6) "encompasses aliens . . . whose collateral challenge to [a] removal order (or a motion to reopen) is pending in the court of appeals, as well as to aliens who have exhausted all direct and collateral review of their removal orders but who, for one reason or another, have not yet been removed from the United States." *Diouf II*, 634 F.3d 1085; *see also Diouf I*, 542 F.3d at 1230 (explaining that the removal period in § 1231(a)(1) will commence even if a stay of removal is entered while a federal court

reviews an alien's habeas petition pursuant to 28 U.S.C. § 2241 or considers a petition for review of a denial by the Board of Immigration Appeals of an alien's motion to reopen).

The INA also authorizes the government to reinstate a prior removal order against an alien who the government believes has unlawfully reentered the United States, with the order "reinstated from its original date." 8 U.S.C. § 1231(a)(5). Aliens with reinstated removal orders may pursue limited forms of relief from removal, including withholding of removal and protection pursuant to the Convention Against Torture. *Andrade-Garcia v. Lynch*, 828 F.3d 829, 831 (9th Cir. 2016). In this circuit, aliens with reinstated removal orders, including those who pursue these limited forms of relief, are treated as detained pursuant to § 1231(a)(6). *Padilla-Ramirez v. Bible*, 862 F.3d 881, 884-87 (9th Cir. 2017), *amended by*, 882 F.3d 826, 830-33 (9th Cir. 2018).

II. The Proceedings in this Case

Plaintiffs Aleman Gonzalez and Gutierrez Sanchez are natives and citizens of Mexico. The Government reinstated prior removal orders against them in 2017 but placed each in withholding-only removal proceedings after asylum officers determined that each has a reasonable fear of persecution or torture in Mexico. Both Plaintiffs requested a bond hearing before an IJ after 180 days in detention. Different IJs, however, denied the requests by reasoning that *Jennings* effectively overruled *Diouf II* and thus deprived the IJs of jurisdiction to conduct the bond hearing *Diouf II* would require. Plaintiffs filed the complaint and petition for a writ of habeas corpus on behalf of a putative class of

similarly situated individuals detained in our court's jurisdiction.

In their complaint-petition, Plaintiffs claim that the bond hearing denials violate the INA, the Administrative Procedure Act, and the U.S. Constitution's Fifth Amendment Due Process Clause. Plaintiffs rely on *Diouf II* to allege that Defendants have denied them bond hearings "[d]espite clear Ninth Circuit precedent establishing the right to a bond hearing for Plaintiffs upon their detention becoming prolonged" as aliens detained pursuant to § 1231(a)(6). Plaintiffs further allege that *Singh* requires the Government to bear a clear and convincing evidentiary burden of proof at such a bond hearing. Alternatively, Plaintiffs claim that constitutional due process requires these protections.

Plaintiffs moved for class certification on their statutory and constitutional claims, and a preliminary injunction. The district court certified a class of § 1231(a)(6) detainees in the Ninth Circuit for the statutory claims only.[2] The court also granted the preliminary injunction, concluding that all preliminary injunction factors weighed in Plaintiffs' favor. The court enjoined the Government from "detaining Plaintiffs and the class members pursuant to [§] 1231(a)(6) for more than 180 days without providing each a bond hearing before an IJ as required by *Diouf II*." At the Government's request, the district court subsequently clarified that the certified class includes only individuals detained pursuant to § 1231(a)(6) who have "live claims" before an immigration court, the BIA, or a circuit

[2] Plaintiffs' class certification motion excluded aliens detained pursuant to § 1231(a)(6) who are members of certified classes in litigations pending in the Central District of California and the Western District of Washington.

court of appeals, which means defenses against their removal from the United States. The court further clarified that, pursuant to *Diouf II*, the preliminary injunction does not require a bond hearing for an alien whose release or removal is imminent. *Diouf II*, 634 F.3d at 1092 n.13. Subject to these clarifications, the Government timely appealed.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over an appeal from the grant of a preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1). We review the grant of a preliminary injunction motion for an abuse of discretion. *Adidas Am., Inc. v. Skechers USA, Inc.*, 890 F.3d 747, 753 (9th Cir. 2018). "[A] district court abuses its discretion when it makes an error of law." *Cuviello v. City of Vallejo*, 944 F.3d 816, 826 (9th Cir. 2019) (citation omitted).

ANALYSIS

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Although the district court determined that all preliminary injunction factors weighed in Plaintiffs' favor, the Government asserts only that the district court erred by concluding that Plaintiffs are likely to succeed on the merits of the statutory claims. We therefore limit our analysis to this factor.

The dispositive issue for Plaintiffs' likelihood of success on their § 1231(a)(6) statutory claims is whether, as

the Government contends, *Diouf II* is clearly irreconcilable with *Jennings*. If the Government's contention is correct, then *Diouf II* cannot support the preliminary injunction the district court granted.

Familiar principles guide our consideration of the Government's principal challenge to the preliminary injunction. In this circuit, a decision of a prior three-judge panel is controlling unless and until a superseding ruling comes from higher authority, including the Supreme Court or a panel of our court sitting en banc. *Miller*, 335 F.3d at 893, 899-900. "[T]he issues decided by the higher court need not be identical in order to be controlling. Rather, the relevant court of last resort must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Id.* at 900. In cases of "clear irreconcilability," we "should consider [our]selves bound by the intervening higher authority and reject the prior opinion of this court as having been effectively overruled." *Id.*

As we have already emphasized, "[t]he 'clearly irreconcilable' requirement is 'a high standard.'" *Robertson*, 875 F.3d at 1291 (citation omitted). "It is not enough for there to be 'some tension' between the intervening higher authority and prior circuit precedent, or for the intervening higher authority to 'cast doubt' on the prior circuit precedent." *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (internal citation omitted) (quoting *United States v. Orm Hieng*, 679 F.3d 1131, 1140-41 (9th Cir. 2012), and *United States v. Delgado-Ramos*, 635 F.3d 1237, 1239 (9th Cir. 2011) (per curiam)). "In order for us to ignore existing Ninth Circuit precedent . . . the reasoning and principles of [the later authority]

would need to be so fundamentally inconsistent with our prior cases that our prior cases cannot stand." *In re Gilman*, 887 F.3d 956, 962 (9th Cir. 2018) (alteration in brackets added). But if we "can apply our prior circuit precedent without running afoul of the intervening authority, we must do so." *Lair*, 697 F.3d at 1207 (internal quotations and citation omitted).

To set the stage for our analysis of whether *Diouf II* is clearly irreconcilable with *Jennings*, we first discuss the relevant precedents of the Supreme Court and our court construing the immigration detention statutes. We then consider the Government's particular arguments about how, in its view, *Jennings* undercuts *Diouf II*. Finally, we address the Government's argument that the district court improperly re-applied the canon of constitutional avoidance to § 1231(a)(6).

I. Constructions of the Immigration Detention Statutes

A. *Zadvydas v. Davis*, 533 U.S. 678 (2001)

We turn first to the Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001). *Zadvydas* is central to understanding our court's application of the canon of constitutional avoidance to all the immigration detention statutes, as well as to understanding the Court's decision in *Jennings*.

In *Zadvydas*, the Court considered a federal habeas challenge to detention pursuant to § 1231(a)(6) brought by aliens with criminal convictions whom the government had detained beyond § 1231(a)(2)'s initial 90-day mandatory detention period. 533 U.S. at 682. The question before the Court was whether, beyond the initial re-

moval period, § 1231(a)(6) authorized indefinite detention or only detention for a period reasonably necessary to secure the alien's removal. *Id.*

Invoking the canon of constitutional avoidance, the Court rejected the government's argument that § 1231(a)(6) sets no limit on the permissible length of detention beyond the removal period. *Id.* at 689. The Court reasoned first that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem" under the Fifth Amendment's Due Process Clause given the physical liberty at issue, the potentially permanent civil confinement the statute could authorize, and the limited "procedural protections available to the alien" pursuant to 8 C.F.R. § 241.4(d)(1) (2001), pursuant to which "the alien bears the burden of proving he is not dangerous[.]" *Id.* at 690-92. Against the backdrop of these constitutional concerns, the Court could not find in § 1231(a)(6)'s text a "clear indication of congressional intent to grant the Attorney General the power to hold indefinitely an alien ordered removed." *Id*. at 697. The Court explained that the statute's use of the word "may" in the phrase "may be detained" is ambiguous and "does not necessarily suggest unlimited discretion." *Id*. The Court thus "read an implicit limitation into" § 1231(a)(6), "limit[ing] an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States." *Id*. at 689.

Faced with the habeas petitions in that case, the Court outlined how a habeas court should apply this construction of § 1231(a)(6). *Id.* at 699. When removal is no longer reasonably foreseeable, § 1231(a)(6) no longer authorizes continued detention. *Id.* at 699-700. "In

that case, . . . the alien's release may and should be conditioned on any of the various forms of supervised release that are appropriate in the circumstances, and the alien may no doubt be returned to custody upon a violation of those conditions." *Id.* at 700 (citing 8 U.S.C. §§ 1231(a)(3); 8 C.F.R. § 241.5)). "[H]av[ing] reason to believe . . . that Congress previously doubted the constitutionality of detention for more than six months," the Court recognized six months as a presumptively reasonable length of detention "for the sake of uniform administration in the federal courts." *Id.* at 701. "After this 6-month period, once the alien 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.* The Court qualified that this "does not mean that every alien not removed must be released after six months," but rather "an alien may be [detained] until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.*

B. This Court's Pre-*Jennings* Constructions of the Immigration Detention Statutes

Although *Zadvydas* concerned only § 1231(a)(6), that decision led this court to "grapple[] in piece-meal fashion with whether the various immigration detention statutes may authorize indefinite or prolonged detention of detainees and, if so, may do so without providing a bond hearing." *Rodriguez v. Robbins*, 804 F.3d 1060, 1077 (9th Cir. 2015) (*Rodriguez III*) (quoting *Rodriguez v. Robbins*, 715 F.3d 1127, 1134 (9th Cir. 2013) (*Rodriguez II*) (further quoting *Rodriguez v. Hayes*, 591 F.3d

1105, 1114 (9th Cir. 2010) (*Rodriguez I*))).[3] Five decisions are relevant here.

First, in *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942 (9th Cir. 2008), our court considered a habeas petition from a lawful permanent resident whom the government had detained for nearly seven years without providing an adequate opportunity to challenge his detention. *Id.* at 944. We recognized that § 1226(a) authorized the government to detain Casas-Castrillon because he remained capable of being removed, *id.* at 948-49, but we also recognized that Casas-Castrillon's nearly seven-year detention posed a "constitutional question," *id.* at 950. We declined to resolve that question because we could "find no evidence that Congress intended to authorize the long-term detention of aliens such as Casas[-Castrillon] without providing them access to a bond hearing before an immigration judge." *Id.*

---

[3] Our court also identified the Court's decision in *Demore v. Kim*, 538 U.S. 510 (2003), as important to our constructions of the immigration detention statutes to address the constitutional issue of prolonged detention. *See Rodriguez III*, 804 F.3d at 1077. *Demore*, however, is the earliest example of the Court's rejection of our court's reliance on *Zadvydas* to construe the other immigration detention statutes. We had construed § 1226(c) to require the government to provide a bail hearing with reasonable promptness to determine whether the alien was a flight risk or a danger to the community. *Kim v. Ziglar*, 276 F.3d 523, 539 (9th Cir. 2002). Foreshadowing its reasoning in *Jennings*, the Court rejected that construction by distinguishing *Zadvydas*'s focus on § 1231(a)(6) as "materially different" from § 1226(c), noting that whereas the statute at issue in *Zadvydas* involved "'indefinite' and 'potentially permanent' detention," § 1226(c) involved detention "of a much shorter duration" with a "definite termination point." *Demore*, 538 U.S. at 527-29.

Relying on an earlier decision of our court that applied the canon of constitutional avoidance to § 1226(c), we determined that prolonged detention under § 1226(a) is "permissible only where the Attorney General finds such detention individually necessary by providing the alien with an adequate opportunity to contest the necessity of his detention." *Id.* at 951 (relying on *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005)).[4] We recognized that "[§] 1226(a), unlike § 1226(c), provides such authority for the Attorney General to conduct a bond hearing and release the alien on bond or detain him if necessary to secure his presence at removal." *Id.* We held that "§ 1226(a) must be construed as *requiring* the Attorney General to provide the alien with such a hearing" given the constitutional doubtfulness of prolonged detention without an individualized determination of dangerousness or flight risk. *Id.* (citing *Tijani*, 430 F.3d at 1242) (emphasis in original). "Thus an alien is entitled to be released on bond unless the 'government establishes that he is a flight risk or will be a danger to the community.'" *Id.* (quoting *Tijani*, 430 F.3d at 1242).

---

[4] In *Tijani*, our court addressed the government's detention of an alien for two years and eight months pursuant to § 1226(c). 430 F.3d at 1242. We invoked *Zadvydas* to question the permissibility of a congressional statute authorizing detention "of this duration for lawfully admitted resident aliens who are subject to removal." *Id.* (citing *Zadvydas*, 533 U.S. at 690). We distinguished *Demore* as a case "where the alien conceded deportability," and then proceeded to apply the canon of constitutional avoidance to construe § 1226(c) to conditionally grant habeas relief unless the government provided the alien with a bond hearing before an IJ where the government bore the burden of justifying continued detention. *Id.*

Second, in *Diouf II*, we reversed a district court's denial of a preliminary injunction that would have required individualized bond hearings pursuant to § 1231(a)(6). 634 F.3d at 1084. We "extend[ed] *Casas-Castrillon*" to § 1231(a)(6), *id.* at 1086, such that "individuals detained [there]under . . . are entitled to the same procedural safeguards against prolonged detention as individuals detained under § 1226(a)," *id.* at 1084. We determined that "prolonged detention under § 1231(a)(6), without adequate procedural safeguards, would raise 'serious constitutional concerns.'" *Id.* at 1086 (quoting *Casas-Castrillon*, 535 F.3d at 950). We thus "appl[ied] the canon . . . and construe[d] § 1231(a)(6) as requiring an individualized bond hearing, before an immigration judge, for aliens facing prolonged detention under that provision." *Id.* (quoting *Casas-Castrillon*, 535 F.3d at 951). We held further that "[s]uch aliens are entitled to release on bond unless the government establishes that the alien is a flight risk or will be a danger to the community." *Id.*

In justifying this application of the canon to § 1231(a)(6) to require a bond hearing, we rejected the government's argument that § 1231(a)(6)'s text does not expressly provide for release on bond as does § 1226(a)'s text. We underscored that we had already construed § 1231(a)(6) to authorize release on bond and acknowledged that the government's own regulations permitted release on bond for aliens detained pursuant to the provision. *Id.* at 1089 (citing *Diouf I*, 542 F.3d at 1234; 8 C.F.R. § 241.5(b)).

We also rejected the government's argument that the regulations it modified in the wake of the Court's construction of § 1231(a)(6) in *Zadvydas* provided sufficient

safeguards to protect the liberty interests of § 1231(a)(6) detainees. *Id.* at 1089 & n.10. We found "serious constitutional concerns" with the government's 180-day review process (*i.e.*, detention lasting six months) because the regulations "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. In the context of this discussion, we explained for the first time that "[a]s a general matter, detention is prolonged when it has lasted six months and is expected to continue more than minimally beyond six months." *Id.* at 1092 n.13; *see also Rodriguez III*, 804 F.3d at 1069 ("In *Diouf II*, we also adopted a definition of 'prolonged' detention . . . for purposes of administering the *Casas*[-*Castrillon*] bond hearing requirement." (citing *Diouf II*, 634 F.3d at 1092 n.13)). Alluding to *Zadvydas*, we explained that the "private interests at stake are profound" at six months of detention, such that "a hearing before an immigration judge is a basic safeguard for aliens facing prolonged detention under § 1231(a)(6)." *Diouf II*, 634 F.3d at 1091-92.

Third, and not long after *Diouf II*, we explained in *Singh* that "given the substantial liberty interests at stake," 638 F.3d at 1200, due process requires the government to prove "by clear and convincing evidence that an alien is a flight risk or a danger to the community to justify the denial of bond," *id.* at 1203-04. Although *Singh* concerned a bond hearing requirement that our court construed § 1226(a) as requiring in *Casas-Castrillon*, *Singh* was not a statutory construction decision. Instead, we drew from the Supreme Court's constitutional procedural due process jurisprudence "plac[ing] a heightened burden of proof on the State in civil proceedings in which

the 'individual liberty interests at stake . . . are both particularly important and more substantial than mere loss of money.'" *Id.* at 1204 (quoting *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996), and citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *Woodby v. INS*, 385 U.S. 276, 285 (1966); *Chaunt v. United States*, 364 U.S. 350, 353 (1960)).

Fourth, in *Rodriguez II*, we affirmed a district court's preliminary injunction that required the government to provide individualized bond hearings before an IJ to class members detained pursuant to §§ 1225(b) and 1226(c). *Rodriguez II*, 715 F.3d at 1130-31. To avoid the constitutional concerns posed by prolonged detention, we held that "§ 1226(c)'s mandatory language must be construed 'to contain an implicit 'reasonable time' limitation, . . . subject to federal court review.'" *Id.* at 1138 (quoting *Zadvydas*, 533 U.S. at 682). After the expiration of that implicit time limitation, the government's authority to detain class members would shift to § 1226(a). *Id.* (citing *Casas-Castrillon*, 535 F.3d at 948). Relying on *Diouf II*'s definition of prolonged detention, we held that "subclass members who have been detained under § 1226(c) for six months are entitled to a bond hearing[.]" *Id.* (citing *Diouf II*, 634 F.3d at 1092 n.13). We acknowledged the government's argument there that "*Diouf II* by its terms addressed detention under § 1231(a)(6), not § 1226(c) or § 1225(b)," but we thought the conclusion "that detention always becomes prolonged at six months" was "consistent with the reasoning of *Zadvydas*, *Demore*, *Casas*[*-Castrillon*], and *Diouf II*[.]" *Id.* at 1039. Finding "no basis" to distinguish § 1225(b) from § 1226(c), we also held that any mandatory detention pursuant to § 1225(b) was "im-

plicitly time-limited" to six months, after which the government's authority shifted to § 1226(a). *Id.* at 1143-44. The § 1225(b) subclass would thus be entitled to a bond hearing in accordance with *Casas-Castrillon*'s construction of § 1226(a). *Id.* (citing *Casas-Castrillon*, 535 F.3d at 948). *Singh*'s strictures would apply to the §§ 1225(b) and 1226(c) subclasses. *Id.* at 1139, 1144.

Finally, *Rodriguez III*—the decision at issue in *Jennings*—largely distilled the holdings of our decisions construing the immigration detention statutes into a single decision. There, we considered a grant of summary judgment and corresponding permanent injunction for a class of noncitizens who challenged their prolonged detention pursuant to §§ 1225(b), 1226(a), 1226(c), and 1231(a) without individualized bond hearings to justify continued detention. *Rodriguez III*, 804 F.3d at 1065. We reversed the judgment and injunction insofar as they concerned noncitizens detained pursuant to § 1231(a), explaining that the class was defined as noncitizens "detained 'pending completion of removal proceedings, including judicial review.'" *Id.* at 1086. We explained that a removal order could not be administratively final for any class members, and thus "[s]imply put, the § 1231(a) subclass does not exist." *Id.* We otherwise affirmed the judgment and injunction.

In *Rodriguez III*, we concluded that "the canon of constitutional avoidance requires us to construe the statutory scheme to provide all class members who are in prolonged detention with bond hearings at which the government bears the burden of proving by clear and convincing evidence that the class member is a danger to the community or a flight risk." *Id.* at 1074. For the §§ 1225(b) and 1226(c) subclasses, we reiterated our

application of the canon in *Rodriguez II* to construe the provisions as containing an implicit six-month time limitation, after which the government's detention authority shifted to § 1226(a), thereby entitling detainees to a bond hearing in accordance with *Casas-Castrillon*. *Id.* at 1079-81 (discussing § 1226(c)), *id.* at 1081-84 (discussing § 1225(b)). We affirmed the injunction for the § 1226(a) subclass as "squarely controlled by our precedents," pointing principally to *Casas-Castrillon*. *Id.* at 1085. Such class members were "entitled to automatic bond hearings after six months of detention." *Id.*

We also addressed procedural protections for the statutory bond hearings we construed § 1226(a) as requiring, and to which all class members were entitled based on our constructions of the immigration statutes at issue. Relying on *Singh*, we affirmed the requirement that the government justify continued detention by clear and convincing evidence. *Id.* at 1087. We also determined, for the first time, that "the government must provide periodic bond hearings every six months" after an initial bond hearing "so that noncitizens may challenge their continued detention as 'the period of . . . confinement grows.'" *Id.* at 1089 (quoting *Diouf II*, 634 F.3d at 1091, which in turn quoted *Zadvydas*, 533 U.S. at 701). The government petitioned for a writ of certiorari, which the Supreme Court granted. *Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016).

C. *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018)

Our court's constructions of §§ 1225(b), 1226(a), and 1226(c) were sharply criticized in *Jennings*. In the Court's opinion, we had "adopted implausible constructions of the three immigration provisions at issue" to

hold "that detained aliens have a statutory right to periodic bond hearings under the provisions at issue." 138 S. Ct. at 836. As the Court explained, "[t]he canon of constitutional avoidance 'comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction.'" *Id.* at 842 (quoting *Clark*, 543 U.S. at 385). The Court found no textual basis for our construction of those statutory provisions.

The Court began with §§ 1225(b)(1) and (b)(2). Observing that both provisions provide that an alien "shall be detained," *id.* at 837, 842, the Court explained that "[r]ead most naturally, [the statutes] mandate detention of applicants for admission until certain proceedings have concluded," *id.* at 842. The Court determined that "[d]espite the clear language," our court read an implicit six-month time limitation regarding the length of detention into them. *Id.* The Court rejected our reading because the provisions' text did not "hint[] that those provisions restrict detention after six months." *Id.* at 843. The Court explained that "[s]potting a constitutional issue does not give a court the authority to rewrite a statute as it pleases," but instead "the canon permits a court to 'choos[e] between competing *plausible* interpretations of a statutory text.'" *Id.* (quoting *Clark*, 543 U.S. at 381) (emphasis in original).

The Court also rejected our reliance on *Zadvydas* "to graft a time limit onto the text of § 1225(b)." *Id.* The Court explained that "*Zadvydas* concerned § 1231(a)(6)," a different provision "authoriz[ing] the detention of aliens who have already been ordered removed from the country." *Id.* The Court explained that *Zadvydas* construed § 1231(a)(6) to mean that an alien who is ordered

removed may not be detained beyond a period reasonably necessary to secure his removal, with six months as the presumptively reasonable period. *Id.* According to the Court, *Zadvydas* "justified this interpretation by invoking the constitutional-avoidance canon" to "detect[] ambiguity in the statutory phrase '*may* be detained.'" *Id.* (emphasis in original). Characterizing *Zadvydas* as "a notably generous application of the constitutional-avoidance canon," the Court determined that we "went much further" in construing §§ 1225(b)(1) and (b)(2). *Id.*

The Court explained that we "failed to address whether Z*advydas*'s reasoning may fairly be applied in this case despite the many ways in which the provision in question in Z*advydas*, § 1231(a)(6), differs materially from those at issue here, §§ 1225(b)(1) and (b)(2)." *Id.* For one, unlike § 1231(a)(6), the provisions "provide for detention for a specified period of time." *Id.* at 844. Thus, detention under these statutes could not be indefinite like detention under § 1231(a)(6) could be without a limiting construction. Second, whereas § 1231(a)(6) uses the word "may," §§ 1225(b)(1) and (b)(2) use the phrase "shall." *Id.* Thus, the latter provisions are clearly mandatory, whereas § 1231(a)(6) is not. Finally, the Court found *Zadvydas* "particularly inapt" because Congress authorized the Attorney General to release aliens detained pursuant to §§ 1225(b)(1) and (b)(2) for urgent humanitarian reasons or a significant public benefit. *Id.* (citing 8 U.S.C. § 1182(d)(5)(A)). By "negative implication," the Court read this to exclude any other manner of release and to "preclude[] the sort of implicit time limit on detention that we found in *Zadvydas*." *Id.*

The Court deemed § 1226(c)'s language "even clearer." *Id.* at 846. The Court determined that § 1226(c) is not silent on the length of permissible detention because it mandates detention of certain aliens pending removal proceedings. *Id.* The Court further determined that, pursuant to § 1226(c)'s terms, the Attorney General "may release" an alien detained pursuant to that provision "'*only if* the Attorney General decides' both that doing so is necessary for witness-protection purposes and that the alien will not pose a danger or flight risk." *Id.* (quoting 8 U.S.C. § 1226(c)(2)) (emphasis in original). Thus, the Court read this text to mean "aliens detained under its authority are not entitled to be released under any circumstances other than those expressly recognized by the statute." *Id.*

Turning to § 1226(a), the Court rejected our court's imposition of "procedural protections that go well beyond the initial bond hearing established by existing regulations—namely, periodic bond hearings every six months in which the Attorney General must prove by clear and convincing evidence that the alien's continued detention is necessary." *Id.* at 847. According to the Court, "[n]othing in § 1226(a)'s text—which says only that the Attorney General 'may release' the alien 'on . . . bond'—even remotely supports the imposition of either of those requirements." *Id.*[5] The Court ulti-

[5] *Jennings* also rejected "layer[ing]" onto § 1226(a) a procedural requirement that would require an IJ to consider "the length of detention prior to a bond hearing . . . in determining whether the alien should be released." 138 S. Ct. at 848. Neither *Diouf II*, nor the district court's preliminary injunction require this. Thus, this aspect of *Jennings* is inapposite to this appeal.

mately remanded for consideration of the plaintiffs' constitutional due process challenges to the statutes at issue. *Id.* at 851.

Jennings clearly invalidated aspects of our court's prior constructions of §§ 1225(b), 1226(a), and 1226(c). About this, we have no doubt. *See Rodriguez v. Marin*, 909 F.3d 252, 255 (9th Cir. 2018) ("In *Jennings*[], the Supreme Court held that we misapplied the canon of constitutional avoidance to hold that certain immigration detention statutes, namely 8 U.S.C. §§ 1225(b), 1226(a), and 1226(c), implicitly contain a reasonableness determination after which due process concerns require that persons in prolonged mandatory detention are entitled to individualized bond hearings and possibly, conditional release."). But this appeal requires us to determine the impact of *Jennings* on *Diouf II*'s construction of § 1231(a)(6), if any.

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

Implicitly acknowledging that *Jennings* did not concern our construction of § 1231(a)(6), the Government urges us to conclude that *Jennings* has invalidated *Diouf II* and therefore to conclude further that we are no longer bound by *Diouf II*. *See Miller*, 335 F.3d at 893.

The scope of our inquiry into whether *Diouf II* is clearly irreconcilable with *Jennings* is limited. This inquiry does not call upon us to opine on whether *Diouf II* reached the right result, nor to determine whether we would construe § 1231(a)(6) differently. *See Close v. Sotheby's, Inc.*, 894 F.3d 1061, 1073-74 (9th Cir. 2018) ("[T]he fact that we might decide a case differently than a prior panel is not sufficient grounds for deeming the

[prior] case overruled."). Instead, we must determine whether the Government's arguments satisfy the "high standard" of clear irreconcilability that governs in this circuit. *Robertson*, 875 F.3d at 1291. "[I]f we can apply our precedent consistently with that of the higher authority, we *must* do so." *FTC*, 926 F.3d at 1213 (emphasis added). "Nothing short of 'clear irreconcilability' will do." *Close*, 894 F.3d at 1073.

The Government advances three overlapping arguments to persuade us that *Jennings* effectively overruled *Diouf II*. First, the Government argues that *Diouf II*'s application of the canon of constitutional avoidance to § 1231(a)(6) contravenes *Jennings*'s mode of applying the canon to the other immigration detention statutes. Second, the Government argues that *Jennings*'s rejection of construing § 1226(a) to require certain procedural protections forecloses *Diouf II*'s construction of § 1231(a)(6). Third, the Government argues that *Diouf II* is no longer good law because *Jennings* reversed a decision of our court that applied *Casas-Castrillon*'s construction of § 1226(a), a decision on which *Diouf II* relied.

We consider and ultimately reject each of the Government's arguments. Although we recognize some tension between *Diouf II* and *Jennings*, the Government has not persuaded us that *Diouf II* is "so fundamentally inconsistent with" *Jennings* that we may overrule *Diouf II* now. *In re Gilman*, 887 F.3d at 962. Apart from rejecting the Government's arguments, we find additional support for the conclusion that *Diouf II* is not clearly irreconcilable with *Jennings* in the Third Circuit's decision in *Guerrero-Sanchez v. Warden York*

County Prison, 905 F.3d 208 (3d Cir. 2018), which expressly adopted *Diouf II*'s construction of § 1231(a)(6) in the wake of *Jennings*.

A. *Diouf II*'s Application of the Canon of Constitutional Avoidance

The Government's core contention is that *Diouf II*'s application of the canon of constitutional avoidance to § 1231(a)(6) runs afoul of *Jennings*. We understand this argument to concern two points specific to *Diouf II*'s interpretation of § 1231(a)(6). First, the Government argues that *Jennings* abrogated our application of the canon of constitutional avoidance to § 1231(a)(6) in *Diouf II*. Second, the Government contends that *Jennings* overrides the conclusion that § 1231(a)(6) may be construed to authorize release on bond and thus *Diouf II*'s application of the canon to construe § 1231(a)(6) as requiring a bond hearing cannot stand after *Jennings*.[6]

In defense of *Diouf II*, Plaintiffs argue that in *Jennings*, the Court "explicitly reaffirmed its prior holding in *Zadvydas* that [§] 1231(a)(6) is amenable to the canon of constitutional avoidance." Although we agree that *Zadvydas* plays an important role in our analysis given *Jennings*'s discussion of that decision, we do not think that the clear irreconcilability analysis here is as simple as

---

[6] We distinguish these arguments from the related, yet distinct issue of whether *Diouf II* properly construed § 1231(a)(6) to require a bond hearing after six months of detention. We consider that issue in our analysis of the Government's argument regarding *Jennings*'s rejection of our court's construction of §1226(a) to require "periodic bond hearings" after six months of detention, beyond the bond hearing that the government's regulations already provided at the outset of detention for an alien detained pursuant to the government's § 1226(a) detention authority.

Plaintiffs posit. The Government does not challenge whether the canon may be applied to § 1231(a)(6) at all, but rather contends that *Jennings* shows that *Diouf II* improperly applied the canon to construe § 1231(a)(6) as requiring a bond hearing. As Plaintiffs recognize, *Zadvydas* did not construe § 1231(a)(6)in this manner. Thus, we must consider the distinct question of whether *Diouf II*'s particular application of the canon runs afoul of *Jennings*.

The Government tells us that *Diouf II*'s application of the canon runs afoul of *Jennings* because, in the Government's view, *Diouf II* merely spotted a constitutional issue regarding prolonged detention that it solved by applying the canon to "insert" a bond hearing requirement into § 1231(a)(6). Pointing to the Court's rejection in *Jennings* of our application of the canon to the other immigration detention statutes, the Government invites us to reject *Diouf II*'s construction of § 1231(a)(6) as erroneously requiring "the very same relief that the Supreme Court found inconsistent with three distinct immigration statutes."

Although we acknowledge the superficial appeal of the Government's suggestion, it carries little weight for us in our clear irreconcilability analysis. As a general matter, "we 'must be careful not to apply the rules applicable under one statute to a different statute without careful and critical examination.'" *Murray v. Mayo Clinic*, 934 F.3d 1101, 1106 (9th Cir. 2019) (quoting *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009)). That admonition carries force here. In no fewer than ten instances, the Court expressly qualified in *Jennings* that it rejected our application of the canon to the statutory provisions "at issue" there. *Jennings*, 138 S. Ct.

at 836, 839, 842, 843, 844, 850, 851. The Court's repeated use of that limiting language strongly suggests that we should not read the Court's rejection of our application of the canon to the other immigration detention statutes as alone undercutting *Diouf II*'s application of the canon to § 1231(a)(6). As we discuss in Part II.B.3, this conclusion is inescapable given the material textual differences between § 1231(a)(6) and the other immigration detention statutes, a point that the Court underscored throughout its analysis in *Jennings*.

Our dissenting colleague takes issue with our observation that *Jennings* repeatedly qualified that its focus was on the statutory provisions at issue there, namely §§ 1225(b), 1226(a), and 1226(c). The dissent contends that *Jennings*'s repeated and express limitations do not deprive that decision "of all persuasive force" in the clear irreconcilability inquiry presented here. Dissent at 61 n.2. (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 351 (2013)). Drawing on the recent decision in *Murray v. Mayo Clinic*, 934 F.3d 1101 (9th Cir. 2019), in which a three-judge panel of our court concluded that an earlier circuit precedent was clearly irreconcilable with two intervening Supreme Court decisions, the dissent argues "that *Jennings* and *Diouf II* analyzed different statutes is not dispositive of their irreconcilability." Dissent at 62 n.2. We do not understand this critique.[7] We have not described *Jennings*'s

[7] We similarly do not understand the dissent's reliance on *Murray*'s clear irreconcilability analysis. *Murray* addressed the continued viability of our court's holding in *Head v. Glacier Northwest, Inc*, 413 F.3d 1053 (9th Cir. 2005) that Title I of the Americans with Disabilities Act (ADA) requires only a showing that disability was a

repeated qualifications regarding its limited focus on the statutory provisions at issue there as dispositive of the clear irreconcilability analysis. Instead, our observation leads us to reject the Government's simplistic argument that the mere fact that *Jennings* invalidated our court's application of the canon to other immigration detention statutes alone gives us license to overrule *Diouf II*. *See Shaibi v. Berryhill*, 883 F.3d 1102, 1109 (9th Cir. 2018) (amended opinion) (concluding that the Supreme Court's "express limitation on its holding" in the intervening decision did not render the prior circuit decision clearly irreconcilable with the intervening decision).

---

motivating factor to prove a violation. The relevant statutory provision prohibited discrimination "on the basis of disability." 42 U.S.C. § 12112(a). After *Head*, the Court interpreted the phrase discrimination "because of such an individual's age" in the Age Discrimination in Employment Act (ADEA) to require but-for causation and rejected a motivating factor analysis. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177-78 (2009). The Court subsequently held that the phrase "because of" in Title VII's anti-retaliation provision also requires but-for causation, again rejecting the motivating factor standard. *Nassar*, 570 U.S. at 351-53. The *Murray* panel determined that *Head* is clearly irreconcilable with *Gross* and *Nassar*'s interpretation of similar statutory text and held that Title I requires but-for causation as well. *Murray*, 934 F.3d at 1106 ("Under *Gross*, the phrase 'on the basis of disability' indicates but-for causation."); *id.* (reasoning that *Nassar*, 570 U.S. at 350, explains that *Gross*'s holding that "because of," "by reason of," "on account of," and "based on" all indicate a but-for causal relationship). Contrary to the dissent's suggestion, this case is not *Murray*. Unlike the provisions discussed there, we are not confronted with nominal and immaterial differences between the provisions at issue in *Jennings* and § 1231(a)(6). In reining in our court's reliance on *Zadvydas* and the canon to construe the immigration detention statutes at issue in *Jennings*, the Court made it eminently clear that the textual differences amongst the statutes *are* material. *See Jennings*, 138 S. Ct. at 843.

More critically, as we explain in Part II.B.3, it is the material textual differences amongst the immigration detention statutes that *Jennings* expressly and repeatedly recognized that give *Jennings*'s treatment of the other statutory provisions little weight in our clear irreconcilability analysis.

Focusing squarely on *Diouf II*, the Government argues more narrowly that § 1231(a)(6) cannot be construed to require an individualized bond hearing because the provision does not expressly use the word "bond." The government raised this very argument in *Diouf II*. 634 F.3d at 1089. But now relying on *Jennings*, the Government contends that *Diouf II* runs afoul of *Jennings*'s admonition that "[s]potting a constitutional issue does not give a court the authority to rewrite a statute as it pleases." 138 S. Ct. at 843.

This argument is not without some appeal. The Government points us only to Part III of *Diouf II*. In a single paragraph, our court identified constitutional concerns with "prolonged detention under § 1231(a)(6), without adequate procedural protections[.]" *Diouf II*, 634 F.3d at 1086. "To address those concerns," we "appl[ied] the canon of constitutional avoidance and construe[d] § 1231(a)(6) as requiring an individualized bond hearing, before an immigration judge, for aliens facing prolonged detention under that provision." *Id.* (citing *Casas-Castrillon*, 535 F.3d at 951). This portion of *Diouf II* contained no analysis regarding the canon's application to § 1231(a)(6)'s text. We also recognized elsewhere in *Diouf II* that § 1231(a)(6) does not explicitly use the word "bond." *Id.* at 1089. These aspects of *Diouf II* give us pause in light of *Jennings*, but only briefly.

In *Diouf II*, we recognized that the canon is a tool of statutory construction that applies when an act of Congress raises a serious constitutional doubt. *Diouf II*, 634 F.3d at 1086 n.7. And we recognized that a federal court utilizes the canon to "'decid[e] which of two plausible statutory constructions to adopt[.]'" *Id.* at 1088 (quoting *Clark*, 543 U.S. at 380-81). Contrary to the Government's contention that *Diouf II* did not grapple with § 1231(a)(6)'s text to justify its application of the canon, *Diouf II* did so. Section 1231(a)(6) provides that "if released" from detention beyond the removal period, an alien "shall be subject to the terms of supervision in [§ 1231(a)](3)." 8 U.S.C. § 1231(a)(6). In *Diouf II*, although we recognized that § 1231(a)(6) does not use the word "bond," we "ha[d] no doubt that bond is also authorized under § 1231(a)(6), *as we have held and as Department of Homeland Security (DHS) regulations acknowledge*." 634 F.3d at 1089. (citing *Diouf I*, 542 F.3d at 1234; 8 C.F.R. § 241.5(b)) (emphasis added).[8] We fail to see how *Jennings* undercuts this articulation and application of the canon.

Jennings "expressly looked" to the same underlying principles and applied the canon "consistent with th[ose] principles[.]" *Lair*, 697 F.3d at 1207. *Jennings* first affirmed that the canon applies "[w]hen 'a serious doubt' is raised about the constitutionality of an act of Congress," pursuant to which "' . . . this Court will first ascertain whether a construction of the statute is fairly

---

[8] 8 C.F.R. § 241.5 is a regulation that applies to aliens who the government releases from § 1231(a)(6) detention. The regulation provides that an officer may require the posting of a bond to ensure an alien complies with the conditions of a supervision order. *Id.* As Plaintiffs acknowledge, this regulation remains in effect.

possible by which the question may be avoided.'" *Jennings*, 138 S. Ct. at 842 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). *Jennings* then reiterated that "the canon permits a court 'to choos[e] between competing plausible interpretations of a statutory text.'" *Id.* at 843 (quoting *Clark*, 543 U.S. at 381) (emphasis in original omitted). *Jennings* reiterated what the Court had already said about the canon in several cases decided long before our *Diouf II* decision. *See United States v. Locke*, 471 U.S. 84, 96 (1985) ("We cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question.") (quoting *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933)); *see also Clark*, 543 U.S. at 381, 385; *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 494 (2001).

The Government and the dissent conspicuously ignore that *Diouf II* articulated and relied on the same principles governing application of the canon as *Jennings*. We have explained, however, that when an intervening decision from a higher authority does not "change the state of the law," but instead "clarifie[s] and reinforce[s]" law that existed at the time of the prior circuit decision, it is unlikely to satisfy the *Miller* standard. *Lair*, 697 F.3d at 1207; *see also Nat'l Fed'n of the Blind v. United Airlines, Inc.*, 813 F.3d 718, 728 (9th Cir. 2016) (reasoning in part that a prior circuit decision was "not so 'clearly irreconcilable'" with an intervening Supreme Court decision because the intervening decision did not "represent a significant shift" in the relevant jurisprudence). The dissent identifies nothing new in *Jennings* regarding the canon's application that *Diouf II* failed to

articulate in applying the canon.[9] As our analysis shows, *Jennings* did not do so but rather engaged in statutory-specific applications of the canon. We thus reject the argument that *Diouf II*'s application of the canon to § 1231(a)(6) is clearly irreconcilable with *Jennings*'s mode of applying the canon.[10]

We also reject the Government's contention that *Jennings* overrides our court's conclusion that § 1231(a)(6) authorizes release on bond—a conclusion central to *Diouf II*'s application of the canon to the statute. *Diouf II*'s construction of § 1231(a)(6) to require a bond hearing plainly followed from two of our decisions that construed

---

[9] Our court did not decide *Diouf II* in a statutory vacuum. Rather, that decision's construction of § 1231(a)(6) followed *Zadvydas*, which identified ambiguity in § 1231(a)(6)'s text regarding the government's authority to detain an alien, and two earlier circuit precedents which construed § 1231(a)(6) to authorize release on bond. *Diouf I*, 542 F.3d at 1234; *Doan v. I.N.S.*, 311 F.3d 1160 (9th Cir. 2002). *Diouf II* relied on these decisions to apply the canon. *See Diouf II*, 634 F.3d at 1087-88, 1091-92 & nn.10-13 (referring to *Zadvydas* on multiple occasions in the context of applying the canon); *id.* at 1089 (referring to *Diouf I*, which in turn relied on *Doan*).

[10] For the first time, in its reply brief, the Government argues that *Jennings* established a framework that "obligated" the district court to look first to "*Zadvydas*'s construction of § 1231(a)" and then to consider *Diouf II*'s application of the canon of constitutional avoidance to determine whether *Diouf II* comported with *Zadvydas*. We do not normally consider arguments raised for the first time in a reply brief. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009). Nevertheless, even considering the argument, we readily reject it for the simple reason that the Government reads into *Jennings* a "framework" that the Court neither articulated, nor even hinted at.

the statute to encompass bond as a condition of release from detention that the statute authorizes.

We first construed § 1231(a)(6) to allow an alien's release on bond in *Doan v. I.N.S.*, 311 F.3d 1160 (9th Cir. 2002), a case we decided shortly after *Zadvydas*. There, we observed that §§ 1231(a)(3) and 1231(a)(6) authorize an alien's release from detention on terms of supervision. We determined that "a bond is well within the kinds of conditions contemplated by the Supreme Court in *Zadvydas*, where the Court observed that 8 C.F.R. § 241.5 establishes conditions of release." *Id.* at 1161 (citing *Zadvydas*, 533 U.S. at 688-89, 695-96). Pursuant to that regulation, the government had required an alien to post bond as a condition of release. *Id.* Thus, we rejected the alien's "contention that because a bond is not expressly listed as a condition in the statute, imposition of any bond as a condition of release is unlawful." *Id.* at 1162. Building on *Doan*, in *Diouf I*, we rejected the government's argument that "Diouf was statutorily ineligible for release on bond" as an alien detained pursuant to § 1231(a)(6) because "[w]e have specifically construed § 1231(a)(6) to permit release on bond." *Diouf I*, 542 F.3d at 1234 (citing *Doan*, 311 F.3d at 1160).

Relying on these earlier precedents, *Diouf II* applied the canon of constitutional avoidance to construe § 1231(a)(6) not only as authorizing release on bond, but as requiring a bond hearing in light of the constitutional issue of prolonged detention. The Government does not acknowledge our decisions construing § 1231(a)(6)'s allowance for release to encompass release on bond, nor does the Government acknowledge *Diouf II*'s reliance on them. *Diouf II*, 634 F.3d at 1089 (citing *Diouf I*, 542

F.3d at 1234; 8 C.F.R. § 241.5(b)). Were we to accept the Government's argument that § 1231(a)(6) does not even authorize release on bond, we would have to abrogate not only *Diouf II*, but also *Doan* and *Diouf I*, on which *Diouf II*'s analysis of § 1231(a)(6) rested.[11] But neither *Doan* nor *Diouf I* relied on the canon to construe § 1231(a)(6), and thus *Jennings* does not undercut either of them. We otherwise see nothing in either decision that is clearly irreconcilable with *Jennings* and therefore we are not free to overrule them. *Miller*, 335 F.3d at 893. Because *Jennings* does not affect these decisions, we reject the Government's first set of arguments.

B. *Jennings*'s Rejection of Construing § 1226(a) to Require Certain Procedural Protections Does Not Undercut *Diouf II*

Jennings rejected, in relevant part, the addition of two procedural protections onto § 1226(a): (1) "periodic bond hearings every six months," (2) "in which the Attorney General must prove by clear and convincing

---

[11] The dissent sees "no ineluctable reason" why we would need to overrule these precedents to accept the Government's argument, Dissent at 65 n.12, and explains them away as merely concerned with the government's authority to release an alien on bond to arrive at the conclusion that *Diouf II* failed to identify a plausible basis in § 1231(a)(6)'s text for a bond hearing requirement, *id*. at 63-66. We do not understand this reasoning. Whether a statute authorizes release on bond is the necessary predicate to whether that statute can be construed to require such release pursuant to a bond hearing. Ignoring these commonsense propositions, the dissent elides *Diouf II*'s application of the canon to construe § 1231(a)(6) not only to provide for a bond hearing, but as requiring a bond hearing after six months of detention to avoid the constitutional problem of prolonged detention.

evidence that the alien's continued detention is necessary[.]" *Id.* at 847-48. The Government contends that § 1231(a)(6)'s "operative language directly mirrors" § 1226(a) because both provisions provide that the government may detain an alien, and thus *Jennings* forecloses construing § 1231(a)(6) to require these protections as well. More sweepingly, the Government suggests that *Jennings* rejected construing § 1226(a) to require a bond hearing at all, thereby also undercutting *Diouf II*'s construction of § 1231(a)(6) to require a bond hearing. We dispose readily of two of the Government's arguments, and then turn to the issue of "periodic bond hearings."

1. *Jennings* Does Not Invalidate *Singh*'s Constitutional Due Process Burden of Proof Holding

We reject first the Government's reliance on *Jennings*'s rejection of construing § 1226(a) to require the government to justify an alien's continued detention by clear and convincing evidence. Although *Jennings* undoubtedly rejected construing the statute to require such a burden, that rejection is inapposite here.

Contrary to the Government's suggestion, *Diouf II* did not construe § 1231(a)(6) to impose such a burden, nor did we premise our determination that the government must meet such a burden on construing any of the immigration detention statutes. In *Singh*, we explained that, "[n]either *Casas-Castrillon*, nor any other Ninth Circuit, *statutory or regulatory authority* specifies the appropriate standard of proof at a *Casas*[*-Castrillon*] bond hearing." 638 F.3d at 1203 (emphasis added). Rather than construe any statute, we determined that

constitutional procedural due process required the government to meet the clear and convincing burden of proof standard. *Singh*, 638 F.3d at 1203-04; *see also Kashem v. Barr*, 941 F.3d 358, 380 (9th Cir. 2019) (acknowledging *Singh*'s clear and convincing evidence burden as a procedural due process standard "which applies in a range of civil proceedings involving substantial deprivations of liberty."). *Rodriguez III*, in turn, relied on *Singh* to affirm a clear and convincing burden of proof for bond hearings held pursuant to our constructions of the immigration detention statutes. *Rodriguez III*, 804 F.3d at 1087. Thus, *Jennings*'s rejection of layering such a burden onto § 1226(a) *as a matter of statutory construction* cannot undercut *Diouf II*, nor undercut our constitutional due process holding in *Singh*.

2. *Jennings* Did Not Reject Reading § 1226(a) to Authorize a Bond Hearing

Second, we reject the Government's reading of *Jennings* as foreclosing construction of § 1226(a) to authorize a bond hearing at all. Rather than focus on the Court's § 1226(a) analysis, the Government misdirects us to the Court's observation that "neither § 1225(b)(1) nor § 1225(b)(2) says anything whatsoever about bond hearings." *Jennings*, 138 S. Ct. at 842. The Court, however said no such thing about § 1226(a).

Section 1226(a) provides that the Attorney General "may release" an alien detained pursuant to that provision "on bond" or "on conditional parole." 8 U.S.C. § 1226(a)(2)(A), (B). The Court expressly acknowledged that "[f]ederal regulations provide that aliens detained under § 1226(a) receive bond hearings at the outset of detention." *Jennings*, 138 S. Ct. at 847 (citing 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1)). Section 1226(a) does not

use the word "hearing." The Court, however, did not suggest that the regulations' provision of those bond hearings was somehow at odds with the government's § 1226(a) detention authority pursuant to the statutory text.[12] Instead, the Court took issue with our court's imposition of "procedural protections that *go well beyond the initial bond hearing established by existing regulations*" for aliens detained pursuant to § 1226(a). *Id.* (emphasis added). The Court's rejection of our court's imposition of a six-month bond hearing requirement for aliens detained pursuant to § 1226(a) beyond the regulations' provision of a single bond hearing at the outset of detention is not the same as rejecting a construction of § 1226(a) to authorize or require bond hearings at all. Thus, we cannot agree with one of the fundamental premises underlying the Government's challenge to *Diouf II* based on the Court's treatment of § 1226(a) in *Jennings*.

---

[12] Like the Government, the dissent focuses on the absence of the word "hearing" in § 1231(a)(6). Dissent at 65. In doing so, the dissent ignores the absence of that word in § 1226(a), and *Jennings*'s analysis regarding that provision. Tellingly, there is nothing in *Jennings* that rejects reading § 1226(a) to require a bond hearing at all, as opposed to our erroneous reading of that provision to require a bond hearing at a particular point in time. As we explain in Part II.B.3, *Jennings*'s rejection of our court's bond hearing requirement for § 1226(a) cannot be fairly applied to *Diouf II*'s construction of § 1231(a)(6) in light of *Zadvydas*.

3. *Jennings*'s Rejection of a Six-Month Bond Hearing Requirement for Aliens Detained Pursuant to § 1226(a) Does Not Undercut *Diouf II*'s Construction of § 1231(a)(6)

The merits of the Government's clear irreconcilability challenge to *Diouf II*'s bond hearing requirement ultimately come down to *Jennings*'s rejection of construing § 1226(a) to contain a periodic bond hearing requirement. Reviewing the Court's actual reasoning in *Jennings*, including with respect to all the provisions at issue there, we cannot agree that *Jennings*'s treatment of § 1226(a) on this issue undercuts *Diouf II*.

In the decision that *Jennings* reversed, we used the phrase "periodic bond hearing" to refer to bond hearings every six months. *Rodriguez III*, 804 F.3d at 1089. The Court used the phrase "periodic bond hearing" to encompass a bond hearing held initially at six months of detention. *Jennings*, 138 S. Ct. at 850-51 ("The Court of Appeals held that aliens detained under the provisions at issue must be given periodic bond hearings, and the dissent agrees. . . . But the dissent draws that 6-month limitation out of thin air . . . [N]othing in any of the relevant provisions imposes a 6-month time limit on detention without the possibility of bail."). Even if we apply the Court's definition, we fail to see how *Jennings* undercuts *Diouf II*'s construction of § 1231(a)(6) to require a bond hearing after the government detains an alien pursuant to this statutory provision for six months and whose release or removal is not imminent.

Similar to our observation in the discussion of the Government's constitutional avoidance argument, we observe here that *Jennings* repeatedly qualified that its

rejection of a "periodic bond hearing" requirement applied to the statutory provisions at issue there. *Jennings*, 138 S. Ct. at 836 ("All parties appear to agree that the text of [§§ 1225(b), 1226(a), 1226(c)], when read most naturally, does not give detained aliens the right to periodic bond hearings during the course of their detention."); *id.* ("[T]he Court of Appeals for the Ninth Circuit held that detained aliens have a statutory right to periodic bond hearings *under the provisions at issue*." (emphasis added)); *id.* at 844 ("[A] series of textual signals distinguishes *the provisions at issue* in this case from *Zadvydas*'s interpretation of § 1231(a)(6)." (emphasis added)); *id.* at 850-51 ("The Court of Appeals held that aliens detained under the provisions at issue must be given periodic bond hearings, and the dissent agrees. . . . But the dissent draws that 6-month limitation out of thin air. However broad its interpretation of the words 'detain' and 'custody,' nothing *in any of the relevant provisions* imposes a 6-month time limit on detention without the possibility of bail." (emphasis added)); *id.* at 851 ("Because the Court of Appeals erroneously concluded that periodic bond hearings are required *under the immigration provisions at issue here* . . . " (emphasis added)). The Court's repeated use of this language strongly suggests that we should not read the Court's rejection of a six-month bond hearing requirement for § 1226(a) as undercutting *Diouf II*'s construction of § 1231(a)(6) to require a bond hearing after six months of detention when an alien's release or removal is not imminent.

We find that conclusion inescapable when we look at *Jennings*'s careful focus on the text of the provisions at issue there and the ways in which they differ from § 1231(a)(6) and thus whether *Zadvydas*'s reasoning

could apply to the other provisions at all. In rejecting our constructions of §§ 1225(b)(1) and (b)(2) to contain an implicit six-month time limit, the Court underscored that *Zadvydas* applied the canon to § 1231(a)(6) based on ambiguity in the provision's "may be detained" language *and* because the provision contained no limitation on the permissible length of detention. *Jennings*, 138 S. Ct. at 843 (noting that in contrast to §§ 1225(b)(1) and (b)(2), "Congress left the permissible length of detention under §1231(a)(6) unclear."); *Zadvydas*, 533 U.S. at 697. Rather than allow the government to subject an alien to potentially indefinite detention, as *Jennings* explained, *Zadvydas* construed § 1231(a)(6) to hold that "an alien who has been ordered removed may not be detained beyond 'a period reasonably necessary to secure removal'" with "six months a[s] a presumptively reasonable period." *Jennings*, 138 S. Ct. at 843 (quoting *Zadvydas*, 533 U.S. at 699 and citing *Zadvydas*, 533 U.S. at 701). As the Court explained, detention pursuant to §§ 1225(b)(1) or (b)(2) presented no such issue based on the clear text of those provisions. *Id.* at 843-44.

The Court's analysis of § 1226(a) in *Jennings* was sparse. But the Court's reasoning in its discussion of §§ 1225(b)(1) and (b)(2) applies to § 1226(a) as well. Contrary to the Government's singular focus on §§ 1226(a) and 1231(a)(6)'s use of the "may be detained" language, the provisions are materially distinct in the meaning of this language. Unlike § 1231(a)(6), "§ 1226(a) authorizes the Attorney General to arrest and detain an alien 'pending a decision on whether the alien is to be removed from the United States.'" *Id.* at 847 (quoting 8 U.S.C. § 1226(a)). Thus, as a textual matter, discretionary detention pursuant to § 1226(a) has an end point, unlike discretionary detention pursuant to § 1231(a)(6) absent

a limiting construction. Pursuant to the Court's own reasoning elsewhere in *Jennings*, the six-month presumptive time limitation that *Zadvydas* read into § 1231(a)(6) to address potentially indefinite detention pursuant to that provision does not "fairly apply" to detention pursuant to § 1226(a).

This material difference between §§ 1226(a) and 1231(a)(6) prevents us from concluding that *Jennings*'s rejection of construing § 1226(a) to require a bond hearing at six months applies to § 1231(a)(6).[13] Unlike with any of the other immigration detention statutes at issue in *Jennings*, *Diouf II* concerned the statutory provision at issue in *Zadvydas* and adopted a definition of prolonged detention that coincides with the presumptive

---

[13] The dissent's analysis proceeds on the mistaken assumption that there are no material differences between §§ 1226(a) and 1231(a)(6). Dissent at 61-62 n.2. In doing so, the dissent does not engage with *Jennings*'s reasoning and analysis regarding the statutory provisions at issue there. Moreover, the dissent commits the converse of the error that led the Court to reject our application of the canon to the other immigration detention statutes. Dissent at 67 (contending that *Jennings* rejected the "scaffolding upon which we had erected" additional procedural protections for § 1226(a) detainees.). Whereas as we had ignored the textual differences amongst the immigration detention statutes to apply the canon to those statutes in the wake of the Court's application of the canon to § 1231(a)(6) in *Zadvydas*, the dissent uncritically applies *Jennings*'s limited analysis concerning § 1226(a) to *Diouf II*'s construction of § 1231(a)(6) despite the ways in which *Jennings*'s reasoning shows that these provisions are materially distinct. *Jennings*'s actual analysis prevents us from finding clearly irreconcilability here. *Cf. Murray*, 934 F.3d at 1106 n.6 (finding clear irreconcilability when there were "no meaningful textual difference[s]" in the statutory text at issue there and the different provisions considered by two intervening decisions).

six-month time limit that *Zadvydas* read into that provision based on § 1231(a)(6)'s textual ambiguity. *Compare Zadvydas*, 533 U.S. at 701 *with Diouf II*, 634 F.3d at 1091-92 & n.13. Further echoing *Zadvydas*, *Diouf II* also qualified that its construction of § 1231(a)(6) to require a bond hearing does not apply if an alien's release or removal is imminent. *Compare Zadvydas*, 533 U.S. at 701 ("[A]n alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.") *with Diouf II*, 634 F.3d at 1092 n.13.

Although *Jennings* rejected our court's reliance on *Zadvydas* to construe the other immigration detention statutes and rejected construing § 1226(a) to require a six-month bond hearing, we cannot find in *Jennings*'s reasoning a rationale that clearly undercuts *Diouf II*'s six-month bond hearing requirement for aliens detained pursuant to § 1231(a)(6). Contrary to the dissent's view, *Jennings* shows that *Zadvydas*'s construction of § 1231(a)(6) provides an "arguable statutory foundation," 138 S. Ct. at 842, for *Diouf II*'s six-month bond hearing requirement that is entirely absent from the other immigration detention provisions.[14]

---

[14] The dissent posits that "we have given short shrift to" the motivations underlying the Court's decision in *Zadvydas*, specifically that the decision "was largely motivated by the fact that the possibility of removal of the aliens before it was truly remote because the countries to which they could be removed were highly unlikely to accept them at any time in the foreseeable future." Dissent at 63 n.4. That is incorrect. As the Court has instructed, *Zadvydas*'s construction of § 1231(a)(6) applies to all aliens detained pursuant to § 1231(a)(6) even if "the constitutional concerns that influenced our statutory construction in *Zadvydas* are not present for aliens" in other circumstances. *Clark*, 543 U.S. at 380. And the Court has

In its reply brief, the Government makes much of that fact that *Jennings* called into question *Zadvydas*'s reading of § 1231(a)(6) as a "notably generous application of the canon." 138 S. Ct. at 843. But the Court did not overrule *Zadvydas*; its statutory analysis, including application of the canon, remain intact.[15] We therefore cannot conclude that *Diouf II*'s construction of § 1231(a)(6) to require a bond hearing after six months of detention runs afoul of *Jennings*. We understand that the Government strenuously disagrees with *Diouf II*'s bond hearing requirement as inconsistent with the habeas framework that *Zadvydas* outlined and with the Government's post-*Zadvydas* regulations. That disagreement, however, has nothing to do

---

rejected the notion that statutory ambiguity disappears based on the circumstances of a given alien detained pursuant to § 1231(a)(6). "Be that as it may, it cannot justify giving the *same* detention provision a different meaning when such aliens are involved. It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation." *Id.* (emphasis in original).

[15] In failing to account for *Jennings*'s reasoning regarding *Zadvydas* and *Diouf II*'s reliance on *Zadvydas*'s reading of § 1231(a)(6), the dissent characterizes the textual ambiguity in § 1231(a)(6) that *Zadvydas* identified as a "narrow ambiguity." Dissent at 63-64. We know of no basis in our clear irreconcilability jurisprudence that would allow us to overrule the prior decision of a three-judge panel on the basis of a reason that appears nowhere in the intervening authority's decision. Neither *Jennings*, nor *Zadvydas* said anything about the scope of the ambiguity in § 1231(a)(6) that *Zadvydas* identified. Contrary to the dissent's view, *Jennings*'s questioning of *Zadvydas*'s particular application of the canon to that ambiguity—the adoption of a six-month time limitation that *Jennings* rejected as a matter of statutory construction for the other immigration detention statutes—says nothing about the ambiguity's scope.

with whether *Jennings*, by its own terms, undercuts *Diouf II*'s construction of § 1231(a)(6). Accordingly, we reject the Government's second argument.

C. *Diouf II*'s Reliance on *Casas-Castrillon*

As a final matter, the Government contends that *Diouf II* is clearly irreconcilable with *Jennings* based on the inter-related nature of our decisions in *Casas-Castrillon*, *Diouf II*, and *Rodriguez III*. The Government's argument is as follows: (1) *Diouf II* extended *Casas-Castrillon*'s construction of § 1226(a) to individuals subject to prolonged detention pursuant to § 1231(a)(6), (2) *Rodriguez III* also applied *Casas-Castrillon*'s construction of § 1226(a), (3) *Jennings* reversed *Rodriguez III*, and, thus, by implication, (4) *Jennings* and *Diouf II* are clearly irreconcilable. We reject these arguments for two reasons.

First, we think that the Government misreads both *Casas-Castrillon* and *Jennings*. As we have explained, *Jennings* did not invalidate construing § 1226(a) to authorize a bond hearing at all, but rather rejected construing § 1226(a) to require a bond hearing at six months in addition to the government's existing bond hearing regulations. More importantly here, *Casas-Castrillon* did not construe § 1226(a) in the manner that the Court rejected in *Jennings*. *Casas-Castrillon* applied the canon of constitutional avoidance to construe § 1226(a)'s authorization for release of an alien on bond as requiring an individualized bond hearing when an alien is subject to prolonged detention. 535 F.3d at 951. By the time our court decided *Rodriguez III*, we had applied *Diouf II*'s definition of prolonged detention as detention lasting longer than six months to § 1226(a), which transformed *Casas-Castrillon*'s bond hearing requirement

into a six-month bond hearing requirement. *See 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. . . . Even if *Diouf II* does not squarely hold that detention always becomes prolonged at six months, that conclusion is consistent with the reasoning of *Zadvydas, Demore, Casas*[*-Castrillon*], and *Diouf II*, and we so hold."); *see also Rodriguez III*, 804 F.3d at 1078 & n.7. By its terms, *Jennings* invalidates *that* aspect of our case law construing § 1226(a), but does not go further.[16]

Second, even if we concluded here that *Jennings* overruled *Casas-Castrillon*, we do not see how that could undercut *Diouf II* entirely. *Diouf II*'s construction of § 1231(a)(6) did not rest solely on its purported extension of *Casas-Castrillon* to aliens detained pursuant to § 1231(a)(6). *Diouf II*, 634 F.3d at 1086. As we have explained, *Diouf II* considered a number of arguments particular to § 1231(a)(6) itself that could not have

---

[16] The dissent contends that in rejecting the Government's challenge to *Diouf II* based on its argument here, we have suggested that "some of *Casas-Castrillon* survives *Jennings*[.]" Dissent at 68 n.14. Our response is twofold. For one, we have done nothing more than explain why we think the Government's challenge to *Diouf II* based on *Jennings* is wrong. We have not decided what specifically remains of *Casas-Castrillon*'s statutory holding after *Jennings*. Second, we do not take issue with the dissent's correct understanding that *Jennings* invalidated procedural protections that go beyond what the government's regulations provide. *Id.* However, we otherwise part ways with the dissent's reading of *Jennings*. As we have explained, *Jennings*'s approval of the government's regulations to provide bond hearings for aliens detained pursuant to § 1226(a) necessarily assumes that § 1226(a) can be plausibly read to authorize such hearings in the first place.

applied to *Casas-Castrillon*'s analysis of § 1226(a). *Id.* at 1086-92. More critically, as *Jennings*'s reasoning makes clear, *Casas-Castrillon* concerned a statutory provision that is materially different from the provision at issue in *Diouf II*. Thus, we conclude that *Diouf II* can stand irrespective of its reliance on *Casas-Castrillon*.[17] Because we reject this final argument, we conclude that the Government has not shown that *Diouf II* is clearly irreconcilable with *Jennings*.

D. Additional Support for *Diouf II* After *Jennings*

Apart from rejecting the Government's arguments, we find additional support for our conclusion that *Diouf II* is not clearly irreconcilable with *Jennings* based on the Third Circuit's decision in *Guerrero-Sanchez v. Warden York County Prison*, 905 F.3d 208 (3d Cir. 2018).

In *Guerrero-Sanchez*, the Third Circuit considered whether the government could subject the alien petitioner in that case to prolonged detention without providing an individualized bond hearing. The Third Circuit first determined that the alien—who had a reinstated removal order and was detained pending his pur-

---

[17] The dissent's reliance on *Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011) (en banc) misses the mark. For one, *Nunez-Reyes* involved our court sitting en banc, not a three-judge panel determining whether an earlier circuit precedent was clearly irreconcilable with the decision of an intervening authority. We are faced with different constraints compared with our court sitting en banc. Second, unlike in *Nunez-Reyes*, there is no single "rule" on which *Diouf II* relied that would warrant a conclusion that *Jennings*'s rejection of any aspect of *Casas-Castrillon* necessarily would invalidate *Diouf II* in its entirety.

suit of withholding-only relief from removal—was subject to detention pursuant to § 1231(a)(6).[18] *Id.* at 213-19. Having located the Circuits treat such detention as authorized pursuant to § 1226(a). *Guzman Chavez v. Hott*, 940 F.3d 867, 880-82 (4th Cir. 2019); *Guerra v. Shanahan*, 831 F.3d 59, 64 (2d Cir. 2016).government's detention authority in § 1231(a)(6), the Third Circuit considered whether the petitioner was entitled to a bond hearing at all. *Id.* at 219. To resolve that issue, the Third Circuit considered, in relevant part, *Zadvydas*, *Jennings*, and *Diouf II*.

Rejecting the government's argument there that "*Zadvyda*s resolves the only ambiguity in the text of § 1231(a)(6)," *id.* at 220, the Third Circuit reasoned that *Zadvydas* did "not explicitly preclude courts from construing § 1231(a)(6) to include additional *procedural* protections during the statutorily authorized detention period, should those protections be necessary to avoid detention that could raise different constitutional concerns," *id.* at 221 (emphasis in original). Finding that the petitioner's 637-day detention without bond raised serious constitutional concerns, *id.*, the Third Circuit declined to address whether the petitioner's continued confinement violated the Due Process Clause. *Id.* at 221, 223. Instead, the court asked whether the canon

---

[18] We recognize that there is a circuit split on the issue of whether an alien subject to a reinstated removal order who pursues withholding-only relief is subject to detention pursuant to § 1226(a) or § 1231(a)(6). Both our court and the Third Circuit treat such detention as authorized pursuant to § 1231(a)(6). *Guerrero-Sanchez*, 905 F.3d at 213-19; *Padilla-Ramirez*, 882 F.3d at 830-32. In contrast, the Second and Fourth Circuits treat such detention as authorized pursuant to § 1226(a). *Guzman Chavez v. Hott*, 940 F.3d 867, 880-82 (4th Cir. 2019); *Guerra v. Shanahan*, 831 F.3d 59, 64 (2d Cir. 2016).

of constitutional avoidance might sustain a reading of § 1231(a)(6) that would require the provision of a bond hearing. *Id.* at 223.

The Third Circuit acknowledged *Jennings*'s discussion regarding the proper invocation of the canon and *Jennings*'s holding that the canon could not be applied to "other provisions in the INA" that use the phrase "shall detain." *Id.* ("We . . . invoke the canon of constitutional avoidance so long as 'the statute is found to be susceptible of more than one construction.' (quoting *Jennings*, 138 S. Ct. at 842)). Turning to § 1231(a)(6)'s text and alluding to *Zadvydas*, the Third Circuit noted that the statute's use of the phrase "may be detained" "invites us to apply the canon of constitutional avoidance[.]" *Id.* at 223-24. "In order to avoid determining whether the petitioner's detention violates the Due Process Clause," the Third Circuit expressly "adopt[ed] the Ninth Circuit's limiting construction of § 1231(a)(6) that 'an alien facing prolonged detention under [that provision] is entitled to a bond hearing before an immigration judge and is entitled to be released from detention unless the government establishes that the alien poses a risk of flight or a danger to the community.'" *Id.* at 224 (quoting *Diouf II*, 634 F.3d at 1092). The Third Circuit also adopted our clear and convincing evidence standard set forth in *Singh*. *Id.* at n.12 ("The Government must meet its burden in such bond hearings by clear and convincing evidence. (citing *Singh*, 638 F.3d at 1203-04)). The Third Circuit's express and reasoned adoption of *Diouf II* even after *Jennings* shows that we do not break new ground in concluding that *Diouf II* is not clearly irreconcilable with *Jennings*.

Ignoring *Guerrero-Sanchez*, the Government quotes from the Sixth Circuit's decision in *Hamama v. Homan*, 912 F.3d 869 (6th Cir. 2018), without any argument about how that case should affect our clear irreconcilability analysis here. To the extent the Government intended to argue that *Hamama* should change our analysis, we reject that argument.

In *Hamama*, the Sixth Circuit vacated a district court's class-wide preliminary injunction concerning §§ 1226(c) and 1231(a)(6) detention claims, pursuant to which the government was required to provide class members with individualized bond hearings. *Id.* at 873-74. With respect to those claims, the Sixth Circuit determined that 8 U.S.C. § 1252(f)(1), a statute that prohibits federal courts other than the Supreme Court from enjoining the operation of §§ 1221-31 except with respect to an individual alien, barred jurisdiction over class-wide injunctive relief there. *Id.* at 877. In rejecting the petitioners' argument that they sought injunctive relief pursuant to a statutory construction of the relevant detention statutes, the Sixth Circuit determined that "*Jennings* foreclosed any statutory interpretation that would lead to what Petitioners want." *Id.* at 879. In the Sixth Circuit's view, "the district court . . . created out of thin air a requirement for bond hearings that does not exist in the statute; and adopted new standards that the government must meet at the bond hearings." *Id.* at 879-80.

Hamama does not compel a different conclusion about whether *Diouf II* is clearly irreconcilable with *Jennings* for two reasons. First, despite remarking that "the *Jennings* Court chastised the Ninth Circuit for 'erroneously conclud[ing] that periodic bond hearings

are required under the immigration provisions *at issue here*," the Sixth Circuit extended *Jennings* to § 1231 without any analysis regarding whether *Jennings*'s reasoning fairly applies to that provision. *Id.* at 879 (quoting *Jennings*, 138 S. Ct. at 850) (emphasis added). Although we do not question *Hamama*'s determination insofar as it concerns the provisions actually at issue in *Jennings*, we cannot agree with the uncritical extension of *Jennings* to § 1231(a)(6), particularly given our foregoing analysis of *Jennings*. Second, unlike *Guerrero-Sanchez*, *Hamama* neither acknowledged, nor grappled with our decision in *Diouf II*. Therefore, we do not find *Hamama* to have any persuasive value here in determining whether we remain bound by *Diouf II* even after *Jennings*.

The dissent takes issue with our reliance on *Guerrero-Sanchez*. Dissent at 63-64 & n.5. Yet, in so doing, the dissent errs by mistaking the clear irreconcilability inquiry that confronts us with an invitation to opine on how we would decide the statutory construction question that *Diouf II* resolved.[19] To be clear, our reliance on *Guerrero-Sanchez* concerns whether we may apply

---

[19] The dissent asserts that we and *Guerrero-Sanchez* "mistakenly perceive[] the narrow ambiguity in § 1231(a)(6) identified by *Zadvydas*" to justify *Diouf II*'s construction of § 1231(a)(6). Dissent 63-64. We have already explained that the dissent's characterization of the ambiguity that *Zadvydas* identified is not justified by *Jennings* or *Zadvydas*. We otherwise note that the dissent's view contravenes how at least one other circuit understood *Zadvydas* prior to *Jennings*. *See Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1249 (10th Cir. 2008) ("In *Zadvydas*, the Supreme Court did not purport to 'resolve' the statutory ambiguity in § 1231(a)(6) once and for all. . . . In no way, . . . did the Court signal that its interpretation was the only reasonable construction of § 1231(a)(6).").

Diouf II even after *Jennings*. In determining whether a prior circuit precedent is clearly irreconcilable with an intervening authority's decision, we have looked to how other circuits have addressed the issue in light of the intervening decision. *See Murray*, 934 F.3d at 1107 (observing that the court's clear irreconcilability conclusion "comport[ed] with the decisions of all of our sister circuits that have considered this question after" the Supreme Court's *Gross* and *Nassar* decisions); *In re Zappos.com, Inc.*, 888 F.3d 1020, 1026 n.6 (9th Cir. 2018) (noting that the panel's conclusion that earlier circuit precedent was not clearly irreconcilable with an intervening Supreme Court decision was "consistent" with sister circuit decisions to have considered the issue). *Guerrero-Sanchez* is the only reasoned decision of another circuit addressing the relationship between *Diouf II*'s construction of § 1231(a)(6) and *Jennings*, and it determined that *Jennings* does not undercut *Diouf II*'s construction. We therefore respectfully disagree with the dissent.

E. The Outcome of the Clearly Irreconcilable Analysis

We have carefully considered *Jennings*, *Diouf II*, and the parties' arguments as well as the dissent's views. As we have explained, there is some tension between *Diouf II* and *Jennings*. But, as members of a three-judge panel, we are not free to overrule the prior decision of a three-judge panel merely because we sense some tension with that decision and the decision of an intervening higher authority even if we might have reached a different outcome than the prior decision in light of that intervening authority. *Consumer Def.*, 926 F.3d at 1213 ("[M]ere tension between the cases

does not meet the higher standard of irreconcilable conflict."). Taken together, *Jennings*'s limited focus on the provisions at issue in that case and *Jennings*'s analysis and reasoning concerning those provisions compel us to conclude that we remain bound by *Diouf II*'s construction of § 1231(a)(6). Neither the Government's arguments, nor the dissent have persuaded us otherwise. Accordingly, we conclude that the district court properly determined that Plaintiffs are likely to succeed on the merits of their § 1231(a)(6) statutory claims.

III. The Preliminary Injunction Is Not Otherwise Contrary to Law

Although we have concluded that Plaintiffs are likely to succeed on the merits of their statutory claims, the Government contends that we must vacate the preliminary injunction because of two other asserted legal errors. We disagree because we find no such errors.

First, the Government argues that *Zadvydas* already applied the canon to § 1231(a)(6) to prohibit indefinite definition, pursuant to which *Zadvydas* specified a particular means by which an alien can challenge detention in a habeas petition. The Government contends that the district court could not re-apply the canon to § 1231(a)(6). The Government, however, cannot properly charge the district court with erroneously "re-applying" the canon of constitutional avoidance to § 1231(a)(6). Indeed, the Government acknowledges that the district court merely followed *Diouf II*'s construction of § 1231(a)(6).

The Government's true complaint is with *Diouf II* itself. As in *Diouf II*, the Government argues here that § 1231(a)(6)'s text cannot be interpreted to require a bond hearing for aliens detained under the provision.

Diouf II, 634 F.3d at 1089. And, as in *Diouf II*, the Government argues that its post-*Zadvydas* regulations adequately address any constitutional concerns that may arise from an alien's continued detention pursuant to § 1231(a)(6). *Diouf II*, 634 F.3d at 1089-92. The Government's attempt to relitigate issues that *Diouf II* decided necessarily fails because we have concluded that *Diouf II* remains controlling precedent. Although the Government may disagree with *Diouf II*'s wisdom, that disagreement does not give us license to disregard *Diouf II*.

Second, the Government argues that *Clark v. Martinez*, 543 U.S. 371 (2005), stands for the proposition that courts can apply *only* *Zadvydas*'s construction of § 1231(a)(6) in all cases, and nothing more. Based on this reading of *Clark*, the Government contends that the district court's preliminary injunction erroneously departs from the framework *Zadvydas* established for federal habeas courts.

Contrary to the Government's argument, *Clark* did not announce a new rule of the canon of constitutional avoidance, nor does *Clark* stand for the proposition that *Zadvydas*'s construction of § 1231(a)(6) is the single permissible application of the canon to that provision. Instead, in *Clark*, the Court held that *Zadvydas*'s construction of § 1231(a)(6) "must" apply to all three categories because "[t]he operative language of § 1231(a)(6) . . . applies without differentiation to all three categories of aliens that are its subject." *Clark*, 543 U.S. at 378. *Clark* thus requires applying § 1231(a)(6), including as judicially construed, in the same manner for all categories

of aliens specified in the statute "without differentiation." *Id.* at 378-79.[20]

Expressly acknowledging *Clark*, *Diouf II* requires the Government to provide a bond hearing to any alien detained under § 1231(a)(6) whose detention becomes prolonged and whose release or removal is not imminent, *Diouf II*, 634 F.3d at 1088 (citing *Clark*, 543 U.S. at 380-81); *id.* at 1084. Consistent with *Clark* and *Diouf II*, the preliminary injunction applies to the entire certified class of aliens that our court treats as detained pursuant to § 1231(a)(6).[21] *See Padilla-Ramirez*, 882 F.3d at 830-32. Thus, we reject the Government's remaining challenges to the preliminary injunction.

CONCLUSION

We conclude that the district court correctly determined that Plaintiffs are likely to succeed on their § 1231(a)(6) statutory claims. Thus, we affirm the district court's grant of a preliminary injunction.

AFFIRMED.

---

[20] In *Clark*, the Court rejected the dissent's contrary view that the government's § 1231(a)(6) detention authority applies differently across categories of aliens as a "novel interpretative approach" that "would render every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case." 543 U.S. at 382. This aspect of *Clark* does not support the Government's position.

[21] The certified class includes aliens with administratively final removal orders under 8 U.S.C. § 1228(b). The Government does not argue that such aliens are not subject to detention pursuant to § 1231(a), and thus has waived any such argument in this appeal. We therefore assume that such aliens may be detained pursuant to § 1231(a)(6).

FERNANDEZ, Circuit Judge, dissenting:

I agree with the majority that Plaintiffs' likelihood of success on their statutory claim turns on whether *Diouf v. Napolitano* (*Diouf II*), 634 F.3d 1081, 1085-86 (9th Cir. 2011), remains binding law in our circuit. I also agree that we must follow *Diouf II* unless a subsequent Supreme Court case has "undercut [its] theory or reasoning . . . in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). And I agree that "'is a high standard'" to meet. *Close v. Sotheby's, Inc.*, 894 F.3d 1061, 1073 (9th Cir. 2018). That standard is met here because *Diouf II*'s reasoning is clearly irreconcilable with *Jennings v. Rodriguez*, __ U.S. __, __, 138 S. Ct. 830, 851, 200 L. Ed. 2d 122 (2018). Therefore, I respectfully dissent.

As an intermediate appellate court, one goal of our jurisprudence is "to preserve the consistency of circuit law." *Miller*, 335 F.3d at 900. But this laudable objective "must not be pursued at the expense of creating an inconsistency between our circuit decisions and the reasoning" of the Supreme Court. *Id.* Deciding whether *Jennings* and *Diouf II* are irreconcilable is not merely a matter of deciding whether their ultimate holdings might coexist in the abstract. *See United States v. Lindsey*, 634 F.3d 541, 550 (9th Cir. 2011); *see also Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1019 (9th Cir. 2006). Instead, the question is whether the Supreme Court has so "undercut the theory or reasoning" of *Diouf II* "that the cases are [now] clearly irreconcilable." *Miller*, 335 F.3d at 900; *see also Ne. Ohio Coal. for the Homeless v. Husted*, 831 F.3d 686, 720-21 (6th Cir. 2016). That in-

quiry "requires us to look at more than [the Court's] surface conclusions," and to examine whether the Court's "'approach . . . [is] fundamentally inconsistent with'" our earlier reasoning. *Rodriguez v. AT & T Mobility Servs. LLC*, 728 F.3d 975, 979 (9th Cir. 2013). That includes the Court's "'mode of analysis.'" *Miller*, 335 F.3d at 900. If "the conclusion reached in our circuit precedent [can] no longer [be] 'supported for the reasons stated' in that decision," the circuit precedent must yield. *Rodriguez*, 728 F.3d at 979; *see also Ortega-Mendez*, 450 F.3d at 1020. We have frequently applied that principle and deviated from our prior holdings. *See, e.g.*, *Murray v. Mayo Clinic*, 934 F.3d 1101, 1105 (9th Cir. 2019), *petition for cert. filed*, 88 U.S.L.W. 3265 (U.S. Feb. 3, 2020) (No. 19-995); *Rodriguez*, 728 F.3d at 981; *United States ex rel. Air Control Techs., Inc. v. Pre Con Indus., Inc.*, 720 F.3d 1174, 1177-78 (9th Cir. 2013); *Lindsey*, 634 F.3d at 549-50; *Ortega-Mendez*, 450 F.3d at 1018-20; *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1123-25 (9th Cir. 2002).

A close examination of *Diouf II* and *Jennings* reveals that the reasoning supporting *Diouf II*'s conclusion that 8 U.S.C. § 1231(a)(6) requires aliens be afforded individualized bond hearings after six months of detention is no longer viable. In *Diouf II*, we held "that an individual facing prolonged immigration detention under 8 U.S.C. § 1231(a)(6) is entitled to release on bond unless the government establishes that he is a flight risk or a danger to the community." *Diouf II*, 634 F.3d at 1082. We extended procedural protections that we had previously granted to aliens facing prolonged detention under

8 U.S.C. § 1226(a)[1] to those detained under § 1231(a)(6), because otherwise their "prolonged detention . . . would raise 'serious constitutional concerns.'" *Diouf II*, 634 F.3d at 1086. We thus "appl[ied] the canon of constitutional avoidance and construe[d] § 1231(a)(6) as requiring an individualized bond hearing, before an immigration judge, for aliens facing prolonged detention." *Id.* *Jennings* is clearly irreconcilable with *Diouf II*'s reasoning, both with regard to our application of the canon of constitutional avoidance and our reliance on *Casas-Castrillon*.[2]

---

[1] *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 949–51 (9th Cir. 2008).

[2] The majority mentions several times that *Jennings*, __ U.S. at __, 138 S. Ct. at 836, 842, 843–44, 850–51, expressly limited its holding to the statutory provisions that were before it (i.e., 8 U.S.C. §§ 1225(b), 1226(a), (c)). But that does "not deprive it of all persuasive force." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 351, 133 S. Ct. 2517, 2527, 186 L. Ed. 2d 503 (2013). Thus, to the extent that the majority relies upon that limitation to justify its reconciling of *Jennings*, __ U.S. at __, 138 S. Ct. at 851, and *Diouf II*, 634 F.3d at 1086, I disagree. As we have said, "the issues decided by the higher court need not be identical in order to be controlling." *Miller*, 335 F.3d at 900; *see also Gahagan v. USCIS*, 911 F.3d 298, 302 (5th Cir. 2018) ("That two decisions involve different statutes is not dispositive."). For example, in *Murray*, 934 F.3d at 1105-07, we determined that the reasoning of one of our earlier circuit cases, *Head v. Glacier Nw. Inc.*, 413 F.3d 1053, 1063-65 (9th Cir. 2005), was clearly irreconcilable with subsequent Supreme Court cases. Neither of those Supreme Court cases addressed the particular statutory provision that was before us in either *Murray* or *Head*. *Murray*, 934 F.3d at 1105-07; *see also Nassar*, 570 U.S. at 351-53, 133 S. Ct. at 2528; *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 173-75, 129 S. Ct. 2343, 2348-49, 174 L. Ed. 2d 119 (2009). Nevertheless, we adopted the Supreme Court's reasoning because there was "no meaningful textual difference" between the statutes in the circumstances at issue there. *Murray*, 934 F.3d at 1106 n.6; *see also id.* at 1106. The same is true here. Thus, that *Jennings*

Jennings establishes that we misused the canon of constitutional avoidance in *Diouf II*. In *Jennings*, the Supreme Court explained that the canon should be employed only "'after the application of ordinary textual analysis,'" when "'the statute is found to be susceptible of more than one construction.'" *Jennings*, __ U.S. at __, 138 S. Ct. at 842; *see also Clark v. Martinez*, 543 U.S. 371, 385, 125 S. Ct. 716, 726, 160 L. Ed. 2d 734 (2005). *Diouf II* engaged in no textual analysis of § 1231(a)(6): we did not identify a textual ambiguity in the statute regarding a bond hearing requirement, nor did we identify any plausible basis in the statutory text for such a hearing. *See Diouf II*, 634 F.3d at 1089; *see also Clark*, 543 U.S. at 379, 381, 125 S. Ct. at 723, 724. *Diouf II*'s application of the constitutional avoidance canon without first analyzing the text of the statute or identifying a relevant ambiguity is clearly irreconcilable with *Jennings*. Instead of properly applying the canon of constitutional avoidance to § 1231(a)(6), *Diouf II* simply grafted *Casas-Castrillon*'s reasoning as to § 1226(a) detainees onto § 1231(a)(6) detainees. *Diouf II*, 634 F.3d at 1089. We did not explain why that was appropriate, notwithstanding our recognition that the text of § 1226(a) expressly mentions bond, while the text of § 1231(a)(6) does not. *See id.*; *cf. Nassar*, 570 U.S. at 352, 133 S. Ct. at 2528 (applying the same analysis when there is no "meaningful textual difference" between the two statutes at issue). That approach in *Diouf II* is irreconcilable with *Jennings*.

---

and *Diouf II* analyzed different statutes is not dispositive of their irreconcilability.

The majority seeks support in the Third Circuit's decision that *Diouf II*'s reasoning remains sound because "[t]he Supreme Court has already determined [in *Zadvydas*[3]] that the text of § 1231(a)(6) is ambiguous as to the due process protections that it provides," and that § 1231(a)(6) could therefore be construed to require bond hearings. *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 223-24 (3d Cir. 2018). However, like *Diouf II* and the majority, the Third Circuit mistakenly perceived the narrow ambiguity in § 1231(a)(6) identified by *Zadvydas*, in the particular context presented there, as essentially equivalent to a general determination that § 1231(a)(6) is "ambiguous as to . . . due process" overall. *Guerrero-Sanchez*, 905 F.3d at 223.[4] Our adopting the Third Circuit's approach would effectively allow courts to decide constitutional issues sub silentio, without ever having to "find[] a statute unconstitutional as applied." *Clark*, 543 U.S. at 384, 125 S. Ct. at 726. Instead, we should follow the procedure described by *Jennings*: a court must identify "'competing *plausible* interpretations of [the] statutory text,'" in the specific context of the matter at

---

[3] *Zadvydas v. Davis*, 533 U.S. 678, 697, 121 S. Ct. 2491, 2502, 150 L. Ed. 2d 653 (2001) ("the word 'may' is ambiguous").

[4] By the way, it seems to me that the Third Circuit, and we, have given short shrift to the fact that the Court's opinion in *Zadvydas* was largely motivated by the fact that the possibility of removal of the aliens before it was truly remote because the countries to which they could be removed were highly unlikely to accept them at any time in the foreseeable future. Thus, detention was indefinite and potentially permanent. *See Zadvydas*, 533 U.S. at 684-86, 690-91, 695-96, 121 S. Ct. at 2496-97, 2498-99, 2502. Even so, the Court has dubbed the decision in *Zadvydas* "notably generous." *Jennings*, __ U.S. at __, 138 S. Ct. at 843; *see also id.* at __, 138 S. Ct. at 843-44 (the Court did not expand that form of generosity).

hand, before applying the canon of constitutional avoidance. *See Jennings*, __ U.S. at __, 138 S. Ct. at 843; *Clark*, 543 U.S. at 379, 125 S. Ct. at 723. Here, that would require us to identify an ambiguity in the text of § 1231(a)(6) that produces a plausible reading of the statute as requiring bond hearings. None is apparent to me.[5]

The majority decides that *Diouf II* conformed with *Jennings* in interpreting the text of § 1231(a)(6) because it noted that prior circuit precedent[6] and agency regulations[7] had recognized the requirement of a bond as a reasonable condition[8] of supervised release pursuant to the statute. *See Diouf II*, 634 F.3d at 1089. But I fail to see how that reasoning or line of authority supplies the necessary plausible interpretation of the text of § 1231(a)(6) as *requiring* a bond hearing. Those authorities arose out of Congress's explicit command to the Attorney General to prescribe regulations governing the terms of an alien's supervised release after his initial 90-day detention. 8 U.S.C. § 1231(a)(13). The Department

---

[5] For example, the Court's determination in *Zadvydas*, 533 U.S. at 697, 121 S. Ct. at 2502, that § 1231(a)(6) was ambiguous as to whether the agency had discretion to indefinitely detain aliens does not support the independent conclusion that § 1231(a)(6) is also ambiguous as to whether the agency must afford those aliens individualized bond hearings before an Immigration Judge when they have been detained for six months. *See Jennings*, __ U.S. at __, 138 S. Ct. at 847-48 (explaining that logic in the context of § 1226(a)); *cf. Diouf II*, 634 F.3d at 1086, 1091-92, 1092 n.13.

[6] *Diouf v. Mukasey* (*Diouf I*), 542 F.3d 1222, 1234 (9th Cir. 2008); *see also Doan v. INS*, 311 F.3d 1160, 1162 (9th Cir. 2002).

[7] 8 C.F.R. § 241.5(a)-(b).

[8] 8 U.S.C. § 1231(a)(3).

of Homeland Security[9] dutifully promulgated pertinent regulations, and one of the release conditions it adopted was that an alien may be required to post a bond in order to ensure his compliance with the terms of his supervision order. 8 C.F.R. § 241.5(b); *see also Doan*, 311 F.3d at 1162. But the agency's proper exercise of its discretion[10] to impose bond as a condition of release pursuant to § 1231(a)(3), combined with our decision that § 1231(a)(6) allows the agency to do so,[11] does not produce the conclusion that § 1231(a)(6) plausibly *requires*, as a matter of statutory construction, the bond hearings sought by the Plaintiffs. *See Morales-Izquierdo*, 486 F.3d at 493.[12] As I have previously noted, neither a bond nor a hearing is mentioned in the text of § 1231(a)(6).[13] Because our court has yet to identify a plausible interpretation of the text of § 1231(a)(6) that would require a

---

[9] *See City & County of San Francisco v. USCIS*, 944 F.3d 773, 781 n.2 (9th Cir. 2019).

[10] *See Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 492 (9th Cir. 2007) (en banc).

[11] *Doan*, 311 F.3d at 1161–62.

[12] And because *Diouf I*, 542 F.3d at 1234, and *Doan*, 311 F.3d at 1162, simply recognized the agency's authority to impose bond as a condition of release, I see no ineluctable reason that those cases would have to be overturned if we overturned *Diouf II*, 634 F.3d at 1086, 1089.

[13] I do not mean to suggest that the statute forbids the agency from promulgating regulations that would allow bond hearings before an Immigration Judge. *See Encino Motorcars, LLC v. Navarro*, __ U.S. __, __, 136 S. Ct. 2117, 2124–25, 195 L. Ed. 2d 382 (2016); *see also Morales-Izquierdo*, 486 F.3d at 493. But that does not make it any less problematic for a court to "simply read a bond hearing requirement into the statute." *See Rodriguez v. Robbins*, 715 F.3d 1127, 1143 (9th Cir. 2013) (characterizing the *Diouf* line of cases).

bond hearing, I disagree with the majority's conclusion that *Diouf II* applied the canon of constitutional avoidance to choose between competing plausible interpretations of § 1231(a)(6), as required by *Jennings*. Rather, its reasoning is irreconcilable with *Jennings*.

Diouf II's holding was also premised on its implicit assumption that the language of § 1226(a) and § 1231(a)(6) was sufficiently similar that *Casas-Castrillon*'s analysis of § 1226(a) could be grafted onto § 1231(a)(6). *Diouf II*, 634 F.3d at 1086, 1089; *see also, e.g.*, *Murray*, 934 F.3d at 1106 & n.6. *Diouf II*'s reasoning in this regard has likewise been fatally undermined because that aspect of *Casas-Castrillon* is itself clearly irreconcilable with *Jennings*.

In *Casas-Castrillon*, we held "that the government may not detain a legal permanent resident . . . for a prolonged period [pursuant to 8 U.S.C. § 1226(a)] without providing him a neutral forum in which to contest the necessity of his continued detention." *Casas-Castrillon*, 535 F.3d at 949. Our holding was premised on our conclusion "that prolonged detention without adequate procedural protections would raise serious constitutional concerns." *Id.* at 950. But we did not decide the constitutional issue in *Casas-Castrillon*. *Id.* Rather, we pointed out that § 1226(a) "provides . . . authority for the Attorney General to conduct a bond hearing and release the alien on bond or detain him if necessary to secure his presence at removal." *Id.* at 951; *see also* 8 U.S.C. § 1226(a)(2) (an alien "may [be] release[d]" on bond or parole). We then held that "[b]ecause the prolonged detention of an alien without an individualized determination of his dangerousness or flight risk would be 'constitutionally doubtful,' . . .

§ 1226(a) must be construed as *requiring* the Attorney General to provide the alien with such a hearing." *Casas-Castrillon*, 535 F.3d at 951. But we identified no ambiguity in § 1226(a) regarding whether a bond hearing was required. *Id.* at 950-51. Instead, we essentially rewrote the statute to make it so. *Id.* That is precisely the procedure rejected by the Supreme Court in *Jennings*. *See Jennings*, __ U.S. at __, 138 S. Ct. at 843; *see also Clark*, 543 U.S. at 378, 125 S. Ct. at 722-23; *id.* at 381, 125 S. Ct. at 724.

In *Jennings*, the Supreme Court rejected as implausible our reading of § 1226(a) "to limit the permissible length of an alien's detention without a bond hearing." *Jennings*, __ U.S. at __, 138 S. Ct. at 842. The Supreme Court held "that there is no justification for any of the procedural requirements that the Court of Appeals layered onto § 1226(a) without any arguable statutory foundation." *Id.* Nonetheless, the Supreme Court acknowledged that aliens detained pursuant to § 1226(a) were entitled, by dint of agency regulations, to "bond hearings at the outset of detention." *Id.* at __, 138 S. Ct. at 847. The Supreme Court thus struck down the additional procedural devices we had created, which went "well beyond the initial bond hearing established by existing regulations—namely, periodic bond hearings every six months in which the Attorney General must prove by clear and convincing evidence that the alien's continued detention is necessary." *Id.* at __, 138 S. Ct. at 847-48. The scaffolding upon which we had erected those excess procedures for § 1226(a) detainees was *Casas-Castrillon* and its progeny. *See Rodriguez v. Robbins*, 804 F.3d 1060, 1084-85, 1086-89 (9th Cir. 2015) ("The district court's decision regarding the

§ 1226(a) subclass was squarely controlled by our precedents," most prominently, *Casas-Castrillon*), *rev'd*, *Jennings*, __ U.S. at __, 138 S. Ct. at 836. Because *Jennings* struck down all procedural protections for § 1226(a) detainees beyond those provided by regulation, *Jennings* dispelled the excess procedures conjured up by *Casas-Castrillon*, 535 F.3d at 950-51.[14] Thus, *Diouf II*'s reasoning that § 1231(a)(6) detainees were entitled to individualized bond hearings simply because *Casas-Castrillon* had conjured those for § 1226(a) detainees is clearly irreconcilable with *Jennings*.

Diouf II contains no other reasoning supporting its conclusion that an individualized bond hearing is required for § 1231(a)(6) detainees. *See Diouf II*, 634 F.3d at 1086, 1089. In light of the analysis above, the majority contradicts *Jennings* by relying on *Diouf II*. *See Close*, 894 F.3d at 1073; *cf. Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011) (en banc) (overruling one case likewise overrules the holdings of those cases that followed its rule). In other words, there is no basis for clinging to a mode of analysis that the Court has

---

[14] The majority suggests that some of *Casas-Castrillon* survives *Jennings*: that is, the majority reads *Jennings* to invalidate only the requirement that a hearing be conducted after six months of detention, which it sees as narrower than *Casas-Castrillon*'s holding, which required an individualized bond hearing after an alien's "prolonged detention." *See Casas-Castrillon*, 535 F.3d at 951. But I take the Supreme Court at its word, and it told us in *Jennings* that we had erred in providing § 1226(a) detainees with "procedural protections that go . . . beyond [those] . . . established by existing regulations." *Jennings*, __ U.S. at __, 138 S. Ct. at 847. Because the hearings prescribed in *Casas-Castrillon* are procedural protections that are not "established by existing regulations," I disagree with the majority that *Casas-Castrillon*'s hearing requirement survived *Jennings*.

plainly held is plainly wrong. Rather, we should vacate the grant of the preliminary injunction.

Thus, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 18-cv-01869-JSC

ESTEBAN ALEMAN GONZALEZ, ET AL.,
PLAINTIFFS

v.

JEFFERSON B. SESSIONS, ET AL., DEFENDANTS

Filed: June 5, 2018

ORDER RE PLAINTIFFS' MOTIONS FOR CLASS CERTIFICATION AND PRELIMINARY INJUNCTION

Re: Dkt. Nos. 21, 22

In *Diouf v. Napolitano*, 634 F.3d 1081, 1082 (9th Cir. 2011) ("*Diouf II*"), the Ninth Circuit held that an individual facing prolonged detention under 8 U.S.C. section 1231(a)(6) "is entitled to release on bond unless the government establishes that he is a flight risk or a danger to the community." The government has detained plaintiffs Esteban Aleman Gonzalez and Jose Eduardo Gutierrez Sanchez pursuant to 8 U.S.C. § 1231(a)(6) for more than six months without an individualized bond hearing. Accordingly, they filed this suit on behalf of themselves and a putative class seeking declaratory and injunctive relief. Now pending before the Court are Plaintiffs' motions for class certification and preliminary injunc-

tion. (Dkt. Nos. 21 and 22.)[1] Plaintiffs seek certification of a class of essentially all present and future section 1231(a)(6) detainees in the Ninth Circuit and a preliminary injunction enjoining the government from detaining plaintiffs and the class for more than 180 days without providing them with a bond hearing before an immigration judge at which the government has the burden of justifying detention. The dispositive issue is whether *Diouf II* is clearly irreconcilable with the United States Supreme Court's recent decision in *Jennings*. As the Court concludes that it is not, it certifies the class and enjoins the government from failing to provide a bond hearing to 1231(a)(6) detainees after 180 days in detention.

IMMIGRATION FRAMEWORK

The Immigration and Nationality Act ("INA") authorizes the detention of noncitizens awaiting removal from the United States. Different sections of the INA govern different phases of detention. It authorizes "the Government to detain certain aliens seeking admission into the country under §§ 1225(b)(1) and (b)(2)" and "aliens already in the country pending the outcome of removal proceedings under §§ 1226(a) and (c)." *Jennings v. Rodriguez*, 138 S. Ct. 830, 838 (2018).

If the proceedings result in an order of removal, the Attorney General is required to remove the noncitizen from the United States within a period of 90 days, known as the "removal period." *See* 8 U.S.C. § 1231(a)(1)(A).

---

[1] Record citations are to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

Detention during the 90 day removal period is mandatory. *See id.* § 1231(a)(2). If the noncitizen is not removed during the removal period, continued detention is authorized beyond the removal period in the discretion of the Attorney General. *Id.* § 1231(a)(6). Section 1231(a)(6) encompasses noncitizens "whose collateral challenge to his removal order (a motion to reopen) is pending in the court of appeals, as well as to aliens who have exhausted all direct and collateral review of their removal orders but who, for one reason or another, have not yet been removed from the United States." *Diouf II*, 634 F.3d at 1085.

"An alien who expresses a fear of returning to the country designated in the reinstated order of removal . . . must be immediately referred to an asylum officer for an interview to determine whether the alien has a reasonable fear of persecution or torture." *Andrade v. Sessions*, 828 F.3d 826, 832 (9th Cir. 2016) (quoting 8 C.F.R. § 241.8(e)). "If the officer decides that the alien does have a reasonable fear of persecution or torture, the case is referred to an immigration judge ("IJ") for full consideration of the request for withholding of removal only." *Ayala v. Sessions*, 855 F.3d 1012, 1015 (9th Cir. 2017); 8 C.F.R. § 208.31(e)). "If, however, the asylum officer decides that the alien has not established a reasonable fear of persecution or torture, then the alien is entitled to appeal that determination to an IJ." *Id.* at 1015-1016; 8 C.F.R. § 208.31(g). "On appeal, if the IJ affirms the officer's negative fear determination, the case is returned to the Service for removal, and the alien is not entitled to appeal further to the BIA." *Id.* at 1016. The noncitzen may, however, petition the Ninth Circuit for review of a negative reasonable fear determination. *Id.*

FACTUAL BACKGROUND

A. Esteban Aleman Gonzalez

Plaintiff Esteban Aleman Gonzalez is a citizen of Mexico who applied for admission to the United States in April 2000. (Dkt. No. 27-1.) During this process Mr. Gonzalez presented an entry document that belonged to another person. (*Id.*) An immigration officer found that Mr. Gonzalez was inadmissible under 8 U.S.C. § 1182(a)(6)(C)(i) because he sought to procure admission "by fraud or by willfully misrepresenting a material fact." (*Id.*) Mr. Gonzalez was removed under an expedited removal order. (*Id.*) Sometime thereafter, Mr. Gonzalez unlawfully reentered the United States. (Dkt. No. 27-2.) In August 2017, immigration officers arrested him and determined that he was "removable as an alien who ha[d] illegally reentered the United States after having been previously removed." (*Id.*) (citing 8 U.S.C. § 1231(a)(5)). Mr. Gonzalez did not contest the finding that he was removable and his removal order was reinstated on August 18, 2017. (*Id.*)

While in custody Mr. Gonzalez expressed a fear that he would persecuted or tortured if he was removed him to Mexico. (Dkt. No. 27-3 ¶ 6). An asylum officer interviewed Mr. Gonzalez, determined that he "has a reasonable fear persecution or torture," and then referred him to an immigration judge for "withholding-only" proceedings. (*Id.*) Thereafter, Mr. Gonzalez moved for a bond hearing. (Dkt. No. 27-4). An immigration judge denied the motion for lack of jurisdiction and scheduled a July 9, 2018 hearing on the merits of Mr. Gonzalez's withholding-of-removal claim. (Dkt. Nos. 27-4, 27-5.) On February 26, 2018, an ICE officer reviewed Mr.

Gonzalez's custody status and determined that he will remain in ICE custody "[p]ending a ruling on [his withholding-of-removal] claim" or until he demonstrates that his "removal is unlikely." (Dkt. No. 27-6.)

B. Jose Eduardo Gutierrez Sanchez

Plaintiff Jose Eduardo Gutierrez Sanchez is a citizen of Mexico who unlawfully entered the United States in May 2009. (Dkt. No. 27-7.) Shortly thereafter, Mr. Sanchez was arrested and charged as inadmissible under 8 U.S.C. § 1182(a)(7)(A)(i)(I). (*Id.*) An expedited removal order issued and Mr. Sanchez was removed. (*Id.*) At a later date, Mr. Sanchez unlawfully reentered the United States. (Dkt. No. 27-8.) On September 26, 2017, Mr. Sanchez was arrested and immigration officials determined that he was "removable as an alien who ha[d] illegally reentered the United States after having been previously removed" under 8 U.S.C. § 1231(a)(5). (*Id.*) Mr. Sanchez did not contest he was removable and his May 2009 removal order was reinstated. (*Id.*)

While in custody, Mr. Sanchez also expressed a fear that he would persecuted or tortured if removed to Mexico. (Dkt. No. 27-9 ¶ 6). An asylum officer interviewed him, determined that he reasonably feared persecution or torture, and referred him to an immigration judge for "withholding-only" proceedings. (*Id.*; *see* 8 C.F.R. §§ 208.31(e), 241.8(e).) In withholding-only proceedings, Mr. Sanchez moved for a bond hearing which was denied for lack of jurisdiction. (Dkt. No. 27-10.)

The IJ has scheduled a June 18, 2018 hearing on the merits of Mr. Sanchez's withholding-of-removal claim. (Dkt. No. 27-11.) On December 19, 2017, an ICE officer reviewed Mr. Sanchez's custody status. (Dkt. No.

31-1.) The officer relied on Mr. Sanchez's criminal history, including "arrests for possession of marijuana, obstruct/resist public officer, battery spouse, robbery: second degree," and Mr. Sanchez's "multiple illegal entries" to conclude that Mr. Sanchez "would be a danger and a flight risk if released." (*Id.*)

THE CLASS CERTIFICATION MOTION

Plaintiffs ask the Court to certify as a class "all individuals who are detained pursuant to 8 U.S.C. § 1231(a)(6) in the Ninth Circuit by, or pursuant to the authority of, the U.S. Immigration and Customs Enforcement ("ICE"), and who have reached or will reach six months in detention, and have been or will be denied a prolonged detention bond hearing before an Immigration Judge ('IJ')."[2]

I. Legal Standard

"Federal Rule of Civil Procedure 23 governs the maintenance of class actions in federal court." *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1124 (9th Cir. 2017). To succeed on their motion for class certification, Plaintiffs must satisfy the threshold requirements of Federal Rule of Civil Procedure 23(a) as well as the requirements for certification under one of the subsections of Rule 23(b). *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012). Rule 23(a) provides that a case is appropriate for certification as a class action if:

---

[2] Both the Central District of California and the Western District of Washington have certified classes of detainees under section 1231(a)(6). Plaintiffs' proposed class definition excludes those individuals that fall within those certified classes. (Dkt. No. 21 at 10 n.3.)

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). "[A] party must not only be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a)," but "also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Comcast v. Behrend*, 569 U.S. 27, 133 S. Ct. 1426, 1432, 185 L. Ed. 2d 515 (2013) (internal quotation marks, citations, and emphasis omitted).

Plaintiffs contends that the putative class satisfies Rule 23(b)(2), which requires that "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." For certification under Rule 23(b)(2), Plaintiffs must show that "declaratory relief is available to the class as a whole" and that the challenged conduct is "such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011).

Plaintiffs seek certification of a 23(b)(2) class as to their statutory and due process claims. As they note, however, in *Jennings* the Supreme Court remanded the

case to the Ninth Circuit to address whether Rule 23 authorized class certification of the due process claims. 138 S. Ct. at 832. The Ninth Circuit has recently asked the parties in that case for supplemental briefing on the question. In light of this uncertainty, and given that addressing the due process claim is not necessary to resolution of Plaintiffs' motions, the Court denies without prejudice Plaintiffs' motion to certify their due process claim. Instead, the Court will analyze the motion solely as to the statutory claim.

II. Analysis

A. Plaintiffs Have Satisfied Rule 23(a)

The Court may certify a class only where "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(A).

i. Numerosity

A putative class satisfies the numerosity requirement "if the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Impracticability is not impossibility, and instead refers only to the "difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964) (citation omitted). "While there is no fixed number that satisfies the numerosity requirement, as a general matter, as class greater than forty often satisfies the requirement, while

one less than twenty-one does not." *Ries v. Ariz. Beverages USA LLC*, 287 F.R.D. 523, 526 (N.D. Cal. Nov. 27, 2012).

Plaintiffs estimate that the class currently contains at least 43 proposed members, 18 in California and 25 in Arizona, but likely many more. (Dkt. No. 21-1 at 10 ¶¶ 6-9, 18 ¶ 5, 24 ¶¶ 5-6, 29 ¶ 6, 35 ¶¶ 6,7.)[3] These numbers make it impractical to bring all class members before the Court on an individual basis. Further, Plaintiffs estimate this number will grow each day as the government places additional individuals in custody who will later reach six months of detention under § 1231(a)(6). Accordingly, Plaintiffs have established that the class is sufficiently numerous.

ii. Commonality

"[C]ommonality requires that the class members' claims depend on a common contention such that 'determination of its truth or falsity will resolve an issue that is central to the validity of each [claim] in one stroke.'" *Mazza*, 666 F.3d at 588-89 (quoting *Dukes*, 131 S. Ct. at 2551). "The plaintiff must demonstrate the capacity of classwide proceedings to generate common answers to common questions of law or fact that are apt to drive the resolution of the litigation." *Id.* (internal quotation marks and citation omitted). To that end, the commonality requirement can be satisfied "by even a single question." *Trahan v. U.S. Bank Nat'l Ass'n*, No. C 09-03111 JSW, 2015 WL 74139, at *5 (N.D. Cal. Jan.

[3] Plaintiffs represent this number is at least 60, not 43, however after a review of Plaintiffs' declarations the Court counts only 43 individuals that are represented by Plaintiffs' counsel or are being detained under section 1231(a)(6) upon Plaintiffs' counsel's belief.

6, 2015). It is not necessary that "[a]ll questions of fact and law . . . be common to satisfy the rule." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). The Ninth Circuit has found "[t]he existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Id.* "[T]he commonality requirements asks us to look only for some shared legal issue or a common core of facts." *Id.* Ultimately, commonality "requires the plaintiff to demonstrate the class members have suffered the same injury." *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir. 2012) (quoting *Dukes*, 131 S. Ct. at 2551).

Plaintiffs satisfy the commonality requirement because they share a common legal question: whether detention beyond six months without an individualized bond hearing violates § 1231(a)(6) as interpreted by the Ninth Circuit in *Diouf*. "This question will be posed by the detention of every member of the class and their entitlement to a bond hearing will largely be determined by its answer." *See Rodriguez v. Hayes*, 591 F.3d 1105, 1123 (9th Cir. 2010) (finding commonality after petitioner raised the common question of whether detention of the putative class members "is authorized by statute, and, in the alternative, that if their detention is authorized it violates the Fifth Amendment's guarantee of due process.")

The Government's arguments to the contrary are unpersuasive. They assert "Plaintiffs' proposed class lacks commonality because the proffered class definition encompasses a broad range of individuals with different factual bases for their claims, including diverse groups

of aliens whose legal and factual interests differ considerably from each other and from those of the proposed class representatives." (Dkt. No. 28 at 18:4-7.) The Government is right that "members of the proposed class do not share every fact in common or completely identical legal issues"; however, "[t]his is not required by Rule 23(a)(1)." *Rodriguez*, 591 F.3d at 1122. Instead, "the commonality requirement asks us to look only for some shared legal issue or a common core of facts" and the proposed members have met that here: there is a shared legal question of whether continued detention after six months without a bond hearing is permissible under § 1231(a)(6). *See id.* If the Court ultimately rules in favor of Plaintiffs the relief will be the same—each class member will be entitled to a bond hearing regardless of individual circumstances. This is sufficient to meet the commonality requirement.

The Government further argues "under *Zadvydas*'s construction of § 1231(a)(6), the detention of named Plaintiffs and their putative class does not raise a serious constitutional problem, let alone violate the Due Process Clause, unless they can show that they are not significantly likely to be removed in the reasonably foreseeable future." *See Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). The Government contends "this is a detail-specific analysis that necessarily requires a factual assessment of, among other things, the likelihood that individuals will prevail on their requests for relief from removal and, for those in withholding-only proceedings, whether there are alternative countries to which they could be removed." (Dkt. No. 28 at 19:23-20:1.) However, this argument goes to the merits of Plaintiffs' claim, not whether the commonality requirement is met. It is

the Government's contention that Plaintiffs and the absent class members have to show they are not likely to be removed in the reasonably foreseeable future. Plaintiffs, on the other hand, assert that under section 1231(a)(6) as interpreted by the Ninth Circuit in *Diouf II*, each Plaintiff and putative class member is entitled to a bond hearing after six months regardless of whether they are likely to be removed in the reasonable foreseeable future. Whether a Plaintiff has or has not been deemed to have a reasonable fear of return, whether there are third-party countries where Plaintiffs can be removed, or whether certain Plaintiffs may be considerably more or less likely to be removed in the reasonably foreseeable future has no bearing on the common statutory question of whether under section 1231(a)(6) Plaintiffs are entitled to a bond hearing.

Finally, the Government emphasizes that Plaintiffs' proposed class includes "not only individuals with reinstated removal orders who are detained pursuant to § 1231(a)(6), but also individuals 'who have been issued administratively final removal orders pursuant to 8 U.S.C. § 1228(b), as well as individuals who are awaiting judicial review of the BIA's denial of a motion to reopen removal proceedings, see 8 U.S.C. § 1229a(c)(7), and who have been issued a judicial stay of removal.'" (Dkt. Nos. 28 at 21:9-13; 1 ¶ 30.) It argues that these Plaintiffs, although detained under the same section as immigrants with reinstated removal orders, "are not similarly situated to individuals in withholding-only proceedings" because they present "substantively different legal claims challenging their final removal orders, are potentially seeking different forms of relief in their removal proceedings beyond the narrow relief available in withholding-only proceedings, and therefore may be

considerably more or less likely to be removed in the reasonably foreseeable future." However, whether the immigrant was ordered removed under 8 U.S.C. § 1228(b) after committing an aggravated felony, is seeking review of their motion to reopen removal proceedings under 8 U.S.C. § 1229a(c)(7), or has been issued a judicial stay of removal, all proposed class members are detained under the same statute: § 1231(a)(6). And under this common statute Plaintiffs raise a legal question that applies to all proposed class members regardless of the underlying reason for their removal.

Accordingly, commonality is satisfied.

iii. Typicality

Rule 23(a)(3) also requires that "the [legal] claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "Typicality refers to the nature of the claim or defense of the class representative and not on facts surrounding the claim or defense." *Hunt v. Check Recovery Sys., Inc.*, 241 F.R.D. 505, 510 (N.D. Cal. Mar. 21, 2007) (citing *Hanon v. Dataprods. Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Evon*, 688 F.3d at 1030 (internal quotation marks and citation omitted). The typicality requirement ensures that "the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 158 n.13

(1982). Like the commonality requirement, the typicality requirement is "permissive" and requires only that the representative's claims are "reasonably coextensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020.

Plaintiffs have established typicality. Plaintiffs' claim for a bond hearing "is reasonably co-extensive with the claims of the class" because the class representatives, as well as the class as a whole, have been detained pursuant to section 1231(a)(6) for six months or longer and have not received a bond hearing. *See Rodriguez*, 591 F.3d at 1124. Although Plaintiffs and the proposed class were ordered removed under different statutes and are at different points in the removal process and hence do not raise identical claims, they all, as already discussed, are detained under the same statute, raise the same statutory-based argument, and are "alleged victims of the same practice of prolonged detention while in immigration proceedings." *See id.*

The Government claims that Plaintiffs' proposed class lacks typicality for the same reasons it lacks commonality: that the factual variations in individual cases and Plaintiffs' differences in the likeliness of removal preclude typicality. These arguments fail for the reasons described above.

Accordingly the typicality requirement is also met.

iv. Adequacy of Representation

Rule 23(a)(4) imposes a requirement related to typicality: that the class representative will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Court must ask: "(1) do the

named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the actions vigorously on behalf of the class?" *Evon*, 688 F.3d at 1031 (quoting *Hanlon*, 150 F.3d at 1020); *see also Brown v. Ticor Title Ins.*, 982 F.2d 386, 290 (9th Cir. 1992) (noting that adequacy of representation "depends on the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive") (citations omitted); Fed. R. Civ. P. 23(g)(1)(B) (stating that "class counsel must fairly and adequately represent the interests of the class").

Both the named Plaintiffs and counsel will adequately represent the class. First, Plaintiffs represent that they will "think about the other class members and act on those interests." (Dkt. No. 21-1 at 52 ¶¶ 19-20, 59 ¶ 12, 60 ¶ 13). Second, Plaintiffs' counsel is highly experienced in class action litigation and immigration law. Marc Van Der Hout has four decades of experience litigating immigration class actions. (Dkt. No. 21-1 at 65-69 ¶¶ 3, 8.) His associates, Judah Lakin and Amalia Willie, are also experienced in class action litigation and practice exclusively in the area of immigration. (*Id.* ¶¶ 10-13.) The four attorneys at Centro Legal de la Raza, Alison Pennington, Lisa Knox, Julia Rabinovich and Jesse Newmark, and the four ACLU attorneys, Michael Kaufman, Bardis Vakili, Julia Mass and Vasudha Talla, have experience litigating complex immigration cases. (Dkt. No. 21-1 at 71-77, 81-86.) Finally, Matt Green has several years of experience in deportation defense, including representing immigrants detained under section 1231(a)(6). (*Id.* at 32-38.)

The Government does not dispute the adequacy of counsel. Instead it argues "the named Plaintiffs cannot represent the interests of potential putative class members who have already been denied or granted withholding-only relief." However, whether a detainee has been denied or granted withholding-only relief, or like Plaintiffs, have not yet had their request for relief reviewed, has no bearing on the detainee's right to a bond hearing under section 1231(a)(6) as interpreted by the Ninth Circuit in *Diouf II*. In other words, the granting or denial of withholding-only relief does not mean that the detainee is entitled to a bond hearing, it only means that the detainee's removal process as to a particular country will or will not move forward. *See Padilla-Ramierz v. Bible*, 882 F.3d 826, 836 (9th Cir. 2017) (clarifying that the decision at stake in withholding-only proceedings is not whether the immigrant is to be removed, but the "more limited decision of whether he may be removed" to his country of origin). The detainee can still remain in detention pursuant to § 1231(a)(6) while an alternative country is identified.

The Government also asserts "both named Plaintiffs are detained as they have re-entered the United States illegally" and therefore they "cannot represent the interests of putative class members who do not have reinstated removal orders, but are detained pursuant to § 1231(a)(6)." However, the common legal question does not turn on the nature of Plaintiffs' removal but rather the statute under which Plaintiffs have been detained. Therefore Plaintiffs, who are detained pursuant to § 1231(a)(6), can adequately represent others detained under § 1231(a)(6). The Government's remaining challenges are only re-assertions of their commonality and

typicality arguments. For the reasons described above, those arguments fail.

Accordingly, adequacy is met.

B. Rule 23(b)(2) is Satisfied

If all four prerequisites of Rule 23(a) are satisfied, the Court must also find that Plaintiffs "satisfy through evidentiary proof" at least one of the three subsections of Rule 23(b). *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). Rule 23(b) sets forth three general types of class actions. *See* Fed. R. Civ. P. 23(b)(1)-(b)(3). Of these types, Plaintiffs seek certification under Rule 23(b)(2). The Court can certify a Rule 23(b)(2) class if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Dukes*, 564 U.S. at 360. "[U]nlike Rule 23(b)(3), a plaintiff does not need to show predominance of common issues or superiority of class adjudication to certify a Rule 23(b)(2) class." *In re Yahoo Mail Lit.*, 308 F.R.D. 577, 587 (N.D. Cal. May 26, 2015). Rather, "[i]n contrast to Rule 23(b)(3) classes, the focus [in a Rule 23(b)(2) class] is not on the claims of the individual class members, but rather whether [Defendant] has engaged in a 'common policy.'" *Id.* at 599.

The Rule 23(b)(2) requirements are also met. It is the Government's uniform policy that bond hearings are not required under § 1231(a)(6) for those detained for

greater than six months. Further the Government "refuses to act on grounds that apply generally to the class" —class members are denied the opportunity to request release on bond by an immigration judge. Plaintiffs seek declaratory and injunctive relief that would benefit all proposed class members: individualized bond hearings after six months of detention.

The Government argues Plaintiffs cannot satisfy Rule 23(b)(2) because 8 U.S.C. § 1252(f)(1) deprives this Court of jurisdiction to grant relief on Plaintiffs' statutory claims on a classwide basis. Section 1252(f)(1) provides that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [8 U.S.C. §§ 1221-1232] other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." 8 U.S.C. § 1252(f)(1). Respondents in *Rodriguez* made the same argument to which the Ninth Circuit retorted "Respondents are doubly mistaken." *Rodriguez*, 591 F.3d at 1119. 8 U.S.C. § 1252(f)(1) does not bar either declaratory or injunctive class-wide relief. *Id.* at 1120. "Section 1252(f) prohibits only injunction of the operation of the detention statutes, not injunction of a violation of the statutes." *Id.* (internal quotations omitted). And the text of the Act clearly shows "that Section 1252(f) was not meant to bar classwide declaratory relief." *Id.* at 1119.

As the Rule 23(a) and (b)(2) requirements are met, Plaintiffs' motion for class certification is GRANTED as to their statutory claims. *See Parsons v. Ryan*, 754 F.3d 657, 686 (9th Cir. 2014) ("the primary role of [Rule 23(b)(2)] has always been the certification of civil rights class actions").

PRELIMINARY INJUNCTION

Plaintiffs request this Court issue a class wide preliminary injunction "enjoining the government from detaining class members for more than 180 days without affording them a bond hearing" before an IJ. (Dkt. No. 22 at 8:8-11.)

A preliminary injunction is an "extraordinary remedy." *Winter v. Nat. Res. Defense Council*, 555 U.S. 7, 24 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. Alternatively, "if a plaintiff can only show that there are serious questions going to the merits—a lesser showing than likelihood of success on the merits—then a preliminary injunction may still issue if the balance of hardships tips sharply in the plaintiff's favor, and the other two Winter factors are satisfied." *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (internal citation and quotation marks omitted). In this respect, the Ninth Circuit employs a sliding scale approach, wherein "the elements of the preliminary injunction test are balanced so that a stronger showing of one element may offset a weaker showing of another." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). A "serious question" is one on which the movant "has a fair chance of success on the merits." *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1421 (9th Cir. 1984) (internal citation omitted).

A. Likelihood of Success on the Merits

Plaintiffs' likelihood of success on their now-certified statutory claim turns on whether *Diouf II* is still good law in the Ninth Circuit. In *Diouf II*, the Ninth Circuit held that immigrants detained pursuant to section 1231(a)(6) for more than six months are entitled to a bond hearing before an immigration judge. 634 F.3d at 1086, 1091. Thus, under *Diouf II,* Plaintiffs and the class members are entitled to an individual bond hearing before an immigration judge and the likelihood of success prong is satisfied. The Government nonetheless insists that *Diouf II* was overruled by the United States Supreme Court's decision in *Jennings v. Rodriguez,* 138 S. Ct. 830 (2018.)

This Court is required to follow *Diouf II* unless the theory or underlying reasoning of *Jennings* is "clearly irreconcilable" with *Diouf II*. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003).

> The "clearly irreconcilable" requirement is "a high standard." So long as the court "can apply our prior circuit precedent without running afoul of the intervening authority" it must do so. "It is not enough for there to be some tension between the intervening higher authority and prior circuit precedent, or for the intervening higher authority to cast doubt on the prior circuit precedent."

United States v. Robertson, 875 F.3d 1281, 1291 (9th Cir. 2017) (internal quotation marks and citations omitted). To decide whether *Jennings* is clearly irreconcilable with *Diouf II*, several cases must be reviewed.

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court applied the doctrine of constitutional

avoidance[4] to construe section 1231(a)(6) "to mean that an alien who has been ordered removed may not be detained beyond 'a period reasonably necessary to secure removal,'" and that "six months is a presumptively reasonable period." *Jennings*, 138 S. Ct. at 843. After being detained for six months, and if the noncitizen provides reason to believe he will not be removed in the reasonably foreseeable future, "the Government must either rebut that showing or release the alien." *Zadvydas*, 533 U.S. at 701.

Seven years later, in *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942 (9th Cir. 2008), the Ninth Circuit reviewed 8 U.S.C. section 1226(a). The court held that to construe the statute to allow prolonged detention without adequate procedural protections, that is, bond hearings before an immigration judge, "would raise serious constitutional concerns." *Id.* at 950. Applying the canon of constitutional avoidance, the court therefore held that section 1226(a) "must be construed as *requiring* the Attorney General to provide the alien without such a hearing." *Id.* (emphasis in original). In *Diouf II*, the Ninth Circuit extended the holding of *Casas-Castrillon* to aliens detained under § 1231(a)(6).

> As was the case in *Casas-Castrillon*, prolonged detention under § 1231(a)(6), without adequate procedural protections, would raise "serious constitutional concerns." *Casas-Castrillon*, 535 F.3d at 950. To

---

[4] "The canon of constitutional avoidance is a 'cardinal principle' of statutory interpretation. [W]hen an Act of Congress raises a serious doubt as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Diouf II*, 634 F.3d 1086 n.7 (internal quotation marks and citations omitted).

> address those concerns, we apply the canon of constitutional avoidance and construe § 1231(a)(6) as requiring an individualized bond hearing, before an immigration judge, for aliens facing prolonged detention under that provision. *See id*. at 951. Such aliens are entitled to release on bond unless the government establishes that the alien is a flight risk or will be a danger to the community.

See id. at 1086. Under *Diouf II*, then, the Government is required to provide Plaintiffs and the class members a bond hearing before an immigration judge.

The Supreme Court decided *Jennings v. Rodriguez* in February of this year. *Jennings* reviewed the Ninth Circuit's decision in *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015). According to the Supreme Court, in *Rodriguez v. Robbins* the Ninth Circuit:

> relying heavily on the canon of constitutional avoidance, . . . construed §§ 1225(b) and 1226(c) as imposing an implicit 6-month time limit on an alien's detention under these sections. After that point, the Court of Appeals held, the Government may continue to detain the alien only under the authority of § 1226(a). The Court of Appeals then construed § 1226(a) to mean that an alien must be given a bond hearing every six months and that detention beyond the initial 6-month period is permitted only if the Government proves by clear and convincing evidence that further detention is justified.

Jennings, 138 S. Ct. at 839. The Supreme Court then went on to reverse the Ninth Circuit. First, the Court held that the canon of constitutional avoidance—while a valid doctrine—could not be applied to sections 1225(b)

and 1226(c) because those statutes required mandatory detention for a certain period rather than the discretionary detention called for by section 1231(a)(6). *Id.* at 842-44, 46-47. Section 1226(a), however, contains the discretionary language "may detain" which the Court held could render the statute ambiguous and thus permit the application of the canon of constitutional avoidance. With respect to section 1226(a), the Supreme Court stated:

> The Court of Appeals ordered the Government to provide procedural protections that go well beyond the initial bond hearing established by existing regulations —namely, periodic bond hearings every six months in which the Attorney General must prove by clear and convincing evidence that the alien's continued detention is necessary. Nothing in § 1226(a)'s text —which says only that the Attorney General "may release" the alien "on . . . bond"—even remotely supports the imposition of either of those requirements. Nor does § 1226(a)'s text even hint that the length of detention prior to a bond hearing must specifically be considered in determining whether the alien should be released.

Jennings, 138 S. Ct. 830, 847-48.

The Government argues that because in *Jennings* the Supreme Court held that "'[N]either § 1225(b)(1) nor § 1225(b)(2) says anything whatsoever about bond hearings;' § 1226(c) 'imposes an affirmative *prohibition* on releasing detained aliens,' except under an express exception; and '[n]othing in § 1226(a)'s text . . . even remotely supports the imposition' of a bond hearing requirement" *Diouf II* is clearly irreconcilable with *Jennings*. (Dkt. No. 27 at 9.) Not so.

First, the Supreme Court held that the canon of constitutional avoidance—which the Ninth Circuit used to interpret section 1225(b)(1) and (2)—could not be applied to those statutes to imply the procedural requirement of a bond hearing because the statutes "mandate detention until a certain point and authorize release prior to that point only under limited circumstances." *Id.* at 844. In doing so, the Court specifically distinguished its earlier decision in *Zadvydas* which applied the canon of constitutional avoidance to section 1231(a)(6) —the statute at issue here—to find certain procedural requirements. *Id.* ("While *Zadvydas* found § 1231(a)(6) to be ambiguous, the same cannot be said of §§ 1225(b)(1) and (b)(2)"); *see also Hurtado-Romero v. Sessions*, 2018 WL 2234500 (N.D. Cal. May 16, 2018) (noting that the factors negating ambiguity, and thus the appropriateness of the application of the canon of constitutional avoidance, are not present in section 1231(a)(6)). Thus, far from being clearly irreconcilable with *Diouf II's* application of the canon of constitutional avoidance to section 1231(a)(6), *Jennings* reaffirms the canon's application to that statute.

Second, *Jennings* does not overrule *Diouf II's* holding that pursuant to the application of the canon of constitutional avoidance section 1231(a)(6) must be construed as requiring an individual bond hearing for prolonged detention. The Government argues that since *Jennings* held that section 1226(a) cannot be construed to require periodic bond hearings every six months at which the government bears the burden of proof by clear and convincing evidence because nothing in the text of the statute hints at those requirements, 138 S. Ct. 847-48, section 1231(a)(6) cannot be interpreted as requiring a bond hearing for prolonged detention. But *Jennings*

said nothing about section 1231(a)(6) not being capable of being plausibly construed as requiring a bond hearing for prolonged detention. To the contrary, *Jennings* specifically did not overrule *Zadvydas* and in *Zadvydas* the Supreme Court used the canon of constitutional avoidance to construe section 1231(a)(6) to include procedural requirements not specifically set forth in the statute. Thus, the Government's interpretation of *Jennings* is in tension with *Zadvydas*. *See Hurtado-Romero,* 2018 WL 2234500 at *2. This Court can find *Jennings* clearly irreconcilable with *Diouf II* only by ignoring *Zadvydas*. However, even if "recent Supreme Court jurisprudence has perhaps called into question the continuing viability of [its precedent], [the lower courts] are bound to follow a controlling Supreme Court precedent until it is explicitly overruled by that Court." *Nunez-Reyes v. Holder,* 646 F.3d 684, 692 (9th Cir. 2011).

Jennings is in tension with *Diouf II* and perhaps even calls it and *Zadvydas* into doubt. But such circumstances do not permit this federal trial court to not follow *Diouf II*. *See Robertson*, 875 F.3d at 1291. As *Diouf II* is not clearly irreconcilable with *Jennings* it remains good law in this Circuit. Plaintiffs have therefore shown a likelihood of success on the merits of their INA and APA statutory claims that under section 1231(a)(6) the Government must provide Plaintiffs and the class members an individualized bond hearing.

B. Remaining Injunction Factors

The Government does not address the remaining preliminary injunction factors. Instead, it simply asserts that if the Court considers them, "the key point is that

the public interest favors applying federal law correctly." As *Jennings* is not clearly irreconcilable with *Diouf II*, the public interest weighs in favor of the Government providing Plaintiffs and the class member bond hearings as required by *Diouf II*.

The remaining factors, irreparable harm and balance of equities, also weigh in favor of an injunction. Plaintiffs face compounding harm with each additional day they remain in custody without a bond hearing, as required by existing Ninth Circuit authority. *See Villalta v. Sessions*, No. 17-CV-05390-LHK, 2017 WL 4355182, at *3 (N.D. Cal. Oc. 2, 2017). Further, the harm to Plaintiffs in remaining in detention without a bond hearing clearly outweighs any "harm" to the Government in providing bond hearings.

In sum, the four preliminary injunction factors weigh in Plaintiffs' favor.

CONCLUSION

For the reasons described above, Plaintiffs' motion for class certification of section 1231(a)(6) detainees in the Ninth Circuit is GRANTED as to their statutory claims. Van Der Hout, Brigagliano & Nightingale, LLP, Centro Legal De La Raza, Matthew Green, ACLU-SC, ACLU-NC, and ACLU-SD are appointed as class counsel.

Plaintiffs' motion for a preliminary injunction under the INA and APA is also GRANTED. The Government is enjoined from detaining Plaintiffs and the class members pursuant to section 1231(a)(6) for more than 180 days without a providing each a bond hearing before an IJ as required by *Diouf II*.

This Order disposes of Docket Nos. 21 and 22.

IT IS SO ORDERED.

Dated: June 5, 2018

/s/ JACQUELINE SCOTT CORLEY
JACQUELINE SCOTT CORLEY
United States Magistrate Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-35460

EDWIN OMAR FLORES TEJADA; GERMAN VENTURA HERNANDEZ, ON BEHALF OF THEMSELVES AS INDIVIDUALS AND ON BEHALF OF OTHERS SIMILARLY SITUATED[*], PETITIONERS-APPELLEES

v.

ELIZABETH GODFREY, FIELD OFFICE DIRECTOR; WILLIAM P. BARR, ATTORNEY GENERAL; MATTHEW T. ALBENCE, ACTING DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; LOWELL CLARK, WARDEN; JAMES MCHENRY, DIRECTOR OF EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; CHAD WOLF, ACTING SECRETARY, DEPARTMENT OF HOMELAND SECURITY,[**] RESPONDENTS-APPELLANTS

Argued and Submitted: Nov. 13, 2019
Pasadena, California
Filed: Apr. 7, 2020

---

[*] Because the district court dismissed Arturo Martinez Baños as a named plaintiff long before the orders at issue in this case, we have removed him from the case caption.

[**] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Chad Wolf is automatically substituted as the Acting Secretary of the U.S. Department of Homeland Security and Matthew T. Albence is automatically substituted as the Acting Director of U.S. Immigration and Customs Enforcement.

Appeal from the United States District Court
for the Western District of Washington
James L. Robart, District Judge, Presiding

OPINION

Before: FERDINAND F. FERNANDEZ, MILAN D. SMITH, JR., and ERIC D. MILLER, Circuit Judges.

Opinion by Judge MILAN D. SMITH, JR.; Partial Concurrence and Partial Dissent by Judge FERNANDEZ

OPINION

M. SMITH, Circuit Judge:

Edwin Omar Flores Tejada and German Ventura Hernandez (Plaintiffs) represent a certified class of aliens with final removal orders who are placed in withholding-only proceedings, and who are detained in the jurisdiction of the Western District of Washington (the District) for six months or longer without an individualized bond hearing. In this suit, Plaintiffs challenged Defendants-Appellants' (hereinafter, the Government[1]) alleged policy and practice of subjecting class members to prolonged detention without an individualized bond hearing before

[1] We use the term "the Government" to refer collectively to the following Defendants-Respondents who Plaintiffs sued in their official capacities: (1) Elizabeth Godfrey, Field Office Director; (2) William P. Barr, U.S. Attorney General; (3) Matthew T. Albence, Acting Director of U.S. Immigration and Customs Enforcement; (4) Lowell Clark, Warden, (5) James McHenry, Director of the Executive Office for Immigration Review, (6) Chad Wolf, Acting Secretary of the U.S. Department of Homeland Security. Our use of the uncapitalized term "the government" should not be construed as a reference to the Defendants-Respondents.

an immigration judge (IJ). Plaintiffs claimed statutory rights to such hearings pursuant to the immigration detention statutes, as well as a constitutional due process right to such hearings.

The district court granted partial summary judgment for Plaintiffs and the class on their statutory claims and, for that reason, granted partial summary judgment for the Government on Plaintiffs' due process claims. The court entered a permanent injunction that requires three things. First, based on our decision in *Diouf v. Napolitano*, 634 F.3d 1081, 1086, 1092 & n.13 (9th Cir. 2011) (*Diouf II*), the Government must provide a class member who it has detained for six months or longer with a bond hearing before an IJ when the class member's release or removal is not imminent. Second, based on our decision in *Singh v. Holder*, 638 F.3d 1196, 1203-04 (9th Cir. 2011), the Government must justify a class member's continued detention by clear and convincing evidence showing that the alien is a flight risk or a danger to the community. Third, the Government must provide class members who remain detained even after an initial bond hearing at six months with additional bond hearings every six months thereafter. The Government urges us to reverse and vacate the final judgment and permanent injunction on Plaintiffs' statutory claims.

This appeal presents the same core question we decide today in *Aleman Gonzalez v. Barr*, No. 18-16465: whether our construction of § 1231(a)(6) in *Diouf II* survives the Supreme Court's decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). Our answer remains the same here. We affirm the district court's judgment and permanent injunction insofar as they conform to our

construction of § 1231(a)(6) in *Diouf II*. We also affirm insofar as the judgment and permanent injunction require the Government to the satisfy the constitutional burden of proof we identified in *Singh*.

However, unlike *Aleman Gonzalez*, this appeal presents us with a different question regarding our construction of § 1231(a)(6). The district court ordered the Government to provide class members with *additional* bond hearings every six months. We hold that the court erroneously imposed this requirement as a statutory matter because we did not construe § 1231(a)(6) as requiring this in *Diouf II*, nor do we find any support for this requirement. We therefore partially reverse and vacate the judgment and permanent injunction, and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND[2]

Edwin Flores Tejada and German Ventura Hernandez joined this suit upon the filing of an amended complaint and petition for a writ of habeas corpus in January 2017. Flores Tejada and Ventura Hernandez are noncitizens against whom the Government reinstated prior removal orders pursuant to 8 U.S.C. § 1231(a)(5). The Government detained and placed each in withholding-only proceedings pursuant to 8 C.F.R. § 1208.31(e) after an asylum officer determined that each had a reasonable fear of persecution or torture if returned to his country of origin. Plaintiffs alleged that the Government failed to provide them with an individualized statutory bond hearing before an IJ, in accordance with our court's

---

[2] We do not retrace the statutory and regulatory background set forth in *Aleman Gonzalez*, and instead limit our focus to discussing the distinct aspects of the proceedings in this case.

precedents. On behalf of a putative class of similarly situated aliens in the District, Plaintiffs claimed a statutory right to an individualized bond hearing pursuant to 8 U.S.C. § 1226(a) and our decision in *Robbins v. Rodriguez*, 804 F.3d 1060 (9th Cir. 2015) (*Rodriguez III*).[3] Plaintiffs further claimed a statutory right to a bond hearing pursuant to any of the immigration detention statutes as well as a constitutional due process right to such a hearing.

After the amended complaint's filing, we held in *Padilla-Ramirez v. Bible*, 862 F.3d 881, 884-87 (9th Cir. 2017), *amended by*, 882 F.3d 826, 830-33 (9th Cir. 2018), that aliens with reinstated removal orders who are placed in withholding-only proceedings are detained pursuant to § 1231(a)(6). Because of that decision, the district court denied Plaintiffs' request for a preliminary injunction that would have required the Government to provide bond hearings pursuant to the regulation applicable to aliens detained pursuant to § 1226(a). 8 C.F.R. § 1236.1(d)(1). Thereafter, upon Plaintiffs' motion, the district court certified a class of: "[a]ll individuals who

---

[3] Given the then-absence of Ninth Circuit case law, Plaintiffs claimed that they were detained pursuant to § 1226(a), finding support in *Guerra v. Shanahan*, 831 F.3d 59 (2d Cir. 2016). In *Guerra*, the Second Circuit held that aliens with reinstated final removal orders who are placed in withholding proceedings are subject to detention pursuant to § 1226(a). *Id.* at 62-64. We expressly rejected this approach in *Padilla-Ramirez v. Bible*, 862 F.3d at 888-89, *as amended*, 882 F.3d at 834-35, to hold that such aliens are detained pursuant to § 1231(a)(6). The Third Circuit has expressly adopted our approach, *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 216-19 (3d Cir. 2018), whereas the Fourth Circuit has expressly adopted the Second Circuit's approach, *Guzman Chavez v. Hott*, 940 F.3d 867, 876-77, 882 (4th Cir. 2019).

(1) were placed in withholding only proceedings under 8 C.F.R. § 1208.31(e) in the [District] 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."

The parties cross-moved for summary judgment on Plaintiffs' claims. The magistrate judge recommended granting partial summary judgment for Plaintiffs on their statutory claims. The magistrate determined that *Diouf II* requires the Government to provide class members with an individualized bond hearing, except for class members whose release or removal is not imminent. The magistrate determined that "[c]lass members must automatically receive such bond hearings after they have been detained for 180 days and every 180 days thereafter" pursuant to *Diouf II*, 634 F.3d at 1092, and *Rodriguez III*, 804 F.3d at 1085, 1089. These hearings had to "comply with the other procedural safeguards established in *Singh* and *Rodriguez III*," with the Government bearing the burden of justifying continued detention by clear and convincing evidence. The magistrate recommended partial summary judgment for the Government on Plaintiffs' due process claims because "class members are entitled to relief under § 1231(a)(6), as construed by the Ninth Circuit in *Diouf II*."

In the wake of *Jennings*, the parties notified the district court of their views about *Jennings*'s impact on the summary judgment motions. The court determined that *Diouf II* and *Jennings* are not clearly irreconcilable, and thus adopted and approved the magistrate's recommendations. The court entered a final judgment,

and a permanent injunction for Plaintiffs on their statutory claims. The Government timely appealed.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over the appeal from the district court's final judgment pursuant to 28 U.S.C. § 1291. "We review a grant of summary judgment de novo." *Pavoni v. Chrysler Grp., LLC*, 789 F.3d 1095, 1098 (9th Cir. 2015). "We review permanent injunctions under three standards: we review factual findings for clear error, legal conclusions de novo, and the scope of the injunction for abuse of discretion." *United States v. Washington*, 853 F.3d 946, 962 (9th Cir. 2017).

ANALYSIS

The Government contends that the district court erred by relying on *Diouf II* to conclude that the class members here are entitled to a bond hearing every 180 days before an IJ, at which the Government bears a clear and convincing burden of proof. The Government further argues that the district court impermissibly "re-applied" the canon of constitutional avoidance to § 1231(a)(6) in contravention of *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Clark v. Martinez*, 543 U.S. 371 (2005). Most of the Government's arguments here are indistinguishable from those we have considered and rejected in *Aleman Gonzalez*.

We will not retread our analysis in *Aleman Gonzalez*, but instead we reiterate our conclusions there that apply equally here. First, *Diouf II*'s construction of § 1231(a)(6) to require an individualized bond hearing for an alien subject to prolonged detention is not clearly irreconcilable with *Jennings*. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). Consistent

with *Diouf II*, 634 F.3d 1086, 1092 & n.13, we affirm the judgment and injunction's requirement that the Government must provide class members with an individualized bond hearing after six months of detention when a class member's release or removal is not imminent. Second, *Jennings* does not abrogate our constitutional due process holding in *Singh* regarding the applicable burden of proof at the bond hearing. Consistent with *Singh*, 638 F.3d at 1203-04, we affirm the judgment and injunction's requirement that the Government must bear a clear and convincing burden of proof to justify an alien's continued detention. Third, the district court did not improperly re-apply the canon of constitutional avoidance to § 1231(a)(6) or violate *Clark*. Consistent with *Clark*, 543 U.S. at 378, the judgment and injunction apply the same construction of § 1231(a)(6) to all class members.

Our affirmance of the judgment and injunction, however, goes no further. In addition to the foregoing requirements we have affirmed, the district court agreed with the magistrate judge's recommendation to order the Government to provide class members with additional statutory bond hearings every six months. The district court imposed this additional bond hearings requirement based on its conclusion that *Jennings* did not address § 1231(a)(6) and that *Diouf II* remains binding. That conclusion was error because we did not address the availability of additional bond hearings every six months in *Diouf II*. In fact, we have never squarely interpreted § 1231(a)(6) to require them.

In *Diouf II*, we applied the canon of constitutional avoidance to construe § 1231(a)(6) as "requiring *an* individualized bond hearing, before an immigration judge,

for aliens facing prolonged detention under that provision," *Diouf II*, 634 F.3d at 1086 (emphasis added), subject to whether the alien's release or removal is imminent, *id.* at 1092 n.13. We explained that "[s]uch aliens are entitled to release on bond unless the government establishes that the alien is a flight risk or will be a danger to the community." *Id.* at 1086. Although we suggested that greater procedural safeguards are required as the length of detention increases, we did so in the context of construing § 1231(a)(6) to require a bond hearing before an IJ after six months of detention, something which the government's post-*Zadvydas* regulations did not provide. *Id.* at 1089-92. We did not apply the canon to read any other requirements into § 1231(a)(6), let alone an additional bond hearings requirement. Thus, the court could not rely on *Diouf II* to sustain the requirement.

As the magistrate judge recognized, our decision in *Rodriguez III*—not *Diouf II*—established an additional bond hearings requirement in the context of an immigration detention statute.[4] In *Rodriguez III*, we relied on *Diouf II*'s abstract discussion of the necessity of greater procedural protections as the length of detention increases to hold that, in the context of § 1226(a), "the government must provide periodic bond hearings every six months so that noncitizens may challenge their

---

[4] We question whether *Rodriguez III* could alone provide the basis for the additional bond hearings requirement for the § 1231(a)(6) class here. *Rodriguez III* made clear that aliens detained pursuant to § 1231(a)(6) were not class members in that case. *Rodriguez III*, 804 F.3d at 1086 ("Simply put, the § 1231(a) class does not exist."). Although *Rodriguez III* imposed additional procedural requirements, it did so only with respect to aliens detained pursuant to §§ 1225, 1226(a), and 1226(c). *Compare id. with id.* at 1086-1090.

continued detention as 'the period of . . . confinement grows.'" *Rodriguez III*, 804 F.3d at 1089 (quoting *Diouf II*, 634 F.3d at 1091).

Jennings defined "periodic bond hearing" to encompass a bond hearing held after an initial six months of detention, *Jennings*, 138 S. Ct. at 850-51, and rejected the imposition of such a "periodic bond hearing" requirement onto § 1226(a), *id.* at 847-48. Although we have already explained in *Aleman Gonzalez* why *Jennings* does not undercut our construction of § 1231(a)(6) in *Diouf II* as requiring a bond hearing after six months of detention, that determination cannot sustain the additional bond hearings requirement the district court imposed here. The court did not identify any authority other than our now-reversed decision in *Rodriguez III* to support its additional bond hearings requirement, nor are we are aware of any. *Rodriguez III* cannot support the additional bond hearings requirement the district court ordered in its judgment and permanent injunction given *Jennings*' reversal.

We have not previously considered whether § 1231(a)(6) can support an additional bond hearings requirement. While *Jennings* did not directly address such a requirement in the context of § 1231(a)(6), we find its reasoning persuasive. *Jennings* made clear that *Zadvydas*'s construction of § 1231(a)(6) to identify six months as a presumptively reasonable length of detention was already "a notably generous application of the constitutional-avoidance canon." *Jennings*, 138 S. Ct. at 843. Although *Diouf II*'s six-month bond hearing construction coincides with *Zadvydas*'s six-month period, we find no support in either *Zadvydas*'s reading of

§ 1231(a)(6) or the statutory text itself to plausibly construe the provision as requiring *additional* bond hearings every six months. We accordingly reverse and vacate the judgment and permanent injunction for Plaintiffs in this regard.[5]

In doing so, we reverse and vacate the partial judgment for the Government on Plaintiffs' due process claims. The district court determined that granting summary judgment for Plaintiffs on the § 1231(a)(6) statutory claim warranted summary judgment for the Government on Plaintiffs' due process claims. We understand the district court to have effectively treated Plaintiffs' due process claims as moot. That is no longer the case given our decision today. Plaintiffs have requested a remand to allow the district court to consider their constitutional claims if we reversed on any statutory issues. At oral argument, the Government did not object to such a remand. We therefore conclude that a remand is appropriate so that the district court can consider Plaintiffs' constitutional claims. *Cf. Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1035 n.12 (9th Cir. 2012).

CONCLUSION

The district court correctly determined that our controlling construction of § 1231(a)(6) in *Diouf II* requires the Government to provide a bond hearing to class members detained in the District whose release or removal is not imminent. The court also properly placed the appropriate burden of proof on the Government at such a

---

[5] We underscore that our vacatur of the judgment and permanent injunction's additional bond hearings requirement as a statutory matter does not foreclose any class member from pursuing habeas relief in accordance with *Zadvydas*.

hearing. We affirm the final judgment and permanent injunction to this effect.

We otherwise vacate the judgment and permanent injunction insofar as they require, as a statutory matter, that the Government provide class members with additional bond hearings every six months beyond the initial bond hearing that *Diouf II* requires. Consequently, we vacate the judgment for the Government on Plaintiffs' due process claims and remand for further proceedings.

AFFIRMED in part, REVERSED and VACATED in part, and REMANDED. Each party shall bear its own costs.

FERNANDEZ, Circuit Judge, concurring in part and dissenting in part:

I would vacate the district court's judgment and permanent injunction entirely. Therefore, I concur in the majority opinion, for the reasons stated therein, to the extent that it vacates the judgment and permanent injunction and remands for further proceedings on Plaintiffs' constitutional claim. However, in light of the views I expressed in my dissenting opinion in *Aleman Gonzalez v. Barr*, No. 18-16465, slip op. at 58 (9th Cir. April 7, 2020), I respectfully dissent from the majority opinion to the extent that it affirms the district court's judgment and leaves the permanent injunction in place.

APPENDIX D

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

Case No. C16-1454JLR

ARTURO MARTINEZ BAÑOS, ET AL.,
PLAINTIFFS-PETITIONERS

v.

NATHALIE ASHER, ET AL., DEFENDANTS-RESPONDENTS

Filed: Apr. 4, 2018

ORDER ADOPTING REPORT AND RECOMMENDATION

I. INTRODUCTION

Before the court are the Report and Recommendation of United States Magistrate Judge Brian A. Tsuchida (R&R (Dkt. # 77)) and Defendants-Respondents Nathalie Asher, Lowell Clark, Thomas D. Homan, John. F. Kelly, James McHenry, and Jefferson B. Sessions's (collectively, "the Government") objections thereto (Obj. (Dkt. # 78)). The Government and Plaintiff Edwin Flores Tejada both subsequently filed notices of supplemental authority. (*See* 1st Pl. Not. (Dkt. # 80); Def. Not. (Dkt. # 81); 2nd Pl. Not. (Dkt. # 82).) Having carefully reviewed all of the foregoing, along with all other relevant documents and the governing law, the court ADOPTS the Report and Recommendation (Dkt. # 77).

II. BACKGROUND AND ANALYSIS

On January 23, 2018, Magistrate Judge Tsuchida issued a Report and Recommendation that recommends granting in part and denying in part the parties' cross-motions for summary judgment. (R&R at 2.) The Government filed its objections on February 23, 2018, asking that the court reject Magistrate Judge Tsuchida's recommendation. (Obj. at 1.) A few days later, on February 27, 2018, the Supreme Court decided *Jennings v. Rodriguez,* --- U.S. ---, 138 S. Ct. 830 (2018), which held that the Ninth Circuit had erroneously applied the canon of constitutional avoidance in finding that 8 U.S.C. §§ 1225(b)(1), 1225(b)(2), and 1226(c) entitle individuals to periodic bond hearings when their detention becomes prolonged at six months. *Jennings,* 138 S. Ct. at 842-47. Both parties submitted notices of supplemental authority discussing the impact of *Jennings* on the case at hand. (*See* 1st Pl. Not.; Def. Not.; 2nd Pl. Not.)

Accordingly, the court first determines the impact, if any, that *Jennings* has on the issues presented in the Report and Recommendation. The court then considers the Report and Recommendation.

A. *Jennings* and Its Impact

The Report and Recommendation relies upon *Diouf v. Napolitano,* 634 F.3d 1081 (9th Cir. 2011) ("*Diouf II*"), and its analysis of U.S.C. § 1231(a)(6) to conclude that class members should "be afforded custody hearings before an [immigration judge] . . . after they have been detained for 180 days and every 180 days thereafter." (R&R at 10-11; *see id.* at 7-11.) The Government argues that *Jennings* calls into question *Diouf*

II, and consequently, the Report and Recommendation. *(See* Def. Not. at 2-3.) The court disagrees.

Diouf II remains binding circuit authority unless it is "clearly irreconcilable" with higher authority. *See United States v. Robertson,* 875 F.3d 1281, 1291 (9th Cir. 2017). Under the "clearly irreconcilable" standard, "it is not enough for there to be some tension between the intervening high authority and prior circuit precedent." *Lair v. Bullock,* 697 F.3d 1200, 1207 (9th Cir. 2012). So long as the court "can apply . . . prior circuit precedent without running afoul of the intervening authority," it must do so. *Id.* (internal quotation marks omitted).

Diouf II and *Jennings* are not "clearly irreconcilable." *See Robertson,* 875 F.3d at 1291. In *Jennings,* the Supreme Court reversed the Ninth Circuit's holding, pursuant to the canon of constitutional avoidance, regarding §§ 1225(b)(1), 1225(b)(2), and 1226(c). In so concluding, *Jennings* explicitly contrasted §§ 1225 and 1226—the statutes at issue in that case—with § 1231(a)(6)—the statute at issue in *Diouf II*. *See* 138 S. Ct. at 843-44. For instance, the Supreme Court recognized that §§ 1225 and 1226 utilize the mandatory language "shall," whereas § 1231(a)(6) utilizes the discretionary language "may"; the "may" language in § 1231(a)(6) suggests ambiguity that leaves space for constitutional avoidance. *Jennings,* 138 S. Ct. at 843.

Thus, *Jennings* concerns statutes—§§ 1225 and 1226—that were not at issue in *Diouf II* and are not at issue here. *See Jennings,* 138 S. Ct. at 843; *Diouf II,* 634 F.3d at 1086. In fact, *Jennings* expressly distinguished § 1231(a)(6), the statute at issue here. *See Jennings,* 138 S. Ct. at 843-44. Thus, the court agrees with the

other district courts to have considered the viability of *Diouf II* after *Jennings*: "[A]t a minimum . . . *Jennings* left for another day the question of bond hearing eligibility under [§] 1231(a), and at best, [*Jennings* shows] that the Ninth Circuit correctly invokes the doctrine of constitutional avoidance" *in Diouf II*. *See Ramos v. Sessions, et al.*, No. 18-cv-00413, 2018 WL 1317276, at *3 (N.D. Cal. Mar. 13, 2018); *see also Borjas-Calix v. Sessions, et al.*, No. CV-16-00685-TUC-DCB, 2018 WL 1428154, at *6 (D. Ariz. Mar. 22, 2018) (holding that *Jennings* did not impact *Diouf II* because *Jennings* was specifically directed to § 1225, *et seq.*, and not § 1231(a)(6)).

The court, therefore, concludes that *Diouf II* remains binding law.

B. Report and Recommendation

The court next addresses the Report and Recommendation. A district court has jurisdiction to review a Magistrate Judge's report and recommendation on dispositive matters. Fed. R. Civ. P. 72(b). "The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to." *Id.* "A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). The court reviews de novo those portions of a report and recommendation to which a party specifically objects in writing. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). "The statute makes it clear that the district judge must review the magistrate judge's findings and recommendations de novo if objection is made, but not otherwise." *Id.*

The Government's objections do not raise any novel issue that was not addressed by Magistrate Judge Tsuchida's Report and Recommendation. (*See generally* Obj.) Moreover, the court has thoroughly examined the record before it and finds that the reasoning contained in the Report and Recommendation is persuasive in light of that record. Accordingly, the court independently rejects the Government's arguments in its objection for the same reasons as Magistrate Judge Tsuchida did.

III. CONCLUSION

For the foregoing reasons, the court ADOPTS the Report and Recommendation (Dkt. # 77) in its entirety. The court DIRECTS the Clerk to send copies of this Order to the parties and to the Honorable Brian A. Tsuchida.

Dated this 4th day of Apr. 2018.

/s/ JAMES L. ROBART
JAMES L. ROBART
United States District Judge

APPENDIX E

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

Case No. C16-1454-JLR-BAT

ARTURO MARTINEZ BAÑOS, ET AL.,
PLAINTIFFS-PETITIONERS

v.

NATHALIE ASHER, ET AL., DEFENDANTS-RESPONDENTS

Filed: Jan. 23, 2018

REPORT AND RECOMMENDATION

INTRODUCTION AND RELEVANT PROCEDURAL HISTORY[1]

The Government[2] has 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 ("IJs"). This 28 U.S.C. § 2241 habeas

[1] A more detailed factual background and procedural history can be found in the October 17, 2017 Report and Recommendation. Dkt. 67.

[2] The respondents in this action are the Seattle Field Office Director for U.S. Immigration and Customs Enforcement ("ICE"), the Acting Director of ICE, the Secretary of the Department of Homeland Security ("DHS"), the Director of the Executive Office for Immigration Review, the Warden of the Northwest Detention Center, and the United States Attorney General.

class action challenges that practice in the Western District of Washington.

Edwin Flores Tejada[3] ("Mr. Flores") represents a class defined as "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 (R & R); Dkt. 70 at 3 (Order Adopting R & R). His second cause of action seeks an order requiring the Government to provide each class member with a custody hearing before an IJ after six months of detention and every six months thereafter. Dkt. 38 at ¶¶ 96-98. His third cause of action seeks a declaratory judgment that the Government's policy of detaining class members without custody hearings violates the Due Process Clause. *Id.* at ¶¶ 99-102.

The parties have filed cross-motions for summary judgment on these claims. Dkts. 72 & 75. As discussed below, the Court recommends that both Mr. Flores's and the Government's motions be **GRANTED** in part and **DENIED** in part. Specifically, judgment should be granted in Mr. Flores's and class members' favor on the second cause of action and in the Government's favor on the third cause of action.

---

[3] The two other named plaintiffs, Arturo Martinez Baños and German Ventura Hernandez, have been dismissed, as has plaintiffs' first cause of action. *See* Dkts. 53, 67, 70.

LEGAL FRAMEWORK

A. Reinstatement and withholding only proceedings

If a non-citizen who is removed pursuant to a removal order subsequently reenters the United States illegally, the original removal order may be reinstated by an authorized official. *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 487 (9th Cir. 2007) (en banc); 8 C.F.R. § 241.8. To reinstate a removal order, DHS must comply with the procedures set forth in 8 C.F.R. § 241.8(a) and (b).[4] *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 956 (9th Cir. 2012). When DHS reinstates a removal order, "the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the [non-citizen] is not eligible and may not apply for any relief under this chapter, and the [non-citizen] shall be removed under the prior order at any time after the reentry." 8 U.S.C. § 1231(a)(5).

Section 241.8(e), however, "creates an exception by which [a non-citizen] who asserts 'a fear of returning to the country designated' in his reinstated removal order is 'immediately' referred to an asylum officer who must determine if the [non-citizen] has a reasonable fear of persecution or torture in accordance with 8 C.F.R.

---

[4] These procedures include obtaining the prior order related to the non-citizen, confirming that the non-citizen is the same person who was previously removed, and confirming that the non-citizen unlawfully reentered the United States. 8 C.F.R. § 241.8(a). An immigration officer must then give the non-citizen written notice of the determination that he is subject to removal and provide him with an opportunity to make a statement contesting the determination. 8 C.F.R. § 241.8(b). If these requirements are met, 8 C.F.R. § 241.8(c) provides that the non-citizen "shall be removed" under the prior removal order.

§ 208.31." *Ortiz-Alfaro*, 694 F.3d at 956. If the asylum officer finds that the non-citizen has not established a reasonable fear of persecution or torture, and an IJ affirms this determination, the matter is returned to DHS for execution of the reinstated order of removal without the opportunity to appeal to the Board of Immigration Appeals ("BIA"). 8 C.F.R. § 208.31(g). On the other hand, if the asylum officer makes a positive reasonable fear determination, the matter is referred to an IJ "for consideration of the request for withholding of removal only." 8 C.F.R. § 208.31(e). The IJ's decision to grant or deny withholding of removal may be appealed to the BIA. 8 C.F.R. § 208.31(g)(2)(ii). Judicial review of the BIA's determination is available in the Court of Appeals. *See Ortiz-Alfaro*, 694 F.3d at 958-60.

In withholding only proceedings, the jurisdiction of the IJ is limited to consideration of whether the non-citizen is entitled to withholding or deferral of removal. 8 C.F.R. § 1208.2(c)(3)(i). If the IJ grants the non-citizen's application for withholding of removal, the non-citizen may not be removed to the country designated in the removal order but may be removed to an alternate country. *See* 8 U.S.C. § 1231(b)(2)(E); 8 C.F.R. § 1208.16(f); *Lanza v. Ashcroft*, 389 F.3d 917, 933 (9th Cir. 2004).

While withholding only proceedings are pending before the IJ or the BIA, DHS cannot execute a reinstated removal order. *See Ortiz-Alfaro*, 694 F.3d at 957; 8 U.S.C. § 1231(b)(3) ("[T]he Attorney General may not remove [a non-citizen] to a country if the Attorney General decides that the [non-citizen's] life or freedom would be threatened in that country because of the [non-citizen's] race, religion, nationality, membership in a particular social group, or political opinion.").

B. Statutory authority for immigration detention

Two statutes govern the detention of non-citizens in immigration proceedings: 8 U.S.C. § 1226 and 8 U.S.C. § 1231(a). "Where [a non-citizen] 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).

Section 1226 provides the framework for the arrest, detention, and release of non-citizens who are in removal proceedings. 8 U.S.C. § 1226; *see also Demore v. Kim*, 538 U.S. 510, 530 (2003) ("Detention during removal proceedings is a constitutionally permissible part of that process."). Section 1226(a) grants DHS discretionary authority to determine whether a noncitizen should be detained, released on bond, or released on conditional parole pending the completion of removal proceedings, unless the non-citizen falls within one of the categories of criminals described in § 1226(c), for whom detention is mandatory.[5] 8 U.S.C. § 1226.

The Ninth Circuit has repeatedly held that after a non-citizen has been detained under § 1226 for six months, he is entitled to a so-called "*Rodriguez*" custody hearing, at which the IJ must release him on bond or reasonable conditions of supervision unless the government

---

[5] Although the relevant statutory sections refer to the Attorney General, the Homeland Security Act of 2002, Pub. L. No. 107-296 § 471, 116 Stat. 2135 (2002), transferred most immigration law enforcement functions from the Department of Justice ("DOJ") to DHS, while the DOJ's Executive Office for Immigration Review retained its role in administering immigration courts and the BIA. *See Hernandez v. Ashcroft*, 345 F.3d 824, 828 n.2 (9th Cir. 2003).

proves by clear and convincing evidence that he poses a flight risk or a danger to the community. *Rodriguez v. Robbins* ("*Rodriguez III*"), 804 F.3d 1060, 1084-85, 1087 (9th Cir. 2015), *cert. granted sub nom Jennings v. Rodriguez*, 136 S. Ct. 2389 (2016); *Rodriguez v. Robbins* ("*Rodriguez II*"), 715 F.3d 1132, 1135 (9th Cir. 2013); *see also Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011); *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 949 (9th Cir. 2008). The Ninth Circuit has based its holdings on the canon of constitutional avoidance, finding that prolonged detention under § 1226 without adequate procedural protections would raise "serious constitutional concerns." *Casas-Castrillon*, 535 F.3d at 950; *Rodriguez III*, 804 F.3d at 1068-69. Most recently in *Rodriguez III*, the court held that IJs must consider the length of detention, and "the government must provide periodic bond hearings every six months so that noncitizens may challenge their continued detention as 'the period of . . . confinement grows.'" 804 F.3d at 1089 (quoting *Diouf v. Napolitano* ("*Diouf II*"), 634 F.3d 1081, 1091 (9th Cir. 2011)).

Section 1231(a) governs the detention and release of non-citizens who have been ordered removed. It authorizes detention in only two circumstances. During the "removal period," detention is mandatory. 8 U.S.C. § 1231(a)(2) (emphases added). The "removal period" generally lasts 90 days, and it begins on the latest of the following: (1) the date the order of removal becomes final; (2) if the removal order is judicially reviewed and if a court orders a stay of the removal of the non-citizen, the date of the court's final order; or (3) if the non-citizen is detained or confined (except under an immigration process), the date the non-citizen is released from detention or confinement. 8 U.S.C. § 1231(a)(1)(B). After the

removal period expires, DHS has the discretionary authority to continue to detain certain non-citizens or to release them on supervision. 8 U.S.C. § 1231(a)(6); *Prieto-Romero*, 534 F.3d at 1059.

In *Diouf II*, the Ninth Circuit extended the procedural protections for § 1226 detainees to those detained under § 1231(a)(6), holding "that an individual facing prolonged immigration detention under 8 U.S.C. § 1231(a)(6) is entitled to release on bond unless the government establishes that he is a flight risk or a danger to the community." 634 F.3d at 1082. Specifically, the court held that the government must provide a custody hearing before an IJ to non-citizens who are denied release in their six-month DHS custody reviews and whose release or removal is not imminent. *Id.* at 1091-92 ("When detention crosses the six-month threshold and release or removal is not imminent, the private interests at stake are profound. Furthermore, the risk of an erroneous deprivation of liberty in the absence of a hearing before a neutral decisionmaker is substantial."); *see also 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.").

At the time this lawsuit was filed, the Ninth Circuit had not yet decided whether noncitizens who are subject to reinstated orders of removal and who are in withholding only proceedings are detained under § 1226(a) or § 1231(a). On July 6, 2017, however, the Ninth Circuit held that such individuals are detained under § 1231(a). *Padilla-Ramirez v. Bible*, 862 F.3d 881, 886 (9th Cir. 2017), *pet. for rehearing filed* (Aug. 19, 2017) (holding that reinstated removal orders are administratively final when they are reinstated, even if withholding only

proceedings are pending). The court did not address whether the petitioner was entitled a custody hearing once his detention became prolonged. *Id.* at 884.

DISCUSSION

Summary judgment is appropriate when the "movant 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); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The parties agree that the only material fact is undisputed: the Government does not provide class members with automatic custody hearings before IJs. Thus the questions before the Court are purely legal. First, does the Immigration and Nationality Act require the Government to provide class members with such hearings after six months detention and every six months thereafter? Second, does the Government violate class members' due process rights by holding them for prolonged periods without an opportunity to contest their detention before a neutral arbiter?

A. Class members are entitled to automatic custody hearings every six months

As noted above, the Ninth Circuit in *Diouf II* held "that an individual facing prolonged immigration detention under 8 U.S.C. § 1231(a)(6) is entitled to release on bond unless the government establishes that he is a flight risk or a danger to the community." 634 F.3d at 1082. The primary dispute between the parties is whether the holding in *Diouf II* applies to non-citizens who are subject to reinstated removal orders and have applied for withholding of removal; in other words, class members. Every judge in this district who has considered

the issue—including the judges assigned to this case—has concluded that *Diouf II* governs. *Mercado Gonzalez v. Asher*, No. C15-1778-MJP-BAT, 2016 WL 871073, at *3 (W.D. Wash. Feb. 16, 2016), *adopted by* 2016 WL 865351 (W.D. Wash. Mar. 7, 2016) (deciding, before *Padilla-Ramirez*, that the Court need not determine whether the petitioner was detained under § 1226(a) or § 1231(a)(6) because he had been detained for more than six months and thus was entitled to a custody hearing under either statute); *Acevedo-Rojas v. Clark*, No. C14-1232-JLR, 2014 WL 6908540, at *6 (W.D. Wash. Dec. 8, 2014) ("[I]f petitioner is denied release at her six-month DHS custody review and her release or removal is not imminent, *Diouf v. Napolitano* ("*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."); *Giron-Castro v. Asher*, No. C14-867-JLR, 2014 WL 8397147, at *2 (W.D. Wash. Oct. 2, 2014) (adopting R & R recommending that the petitioner be granted a bond hearing under *Diouf II*); *Mendoza v. Asher*, No. C14-811-JCC, 2014 WL 8397145, at *2 (W.D. Wash. Sept. 16, 2014) (rejecting government's argument that it would improper to "extend" *Diouf II* to non-citizens detained under § 1231(a)(6) following reinstatement of a removal order because "*Diouf II* does not distinguish between categories of [non-citizens] whose detention is governed by § 1231(a)(6), and instead applies to *every* [non-citizen] facing prolonged detention under the statute").

The Government recognizes some of this authority, but it urges the Court to reach a different result. Dkt. 75 at 7 n.1. The Government, however, merely recycles arguments that the judges on this case have considered

and rejected.[6] *See Mercado-Gonzalez*, 2016 WL 871073, at *4; *Giron-Castro*, No. C14-867-JLR-JPD, Dkt. 17 at 14-16 (W.D. Wash. Aug. 19, 2014), *adopted by* 2014 WL 8397147 (W.D. Wash. Oct. 2, 2014). The Government offers no persuasive reason to reverse course on this issue.

First, the Government argues this case is distinguishable from *Diouf II* because Diouf was ordered removed after overstaying his student visa and could collaterally challenge the removal order through an application to reopen the removal proceedings, whereas class members are subject to reinstated removal orders that cannot be challenged. *Id.* at 8. This distinction is immaterial. The Ninth Circuit has made clear that "[r]egardless of the stage of the proceedings, the same important interest is at stake—freedom from prolonged detention." *Diouf II*, 634 F.3d at 1087.

The Government next asserts that this case is distinguishable from *Diouf II* because Diouf had never been previously removed from the United States, while class members have been removed before. Dkt. 75 at 8. According to the Government:

> The government's interest in detaining [non-citizens] previously removed and who have illegally reentered the United States presents qualitatively different concerns than those addressed in *Diouf II*. *Diouf II*, 634 F.3d at 1088 ("It is far from certain that § 1231(a)(6) detainees such as Diouf will be removed.").

---

[6] The Government also raises several new arguments, but these are dependent on the Court finding that *Diouf II* does not apply. *See* Dkt. 75 at 11-17. Because the Court concludes that *Diouf II* governs this case, the other arguments are not addressed.

> In the absence of careful consideration of the government's interest in the continued detention of previously removed individuals who have illegally reentered the United States, a sweeping extension of *Diouf II*'s requirement of an individualized bond hearing for individuals being held in custody pursuant to 8 U.S.C. § 1231(a)(6) for more than 180 days after reinstatement of their prior removal order is unwarranted.

Dkt. 75 at 8. This argument is not well taken. The fact that it was uncertain whether Diouf would be removed was only one of four reasons the Ninth Circuit gave for finding that the government's interest in detaining § 1231(a)(6) detainees was not substantial enough to justify denying a custody hearing. The court also found that the government has an interest in ensuring that all non-citizens are available for removal, detention is permitted if it is found that the noncitizen poses a flight risk, and the petitions for review may take years to resolve. *Diouf II*, 634 F.3d at 1088. These reasons apply with full force to class members and provide ample justification for treating § 1231(a)(6) detainees subject to a reinstated order of removal the same way other § 1231(a)(6) detainees are treated.

Finally, the Government contends that unlike Diouf's removal order, class members' removal orders cannot be judicially reviewed. Dkt. 75 at 9. But class members are entitled to seek Ninth Circuit review of the BIA's final determination regarding their withholding of removal applications. Thus the Ninth Circuit's central concern in *Diouf II*—prolonged detention while petitions for review are resolved—is equally applicable here.

Contrary to the Government's arguments, Court need not "extend" *Diouf II* to find that it governs this case. The Ninth Circuit's holding in *Diouf II* was broadly worded: "We hold that *individuals* detained under § 1231(a)(6) are entitled to the same procedural safeguards against prolonged detention as individuals detained under § 1226(a)." 634 F.3d at 1084 (emphasis added). The court recognized that § 1231(a)(6) encompasses non-citizens "such as Diouf, whose collateral challenge to his removal order (a motion to open) is pending in the court of appeals, *as well as* to [non-citizens] who have exhausted all direct and collateral review of their removal orders but who, for one reason or another, have not yet been removed from the United States," yet it did not narrow its holding. *Id.* at 1085 (emphasis added). Although there are some differences between class members and Diouf, none of those differences undermine the Ninth Circuit's ultimate concern that "prolonged detention under § 1231(a)(6), without adequate procedural protections, would raise 'serious constitutional concerns.'" *Diouf II*, 634 F.3d at 1086 (quoting *Casas-Castrillon*, 535 F.3d at 950). Class members' current prolonged detention without the opportunity for a hearing before an IJ raises such constitutional concerns. Accordingly, they are entitled to relief.

Diouf II held that non-citizens detained under § 1231(a)(6) should have the same procedural safeguards as those detained under § 1226(a). 634 F.3d at 1086. Ninth Circuit authority thus dictates that class members be afforded custody hearings before an IJ where the Government bears the burden of justifying continued detention by clear and convincing evidence. *Id.* at 1086, 1092; *see also Rodriguez III*, 804 F.3d 1085-89;

Singh, 638 F.3d at 1203. Class members must automatically receive such hearings after they have been detained for 180 days and every 180 days thereafter.[7] *Diouf II*, 634 F.3d at 1092; *Rodriguez III*, 804 F.3d at 1085, 1089. In addition, the custody hearings must comply with the other procedural safeguards established in *Singh* and *Rodriguez III*. As detailed in the Court's proposed Order, the Government should be required to report to the Court on its execution of the Court's order, and the Court should retain jurisdiction over any disputes that arise between the parties on this issue.

In sum, judgment should be granted in class members' favor on the second cause of action. It is past time for the Government to follow the law of this Circuit as established in *Diouf II*.

B. Class members are not entitled to relief on their due process claim

It is well established that the Court must avoid reaching constitutional questions in advance of the necessity of deciding them. *See, e.g.*, *Rosenberg v. Fleuti*, 374 U.S. 499, 451 (1963); *Diouf II*, 634 F.3d at 1086 (declining to reach due process claim where issue could be resolved on non-constitutional grounds). Because the

---

[7] There is one caveat: "If the 180-day threshold has been crossed, but the [non-citizen's] release or removal is imminent, DHS is not required to conduct a 180-day review, *see* 8 C.F.R. § 241.4(k)(3), and neither should the government be required to afford the [noncitizen] a hearing before an immigration judge." *Diouf II*, 634 F.3d at 1092 n.13. However, "DHS should be encouraged to afford a [non-citizen] a hearing before an immigration judge *before* the 180-day threshold has been reached if it is practical to do so and it has already become clear that the [noncitizen] is facing prolonged detention." *Id.* (emphasis in original).

Court has concluded that class members are entitled to relief under § 1231(a)(6), as construed by the Ninth Circuit in *Diouf II*, it should not resolve the question of whether the Government also violated the Due Process Clause. Accordingly, judgment should be granted in the Government's favor on the third cause of action.

CONCLUSION AND RIGHT TO OBJECT

Both the parties' cross-motions for summary judgment (Dkts. 72 & 75) should be **GRANTED** in part and **DENIED** in part. A proposed Order that provides additional details regarding this recommendation is attached.

This Report and Recommendation is not an appealable order. Therefore a notice of appeal seeking review in the Court of Appeals for the Ninth Circuit should not be filed until the assigned District Judge enters a judgment in the case. Objections, however, may be filed and served upon all parties no later than **February 7, 2018**. The Clerk should note the matter for **February 9, 2018**, as ready for the District Judge's consideration if no objection is filed. If objections are filed, any response is due within 14 days after being served with the objections. A party filing an objection must note the matter for the Court's consideration 14 days from the date the objection is filed and served. The matter will then be ready for the Court's consideration on the date the response is due. Objections and responses shall not exceed ten pages. The failure to timely object may affect the right to appeal.

DATED this 23rd day of Jan., 2018.

/s/ BRIAN A. TSUCHIDA
BRIAN A. TSUCHIDA
United States Magistrate Judge

APPENDIX F

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

Case No. C16-1454JLR-BAT

ARTURO MARTINEZ BAÑOS, ET AL.,
PLAINTIFFS-PETITIONERS

v.

NATHALIE ASHER, ET AL., DEFENDANTS-RESPONDENTS

Filed: Dec. 11, 2017

ORDER ADOPTING REPORT AND RECOMMENDATION

I. INTRODUCTION

This matter comes before the court on the Report and Recommendation of United States Magistrate Judge Brian A. Tsuchida (R&R (Dkt. # 67)) and Defendants-Respondents Nathalie Asher, Lowell Clark, Thomas D. Homan, John F. Kelly, James McHenry, and Jefferson B. Sessions's (collectively, "the Government") objections thereto (Objections (Dkt. # 68)). Having carefully reviewed all of the foregoing, along with all other relevant documents, and the governing law, the court ADOPTS the Report and Recommendation (Dkt. # 67).

II. STANDARD OF REVIEW

A district court has jurisdiction to review a Magistrate Judge's report and recommendation on dispositive matters. Fed. R. Civ. P. 72(b). "The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to." *Id.* "A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). The court reviews de novo those portions of the report and recommendation to which specific written objection is made. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). "The statute makes it clear that the district judge must review the magistrate judge's findings and recommendations de novo if objection is made, but not otherwise." *Id.*

III. DISCUSSION

The Government's objections do not raise any novel issue that was not addressed by Magistrate Judge Tsuchida's Report and Recommendation. Moreover, the court has thoroughly examined the record before it and finds the Magistrate Judge's reasoning persuasive in light of that record. Accordingly, the court independently rejects the Government's arguments made in its objections for the same reasons as Magistrate Judge Tsuchida did.

IV. CONCLUSION

For the foregoing reasons, the court ADOPTS the Report and Recommendation (Dkt. # 67) in its entirety. The court DIRECTS the Clerk to send copies of this Order to the parties and to the Honorable Brian A. Tsuchida.

Dated this 11th day of Dec., 2017.

/s/ JAMES L. ROBART
JAMES L. ROBART
United States District Judge

APPENDIX G

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

Case No. C16-1454-JLR-BAT

ARTURO MARTINEZ BAÑOS, ET AL.,
PLAINTIFFS-PETITIONERS

v.

NATHALIE ASHER, ET AL., DEFENDANTS-RESPONDENTS

Filed: Oct. 17, 2017

REPORT AND RECOMMENDATION

INTRODUCTION

The Government[1] has a practice of detaining noncitizens who are subject to reinstated removal orders and who are seeking withholding of removal, for prolonged periods without providing custody hearings before immigration judges ("IJs"). This 28 U.S.C. § 2241 immigration habeas action and putative class action chal-

[1] The respondents in this action are the Seattle Field Office Director for U.S. Immigration and Customs Enforcement ("ICE"), the Acting Director of ICE, the Secretary of the Department of Homeland Security ("DHS"), the Director of the Executive Office for Immigration Review, the Warden of the Northwest Detention Center, and the United States Attorney General.

lenges that practice in the Western District of Washington. Plaintiffs[2] seek injunctive and declaratory relief on behalf of themselves and a class defined as "All individuals who are placed in withholding only proceedings under 8 C.F.R. § 1208.31(e) in the Western District of Washington who are detained or subject to an order of detention."

The Government has filed an amended motion to dismiss plaintiffs' individual claims, Dkt. 57, and plaintiffs have filed an amended motion for class certification, Dkt. 41. As discussed below, the Court recommends that the Government's motion to dismiss be **GRANTED** in part and **DENIED** in part and that plaintiffs' motion for class certification be **GRANTED** subject to amendment of the class definition.[3]

LEGAL FRAMEWORK

A. Reinstatement and withholding only proceedings

If a non-citizen who is removed pursuant to a removal order subsequently reenters the United States illegally, the original removal order may be reinstated by an authorized official. *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 487 (9th Cir. 2007) (en banc); 8 C.F.R. § 241.8.

---

[2] This lawsuit was initiated by Arturo Martinez Baños ("Mr. Martinez"), a native and citizen of Mexico. The amended petition added Edwin Flores Tejada ("Mr. Flores") and German Ventura Hernandez ("Mr. Ventura"), natives and citizens of El Salvador and Mexico, respectively. On July 11, 2017, the Honorable James L. Robart granted the Government's motion to dismiss Mr. Martinez and his claims. Dkt. 53. Mr. Flores and Mr. Ventura are currently the named plaintiffs.

[3] Because the issues have been thoroughly briefed by the parties, oral argument would not be of assistance to the Court. Accordingly, the requests for oral argument are DENIED.

To reinstate a removal order, DHS must comply with the procedures set forth in 8 C.F.R. § 241.8(a) and (b).[4] *Oritz-Alfaro v. Holder*, 649 F.3d 955, 956 (9th Cir. 2012). When DHS reinstates a removal order, "the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the [non-citizen] is not eligible and may not apply for any relief under this chapter, and the [non-citizen] shall be removed under the prior order at any time after the reentry." 8 U.S.C. § 1231(a)(5).

Section 241.8(e), however, "creates an exception by which [a non-citizen] who asserts 'a fear of returning to the country designated' in his reinstated removal order is 'immediately' referred to an asylum officer who must determine if the [non-citizen] has a reasonable fear of persecution or torture in accordance with 8 C.F.R. § 208.31." *Ortiz-Alfaro*, 694 F.3d at 956. If the asylum officer finds that the non-citizen has not established a reasonable fear of persecution or torture, and an IJ affirms this determination, the matter is returned to DHS for execution of the reinstated order of removal without the opportunity to appeal to the Board of Immigration Appeals ("BIA"). 8 C.F.R. § 208.31(g). On the other hand, if the asylum officer makes a positive reasonable

---

[4] These procedures include obtaining the prior order related to the non-citizen, confirming that the non-citizen is the same person who was previously removed, and confirming that the non-citizen unlawfully reentered the United States. 8 C.F.R. § 241.8(a). An immigration officer must then give the non-citizen written notice of the determination that he is subject to removal and provide him with an opportunity to make a statement contesting the determination. 8 C.F.R. § 241.8(b). If these requirements are met, 8 C.F.R. § 241.8(c) provides that the non-citizen "shall be removed" under the prior removal order.

fear determination, the matter is referred to an IJ "for consideration of the request for withholding of removal only." 8 C.F.R. § 208.31(e). The IJ's decision to grant or deny withholding of removal may be appealed to the BIA. 8 C.F.R. § 208.31(g)(2)(ii). Judicial review of the BIA's determination is available in the Court of Appeals. *See Ortiz-Alfaro*, 694 F.3d at 958-60.

In withholding only proceedings, the jurisdiction of the IJ is limited to consideration of whether the non-citizen is entitled to withholding or deferral of removal. 8 C.F.R. § 1208.2(c)(3)(i). If the IJ grants the non-citizen's application for withholding of removal, the non-citizen may not be removed to the country designated in the removal order but may be removed to an alternate country. *See* 8 U.S.C. § 1231(b)(2)(E); 8 C.F.R. § 1208.16(f); *Lanza v. Ashcroft*, 389 F.3d 917, 933 (9th Cir. 2004).

While withholding-only proceedings are pending before the IJ or the BIA, DHS cannot execute a reinstated removal order. *See Ortiz-Alfaro*, 694 F.3d at 957; 8 U.S.C. § 1231(b)(3) ("[T]he Attorney General may not remove [a non-citizen] to a country if the Attorney General decides that the [non-citizen's] life or freedom would be threatened in that country because of the [non-citizen's] race, religion, nationality, membership in a particular social group, or political opinion.").

B. Statutory authority for immigration detention

Two statutes govern the detention of non-citizens in immigration proceedings: 8 U.S.C. § 1226 and 8 U.S.C. § 1231(a). "Where [a non-citizen] 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).

Section 1226 provides the framework for the arrest, detention, and release of non-citizens who are in removal proceedings. 8 U.S.C. § 1226; *see also Demore v. Kim*, 538 U.S. 510, 530 (2003) ("Detention during removal proceedings is a constitutionally permissible part of that process."). Section 1226(a) grants DHS discretionary authority to determine whether a noncitizen should be detained, released on bond, or released on conditional parole pending the completion of removal proceedings, unless the non-citizen falls within one of the categories of criminals described in § 1226(c), for whom detention is mandatory.[5] 8 U.S.C. § 1226.

The Ninth Circuit has repeatedly held that after a non-citizen has been detained under § 1226 for six months, he is entitled to a so-called "*Rodriguez*" custody hearing, at which the IJ must release him on bond or reasonable conditions of supervision unless the government proves by clear and convincing evidence that he poses a flight risk or a danger to the community. *Rodriguez v. Robbins* ("*Rodriguez III*"), 804 F.3d 1060, 1084-85, 1087 (9th Cir. 2015), *cert. granted sub nom Jennings v. Rodriguez*, 136 S. Ct. 2389 (2016); *Rodriguez v. Robbins* ("*Rodriguez II*"), 715 F.3d 1132, 1135 (9th Cir.

---

[5] Although the relevant statutory sections refer to the Attorney General, the Homeland Security Act of 2002, Pub. L. No. 107-296 § 471, 116 Stat. 2135 (2002), transferred most immigration law enforcement functions from the Department of Justice ("DOJ") to DHS, while the DOJ's Executive Office for Immigration Review retained its role in administering immigration courts and the BIA. *See Hernandez v. Ashcroft*, 345 F.3d 824, 828 n.2 (9th Cir. 2003).

2013); *see also Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011); *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 949 (9th Cir. 2008). The Ninth Circuit has based its holdings on the canon of constitutional avoidance, finding that prolonged detention under § 1226 without adequate procedural protections would raise "serious constitutional concerns." *Casas-Castrillon*, 535 F.3d at 950; *Rodriguez III*, 804 F.3d at 1068-69. Most recently in *Rodriguez III*, the court held that IJs must consider the length of detention, and "the government must provide periodic bond hearings every six months so that noncitizens may challenge their continued detention as 'the period of . . . confinement grows.'" 804 F.3d at 1089 (quoting *Diouf v. Napolitano* ("*Diouf II*"), 634 F.3d 1081, 1091 (9th Cir. 2011)).

Section 1231(a) governs the detention and release of non-citizens who have been ordered removed. It authorizes detention in only two circumstances. During the "removal period," detention is mandatory. 8 U.S.C. § 1231(a)(2) (emphases added). The "removal period" generally lasts 90 days, and it begins on the latest of the following: (1) the date the order of removal becomes final; (2) if the removal order is judicially reviewed and if a court orders a stay of the removal of the non-citizen, the date of the court's final order; or (3) if the non-citizen is detained or confined (except under an immigration process), the date the non-citizen is released from detention or confinement. 8 U.S.C. § 1231(a)(1)(B). After the removal period expires, DHS has the discretionary authority to continue to detain certain non-citizens or to release them on supervision. 8 U.S.C. § 1231(a)(6); *Prieto-Romero*, 534 F.3d at 1059.

In *Diouf II*, the Ninth Circuit extended the procedural protections for § 1226 detainees to those detained under § 1231(a)(6), holding "that an individual facing prolonged immigration detention under 8 U.S.C. § 1231(a)(6) is entitled to release on bond unless the government establishes that he is a flight risk or a danger to the community." 634 F.3d at 1082. Specifically, the court held that the government must provide a custody hearing before an IJ to non-citizens who are denied release in their six-month DHS custody reviews and whose release or removal is not imminent. *Id.* at 1091-92 ("When detention crosses the six-month threshold and release or removal is not imminent, the private interests at stake are profound. Furthermore, the risk of an erroneous deprivation of liberty in the absence of a hearing before a neutral decisionmaker is substantial."); *see also 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.").

At the time this lawsuit was filed, the Ninth Circuit had not yet decided whether noncitizens who are subject to reinstated orders of removal and who are in withholding only proceedings are detained under § 1226(a) or § 1231(a). On July 6, 2017, however, the Ninth Circuit held that such individuals are detained under § 1231(a). *Padilla-Ramirez v. Bible*, 862 F.3d 881, 886 (9th Cir. 2017), *pet. for rehearing filed* (Aug. 19, 2017) (holding that reinstated removal orders are administratively final when they are reinstated, even if withholding only proceedings are pending). The court did not address whether the petitioner was entitled a custody hearing once his detention became prolonged. *Id.* at 884.

BACKGROUND

A. Mr. Flores

On December 21, 2015, Mr. Flores was arrested by ICE officers and transported to the Northwest Detention Center. Dkt. 38 at ¶ 77. Because he had been ordered removed previously and had reentered the United States without inspection, ICE reinstated his original removal order. *See id.* at ¶ 76. Mr. Flores expressed a fear of returning to El Salvador and was referred to an asylum officer for a reasonable fear interview. *See id.* at ¶¶ 76-77. The asylum officer found that Mr. Flores demonstrated a reasonable fear of torture and referred his case to an IJ for withholding only proceedings. *Id.* at ¶ 77.

On August 30, 2016, after 252 days in detention, an IJ held a custody hearing but found that she did not have jurisdiction to order his release because his withholding only proceedings were pending. Dkt. 44-1 at 32; Dkt. 38 at ¶ 78. Mr. Flores appealed to the BIA. Dkt. 38 at ¶ 79. While his BIA appeal was pending, he joined this lawsuit. Dkt. 38. On February 3, 2017, the BIA determined that he was entitled to a custody hearing. Dkt. 44-1 at 36-38. On February 16, 2017, the IJ held a custody hearing and denied Mr. Flores's request for release, finding that he presented a flight risk. Dkt. 44-2.

On March 7, 2017, an IJ denied Mr. Flores's application for withholding of removal. Dkt. 57-1 at ¶ 20. The BIA dismissed Mr. Flores's appeal on July 14, 2017. *Id.* at ¶¶ 21-22. On August 5, 2017, Mr. Flores filed a petition for review in the Ninth Circuit Court of Appeals, and his removal was temporarily stayed. Dkt. 60-1 at 5-6.

B. Mr. Ventura

On October 18, 2016, ICE officers arrested Mr. Ventura and transported him to the Northwest Detention Center. Dkt. 38 at ¶ 84. Like Mr. Flores, Mr. Ventura had a prior removal order reinstated and, after expressing a fear of return to his home country, was placed in withholding only proceedings. *Id.* He joined this lawsuit on January 31, 2017, after being detained for 105 days. Dkt. 38. On March 14, 2017, an IJ denied his request for withholding of removal. Dkt. 57-2 at ¶ 8. He did not appeal, and on April 25, 2017, he was removed to Mexico. *Id.* at ¶¶ 9-10.

C. Relevant procedural history

In September 2016, Mr. Martinez, who has since been dismissed, initiated this lawsuit to obtain custody hearings for non-citizens as soon as they were placed in withholding only proceedings or, at the latest, after six months detention. Dkt. 1. He argued that putative class members were subject to detention under 8 U.S.C. § 1226(a), the statute that governs detention of non-citizens before a final order of removal is entered, and therefore were entitled to immediate custody hearings under *Rodriguez III*. Alternatively, he maintained that if detention was authorized by 8 U.S.C. § 1231(a), the statute that provides for detention of non-citizens who are subject to a final order of removal, putative class members were entitled to custody hearings after 180 days in detention under *Diouf II*.

In October 2016, Mr. Martinez filed a motion for class certification, Dkt. 6, and the following month, the Government moved to dismiss his individual claims, Dkt. 16. In February 2017, after receiving leave of the Court, Mr.

Martinez filed an amended habeas petition that brought the same substantive claims as the original petition but added Mr. Flores and Mr. Ventura. Dkt. 38. Plaintiffs also withdrew their original motion for class certification and filed an amended motion. Dkt. 41. The Government then filed a motion to dismiss Mr. Flores's and Mr. Ventura's individual claims. Dkt. 44.

In March 2017, the undersigned recommended that the Government's motion to dismiss Mr. Martinez's individual claims be denied and the motion to dismiss Mr. Flores's and Mr. Ventura's claims be stricken. Dkt. 49. On July 11, 2017, the Honorable James L. Robart declined to adopt recommendation as to Mr. Martinez, dismissing him and his claims because he was not detained at the time he initiated the lawsuit. Dkt. 53. Judge Robart, however, agreed to strike the Government's second motion to dismiss because the motion was filed in violation of the Local Rules. *Id.* Judge Robart referred the matter to the undersigned for further proceedings.

The Government then filed an amended motion to dismiss. Dkt. 56. After that motion was fully briefed, the Court directed supplemental briefing regarding the proposed class definition. Dkt. 62. The Court concluded that the proposed class definition was overbroad and *sua sponte* offered an amended class definition: "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." *Id.* at 2. The Court ordered the parties

to respond to the proposal, which they have done. Dkts. 64-66.

DISCUSSION

A. The Government's amended motion to dismiss

The Government moves to dismiss Mr. Flores's and Mr. Ventura's individual claims. *See* Dkt. 61. It argues (1) Mr. Flores's claims are not ripe, (2) Mr. Flores's and Mr. Ventura's claims are moot, (3) plaintiffs lack standing to seek the requested relief, and (4) plaintiffs' claims fail on the merits. As discussed below, the Government correctly argues that Mr. Ventura's claims are moot and that plaintiffs' first cause of action, which requests immediate custody hearings, should be dismissed. Otherwise, the Government's motion to dismiss should be denied.

1. Legal standards

The Government brings its motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Rule 12(b)(1) permits the court to dismiss a claim for lack of subject matter jurisdiction. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir. 2003). The burden of establishing subject matter jurisdiction rests upon the party asserting jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A Rule 12(b)(1) challenge can be either facial, confining the inquiry to the allegations in the complaint, or factual, permitting the Court to look beyond the complaint to declarations or other evidence in the record. *Savage v. Glendale Union High Sch., Dist. No. 205*, 343 F.3d 1036, 1039 n. 2 (9th Cir. 2003). When considering a factual attack, the Court may "resolve factual disputes concerning the existence of jurisdiction."

McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988). In reviewing a facial attack, the Court applies the same legal standard that it would in considering a Rule 12(b)(6) motion to dismiss. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014).

To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The complaint may be dismissed if it lacks a cognizable legal theory or states insufficient facts to support a cognizable legal theory. *Zixiang v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013). When considering a Rule 12(b)(6) motion, the Court accepts all facts alleged in the complaint as true. *Barker v. Riverside Cnty. Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009).

2. Mr. Flores's claims are justiciable

"Under Article III [of the Constitution], a federal court only has jurisdiction to hear claims that present an actual 'case or controversy.'" *Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)). In a class action, at least one named plaintiff must satisfy Article III's justiciability requirements. *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1044-45 (9th Cir. 1999); *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 1000 n.7 (9th Cir. 2006). The Government argues that Mr. Flores's claims must be dismissed based on the doctrines of standing, ripeness, and mootness, all of which originate in the "case or controversy" requirement. The Court disagrees.

a. Standing

To establish Article III standing, a plaintiff must show (1) an "injury in fact" that is "concrete and particularized" and "actual or imminent," (2) that the injury is fairly traceable to the defendant's challenged conduct, and (3) that the injury is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). "A plaintiff must demonstrate standing separately for each form of relief sought but is not required to demonstrate that a favorable decision will relieve his every injury." *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 655 (9th Cir. 2011) (internal quotation marks and citation omitted). Where a plaintiff seeks prospective injunctive relief, he also must demonstrate "a sufficient likelihood that he will again be wronged again in a similar way." *City of L.A. v. Lyons*, 461 U.S. 95, 111 (1983); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009); *Clark v. City of Lakewood*, 259 F.3d 996, 1007 (9th Cir. 2001). In other words, a plaintiff must establish a "real and immediate threat of repeated injury." *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974); *see also Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006). "Standing is determined by the facts that exist at the time the complaint is filed." *Clark v. City of Lakewood*, 259 F.3d 996, 1006 (9th Cir. 2001).

The Government argues that Mr. Flores does not have standing to seek prospective equitable relief. Dkt. 57 at 16. According to the Government, Mr. Flores must establish that he will remain in custody until January 10, 2018, which is 180 days after the BIA affirmed the denial of withholding of removal. *Id.* As plaintiffs argue, however, the Government's arguments miss the mark by

failing to analyze standing as of the filing of the amended complaint. *See* Dkt. 60 at 7-8. When the amended complaint was filed, Mr. Flores had been detained for a prolonged period of time without a custody hearing. *See* Dkt. 38 at ¶ 23. This satisfies the "injury in fact" requirement. The injury was caused by the conduct that is challenged here—the Government's refusal to provide custody hearings to non-citizens who are in withholding only proceedings and have been detained for 180 days—and would be redressed by a favorable decision. Furthermore, it has been more than 180 days since Mr. Flores finally received a custody hearing, and one of the questions raised in this lawsuit is whether he is entitled to another such hearing. Thus any repeated injury requirement is satisfied. Finally, the Government fails to cite any support for their claim that the 180-day custody hearing clock restarted when the BIA dismissed Mr. Flores's appeal. Mr. Flores has standing.

b. Ripeness

"The ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) (internal quotation marks omitted). It is "designed to separate matters that are premature for review because the injury is speculative and may never occur from those cases that are appropriate for federal court action." *Wolfson v. Brammer*, 616 F.3d 1045, 1057 (9th Cir. 2010) (internal quotation marks and citation omitted). "Ripeness has both constitutional and prudential components. . . . The constitutional component of ripeness overlaps with the 'injury in fact' analysis for Article III standing." *Id.* at 1058. Because

Mr. Flores has sufficiently demonstrated an injury in fact, as explained above, the constitutional component of ripeness is satisfied.

Courts weigh two factors to evaluate prudential ripeness: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). "A claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Wolfson*, 606 F.3d at 1060. "To meet the hardship requirement, a litigant must show that withholding review would result in direct and immediate hardship. . . . " *Id.* (internal quotation marks and citation omitted).

The Government argues that Mr. Flores's claims are not ripe because he has not been detained for more than 180 days since the BIA's decision dismissing his appeal of the denial of withholding. As noted above, the Government cites no authority for their claim. Whether Mr. Flores is entitled to another custody hearing is a question raised in this lawsuit. The issues here are primarily legal, no further factual development is required, and delaying review could prevent Mr. Flores from receiving immediately appropriate relief. Mr. Flores's claims are both constitutionally and prudentially ripe.

c. Mootness

"[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Cnty. of L.A. v. Davis*, 440 U.S. 652, 631 (1979). Mootness and standing "differ in critical respects." *Clark v. City of Lakewood*, 259 F.3d 996, 1006 (9th Cir. 2001). While standing is determined by the facts that exist at the time the action is initiated, mootness inquiries require the Court to assess changing circumstances that arise after the action has begun. *Id.* "The party asserting mootness bears the burden of establishing that there is no effective relief that the court can provide." *Forest Guardians v. Johanns*, 450 F.3d 455, 561 (9th Cir. 2006).

The Government argues that Mr. Flores's claims are moot because he has already received the only relief available to him under § 2241, a custody hearing. Dkt. 57 at 11-12. But, as Mr. Flores notes, he already has been detained for more than 180 days since his custody hearing and his removal is currently stayed. Dkt. 60 at 5 n.2. This lawsuit will decide whether he is entitled to another hearing given the length of his detention. His individual claims are not moot.[6]

---

[6] Even if Mr. Flores's individual claims were moot, the Court would still have jurisdiction over the action under the "relation back" doctrine. *See Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1090-91 (9th Cir. 2011) (describing how the "relation back" doctrine applies in class actions); *Rivera v. Holder*, 307 F.R.D. 539, 548 (W.D. Wash. 2015) (applying the "relation back" doctrine to retain jurisdiction over immigration class action because the plaintiff's claims were "inherently transitory"); *Lyon v. U.S. ICE*, 300 F.R.D. 628, 639 (N.D. Cal. 2014) (holding that immigration detainees' claims were inherently transitory because "the length of [a non-citizen's] detention

3. Mr. Ventura's claims should be dismissed

Unlike Mr. Flores, who remains in detention pending resolution of his Ninth Circuit petition for review, Mr. Ventura's immigration proceedings concluded and he was removed to Mexico. "For a habeas petition to continue to present a live controversy after the petitioner's release or deportation . . . there must be some remaining 'collateral consequence' that may be redressed by success on the petition." *Abdala v. I.N.S.*, 488 F.3d 1061, 1064 (9th Cir. 2007).

The Government argues that Mr. Ventura's individual claims—but not his class claims—are moot because there is no collateral consequence.[7] Dkt. 57 at 13-14; Dkt. 61 at 2. In response, plaintiffs do not assert any collateral consequence. Instead, they argue that Mr. Ventura's claims should not be dismissed because under the "relation back" doctrine, a putative class action can survive the mootness of a named plaintiff's claims. Dkt. 60 at 4-6 (citing, *inter alia*, *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *U.S. Parole Commission v. Geraghty*, 445 U.S. 388 (1980); *Gerstein v. Pugh*, 420 U.S. 103 (1975)).

---

cannot be ascertained at the outset of a case and may be ended before class certification by various circumstances").

[7] As the Supreme Court has explained, "[T]he fact that a named plaintiff's substantive claims are mooted due to an occurrence other than a judgment on the merits does not mean that all the other issues in the case are mooted. A plaintiff who brings a class action presents two separate issues for judicial resolution. One is the claim on the merits; the other is the claim that he is entitled to represent a class." *U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 402 (1980).

Given that there is no remaining collateral consequence, Mr. Ventura's individual claims should be dismissed as moot. Moreover, even assuming the "relation back" doctrine applied here, Mr. Ventura could not represent the amended class because it is limited to those subject to prolonged detention, and Mr. Ventura was never in this situation. Accordingly, Mr. Ventura's individual and class claims should be dismissed.

4. The first cause of action should be dismissed

This action claims that (1) the Government violates 8 U.S.C. § 1226 by failing to provide plaintiffs and putative class members with custody hearings immediately upon their placement in withholding only proceedings, (2) the Government violates 8 U.S.C. § 1101 *et seq.* by failing to provide plaintiffs and putative class members with custody hearings once their detention becomes prolonged, and (3) the Government's policy of denying plaintiffs and putative class members custody hearings violates the Due Process Clause. Dkt. 38 at 24-25.

On July 6, 2017, the Ninth Circuit held that noncitizens in withholding only proceedings are detained under 8 U.S.C. § 1231(a) instead of § 1226. *Padilla-Ramirez*, 862 F.3d at 886. Plaintiffs "recognize that *Padilla-Ramirez* compels dismissal of their claims challenging the government's failure to provide immediate custody hearings." Dkt. 60 at 2. Accordingly, plaintiffs' first cause of action should be dismissed.

Although the Government also seeks dismissal of the remaining claims on the merits, Dkt. 57 at 16-21, there is no serious dispute that the amended petition survives Rule 12(b)(6) review.

B. Plaintiffs' amended motion for class certification[8]

Mr. Flores seeks to represent a class defined as "All individuals who are placed in withholding-only proceedings under 8 C.F.R. § 1208.31(e) in the Western District of Washington who are detained or subject to an order of detention." Dkt. 38 at 22. The Government opposes class certification. As discussed below, the Court should amend the class definition and grant Mr. Ventura's motion.

1. Legal standards

A district court has broad discretion in making a class certification determination under Federal Rule of Civil Procedure 23.[9] *Navellier v. Sletten*, 262 F.3d 923, 941 (9th Cir. 2001); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979). Nonetheless, a court must exercise its discretion "within the framework of Rule 23."

---

[8] The amended motion for class certification was filed when all three plaintiffs were a part of the lawsuit. As noted above, Mr. Martinez has been dismissed, and this Report and Recommendation concludes that Mr. Ventura should be dismissed. Accordingly, the Court will discuss the motion as though it was filed by only Mr. Flores, and it will omit discussion of the parties' arguments regarding Mr. Martinez and Mr. Ventura.

[9] Rule 23 is applicable to habeas actions through Federal Rule of Civil Procedure 81(a)(4), which provides that the Federal Rules of Civil Procedure are applicable to habeas proceedings to the extent that the practice in such proceedings "is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has previously conformed to the practice in civil actions." Fed. R. Civ. P. 81(a)(4). "While 'ordinarily disfavored,' the Ninth Circuit has recognized that class actions may be brought pursuant to habeas corpus." *Rodriguez v. Hayes*, 591 F.3d 1105, 1117 (9th Cir. 2010) (quoting *Cox v. McCarthy*, 829 F.2d 800, 804 (9th Cir. 1987)).

Navellier, 262 F.3d at 941. A district court may certify a class only if the plaintiff establishes:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011); *Rodriguez v. Hayes* ("*Rodriguez I*"), 591 F.3d 1105, 1122 (9th Cir. 2010).

The plaintiff also must fall into one of three categories under Rule 23(b). *Dukes*, 564 U.S. at 345-46; *see also Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 512 (9th Cir. 2013). Mr. Flores seeks certification under Rule 23(b)(2), which provides that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

Rule 23 "does not set forth a mere pleading standard." *Dukes*, 131 S. Ct. at 2551. Certification is proper "only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" *Id.* (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982)).

2. Class definition

Before addressing the Rule 23(a) requirements, the Court must consider the class definition. As the Court previously explained to the parties, the class Mr. Flores seeks to represent—"All individuals who are placed in withholding only proceedings under 8 C.F.R. § 1208.31(e) in the Western District of Washington who are detained or subject to an order of detention"—is overbroad. Dkt. 62. "Where appropriate, the district court may redefine the class." *Armstrong v. Davis*, 275 F.3d 849, 871 n.28 (9th Cir. 2001). Accordingly, the Court proposed an amended class definition: "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" ("the proposed class" or "the class definition"). Dkt. 62 at 2. Mr. Flores approves of this change. Dkt. 64. The Government does not, arguing that even the proposed class cannot be certified under Rule 23. As discussed below, however, the Government's arguments against class certification are not persuasive.

3. Numerosity

The numerosity requirement is satisfied when "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). There is no threshold number of class members that automatically satisfies this requirement. *General Tel. Co. Nw. v. EEOC*, 446 U.S. 318, 330 (1980). "Relatively small class sizes have been found to satisfy this requirement where joinder is still found impractical." *Rivera v. Holder*, 307 F.R.D.

539, 550 (W.D. Wash. 2015); *see also McCluskey v. Trustees of Red Dot Corp. Employee Stock Ownership Plan & Trust*, 268 F.R.D. 670, 673 (W.D. Wash. 2010) (collecting cases, including eight cases that approved of classes comprised of between seven and twenty identifiable members). In determining whether joinder is impracticable when the class size is not great, courts consider factors including "judicial economy, geographic dispersal of the class members, the ability of individual claimants to bring separate suits, and whether plaintiffs seek prospective relief affecting future class members." *Rivera*, 307 F.R.D. at 550.

The evidence before the Court establishes that over the course of a year, there are likely over 90 individuals at the Northwest Detention Center who are subject to reinstatement of removal and are referred to withholding only proceedings after demonstrating a reasonable fear. Dkt. 32 at ¶ 7; *see also* Dkt. 65-1 at ¶ 3 (identifying 58 detainees at the Northwest Detention Center who had reinstated removal orders and were in withholding only proceedings on September 16, 2017); Dkt. 29-2 at ¶ 6 (identifying 70 withholding only cases pending in the Tacoma Immigration Court as of January 12, 2017 for detained individuals). Not all of these individuals are detained for a prolonged period of time, and therefore they may not become members of the proposed class. As of October 2, 2017, however, there were at least 10 individuals at the Northwest Detention Center who would fall within the proposed class. Dkt. 65-1 at ¶ 3.

The parties dispute whether there is sufficient evidence to satisfy the numerosity requirement. *See* Dkt. 41 at 13-18; Dkt. 45 at 20-21; Dkt. 65 at 4-5; Dkt. 66 at 4-6. The Court concludes that although the currently

identifiable class size is small, joinder is impracticable. First, judicial economy will be served best by certifying the proposed class. The primary relief sought is an injunction ordering the Government to provide custody hearings for class members, which would result in a change in the current policy that authorizes prolonged detention without a custody hearing before an IJ. Rather than dealing with class members' claims piecemeal, it would be more efficient to handle them as a group. Second, the proposed class is comprised of people who are likely to have difficulty pursuing their claims individually because of financial inability, lack of representation, lack of knowledge, and perhaps language difficulties. Certifying a class would ensure that they have representation and are able to benefit from any favorable outcome. Finally, Mr. Flores seeks relief that will apply to future class members, and therefore the ultimate number of people affected by a favorable ruling in this case will be greater than 10. *Cf. Rivera*, 307 F.R.D. at 550 (finding joinder impractical "especially given the transient nature of the class and the inclusion of future class members"). For these reasons, numerosity is satisfied.

4. Commonality

To satisfy commonality, a plaintiff must demonstrate that "there are common questions of law or fact to the class." Fed. R. Civ. P. 23(a)(2). Commonality is met through the existence of a "common contention" that is of "such a nature that it is capable of classwide resolution." *Dukes*, 564 U.S. at 350. A contention is capable of classwide resolution if "the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

Accordingly, "what matters to class certification . . . is not the raising of common questions—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Id.* Commonality poses a "limited burden" because it "only requires a single significant question of law or fact." *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 589 (9th Cir. 2012).

Mr. Flores argues that commonality is satisfied because there is a common question of law and fact shared by all class members: whether all individuals in withholding only proceedings with reinstated removal orders are entitled to automatic custody hearings once their detention becomes prolonged, and every six months thereafter. Dkts. 66 at 7; Dkt. 64 at 4; Dkt. 41 at 17-20. The Court agrees. The answer to this central question will decide the case, and if the Court rules in favor of the class, all class members will be entitled to the same relief, namely custody hearings before an IJ. Commonality is satisfied.[10]

5. Typicality

"Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). In determining typicality, courts consider "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have

[10] The Government addresses the commonality and typicality factors together. As their arguments are more directed at typicality, the Court will address them in the next section.

been injured by the same course of conduct." *Id.* at 508. "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014) (quotation marks and citations omitted).

Mr. Flores argues that, like members of the proposed class, he is currently subject to prolonged detention without an opportunity to obtain an individualized custody hearing before an IJ. *See* Dkt. 66 at 4; Dkt. 41 at 21-22. He further contends that he and members of the proposed class are all subject to the Government's uniform policy and practice that denies them custody hearings even after detention becomes prolonged. *See* Dkt. 41 at 21. The Court agrees that Mr. Flores satisfies the typicality requirement. He and members of the amended class suffer the same or a similar injury because they all have been detained for a prolonged period without a custody hearing before an IJ, and their injuries have been caused by the same governmental conduct.

The Government nevertheless argues that Mr. Flores's injury is not the same as other members of the proposed class because he received a custody hearing. Dkt. 45 at 14. While Mr. Flores's injury is not identical to those of class members who have not received a custody hearing, it is similar enough to satisfy the typicality requirement because it has been over 180 days since Mr. Flores's custody hearing, and therefore he, like members of the proposed class, has been detained for a prolonged period without a custody hearing. *See* Dkt. 66 at 7.

The Government also argues that Mr. Flores is not a member of the proposed class because his withholding only proceedings concluded with a denial, and thus he is no longer "placed in withholding only proceedings." Dkt. 65 at 2-3. The class definition, however, applies to individuals who "*were* placed in withholding only proceedings," which includes individuals who are now seeking Ninth Circuit review of the denial of withholding. As such, he continues to be a member of the class.

Finally, the Government asserts the same issues of standing, ripeness, and mootness that the Court discussed above. Dkt. 45 at 11-14, 17-19; Dkt. 65 at 2-3. The arguments remain unpersuasive. Mr. Flores's claims are typical of class members' claims.

6. Adequacy

A plaintiff seeking to represent a class must be able to "fairly and adequately protect the interests" of all class members. Fed. R. Civ. P. 23(a)(4). "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).

Mr. Flores contends that he will fairly and adequately protect class members' interests because he seeks the same relief as class members and has no antagonistic interests. Dkt. 41 at 22-23. He contends that his goal is to successfully challenge the Government's policies regarding detention and custody hearings, which would affect both himself and proposed class members. *Id.* The Government opposes a finding of adequacy on

the same grounds it opposed a finding of commonality and typicality. Dkt. 45 at 19-20. The Court has already addressed those arguments and found them unpersuasive. Mr. Flores is an adequate class representative. Furthermore, based on the declaration of Mr. Flores's counsel, Dkt. 10, the Court is satisfied that class counsel has sufficient experience and will pursue the action vigorously. Adequacy is satisfied.

7. Rule 23(b)(2) certification

Certification of a class is appropriate under Rule 23(b)(2) where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b).

> The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them. . . . In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant.

Dukes, 564 U.S. at 360 (internal quotations and citations omitted).

Mr. Flores argues that Rule 23(b)(2) is satisfied because he challenges and seeks declaratory and injunctive relief from systemic policies and practices that deny

him and proposed class members the right to an automatic custody hearing before an IJ after six months detention and every six months thereafter. Dkt. 41 at 24; Dkt. 66 at 7. The Government responds that a single injunction would not apply to all class members, citing the fact that Mr. Flores already received a custody hearing. Dkt. 65 at 5-6; *see also* Dkt. 45 at 21-22. As discussed above, however, Mr. Flores seeks another custody hearing.

The Government has a policy of detaining proposed class members for prolonged periods of time without a custody hearing before an IJ. This lawsuit challenges that policy. If Mr. Flores prevails, all class members will be entitled to custody hearings after six months of detention and then every six months until they are released. It does not matter whether the class members' withholding only proceedings are pending before an IJ, the BIA, or are being appealed to the Ninth Circuit. A single injunction would address all claims raised. Therefore, the Court concludes that Rule 23(b)(2) is satisfied.

CONCLUSION AND RIGHT TO OBJECT

The Court recommends that the Government's motion to dismiss be **GRANTED** in part and **DENIED** in part. The Court also recommends that plaintiff's amended motion for class certification be **GRANTED** subject to an amended class definition. A proposed Order accompanies this Report and Recommendation.

This Report and Recommendation is not an appealable order. Therefore a notice of appeal seeking review in the Court of Appeals for the Ninth Circuit should not be filed until the assigned District Judge enters a judgment in the case. Objections, however, may be filed

and served upon all parties no later than **November 1, 2017**. The Clerk should note the matter for **November 3, 2017**, as ready for the District Judge's consideration if no objection is filed. If objections are filed, any response is due within 14 days after being served with the objections. A party filing an objection must note the matter for the Court's consideration 14 days from the date the objection is filed and served. The matter will then be ready for the Court's consideration on the date the response is due. Objections and responses shall not exceed 24 pages. The failure to timely object may affect the right to appeal.

DATED this 17th day of Oct., 2017.

/s/ BRIAN A. TSUCHIDA
BRIAN A. TSUCHIDA
United States Magistrate Judge

APPENDIX H

8 U.S.C. 1231(a) provides:

Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed

(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.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(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.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien—

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

(4) Aliens imprisoned, arrested, or on parole, supervised release, or probation

(A) In general

Except as provided in section 259(a)[1] of title 42 and paragraph (2),[2] the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment. Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal.

(B) Exception for removal of nonviolent offenders prior to completion of sentence of imprisonment

The Attorney General is authorized to remove an alien in accordance with applicable procedures under this chapter before the alien has completed a sentence of imprisonment—

(i) in the case of an alien in the custody of the Attorney General, if the Attorney General determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense

---

[1] See References in Text note below.

[2] So in original. Probably should be "subparagraph (B),".

(other than an offense related to smuggling or harboring of aliens or an offense described in section 1101(a)(43)(B), (C), (E), (I), or (L) of this title[3] and (II) the removal of the alien is appropriate and in the best interest of the United States; or

(ii) in the case of an alien in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the incarceration of the alien determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense described in section 1101(a)(43)(C) or (E) of this title), (II) the removal is appropriate and in the best interest of the State, and (III) submits a written request to the Attorney General that such alien be so removed.

(C) Notice

Any alien removed pursuant to this paragraph shall be notified of the penalties under the laws of the United States relating to the reentry of deported aliens, particularly the expanded penalties for aliens removed under subparagraph (B).

(D) No private right

No cause or claim may be asserted under this paragraph against any official of the United States

---

[3] So in original. Probably should be followed by a closing parenthesis.

or of any State to compel the release, removal, or consideration for release or removal of any alien.

(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).

(7) Employment authorization

No alien ordered removed shall be eligible to receive authorization to be employed in the United States unless the Attorney General makes a specific finding that—

(A) the alien cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien, or

(B) the removal of the alien is otherwise impracticable or contrary to the public interest.