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

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* 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

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[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

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[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

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[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

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[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.

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[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.

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[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

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[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.").

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[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

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[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 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 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.

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[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

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[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.

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[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]

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[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)).

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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."

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[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

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[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

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[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

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[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.