Case Nos.: 19-1787, 19-1900
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MARK ANTHONY REID; ROBERT WILLIAMS, on behalf of himself and others similarly situated; LEO FELIX CHARLES, on behalf of himself and others similarly situated

Petitioners - Appellants/Cross - Appellees,

v.

CHRISTOPHER J. DONELAN, Sheriff, Franklin County, Massachusetts; LORI STREETER, Superintendent, Franklin County Jail & House of Correction; THOMAS M. HODGSON, Sheriff, Bristol County, Massachusetts; JOSEPH D. MCDONALD, JR., Sheriff, Plymouth County, Massachusetts; STEVEN W. TOMPKINS, Sheriff, Suffolk County, Massachusetts; KEVIN K. MCALEENAN, Acting Secretary of the Department of Homeland Security; DENIS C. RIORDAN, Director, Immigration and Customs Enforcement Boston Field Office; WILLIAM P. BARR, Attorney General; JAMES MCHENRY, Director of the Executive Office for Immigration Review; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; DAVID DUBOIS, Sheriff, Strafford County, New Hampshire; CHRISTOPHER BRACKETT, Superintendent, Strafford County House of Corrections; MATTHEW T. ALBENCE, Acting Director, Immigration and Customs Enforcement

Respondents - Appellees/ Cross - Appellants,

On Appeal from the United States district court for the District of Massachusetts
The Honorable Patti B. Saris
Case No. 3:13-cv-30125-PBS

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INTRODUCTION AND SUMMARY OF ARGUMENT

The government unlawfully imprisons Petitioners-Appellants ("Petitioners") for at least six months and, in many cases, significantly longer, without ***any*** process to determine whether their incarceration is justified. The district court denied Petitioners' request for automatic, individualized process in immigration court after six months and instead required Petitioners to file *habeas* petitions in federal district court to secure their constitutionally-guaranteed hearing right. This was error. The Fifth and Eighth Amendments entitle Petitioners to bond hearings in immigration court at six months, the latest point at which the Constitution has guaranteed individualized process in any other peace-time context. If this Court declines to require Petitioners' requested relief of traditional bond hearings at six months, it should hold at least that the Due Process Clause requires reasonableness hearings conducted by Immigration Judges (IJs) at that time, to be followed by bond hearings for individuals whose continued categorical mandatory detention is unreasonable.

On the other hand, the district court's class-wide ruling on the ***conduct*** of bond hearings (as opposed to the preconditions for hearings) was correct and should be affirmed, except in one respect. This class action presents the common questions of (1) whether unreviewed, prolonged detention is constitutional; (2) if not, what remedy is proper; and (3) what procedural protections under the Due

Process Clause, including what burden of proof, are required at prolonged detention bond hearings. This case thus satisfies Rule 23(b)(2), regardless of whether the court ultimately sides with Petitioners on all questions. Therefore, contrary to the government's arguments, the district court was correct not to decertify the class *sua sponte* after requiring Petitioners to file *habeas* petitions. Furthermore, the district court's injunction prescribing burdens of proof at bond hearings provides an independent basis for certification. Additionally, longstanding class-action doctrine and practice, and equitable considerations, support preserving the class.

Regarding the merits, contrary to the government's assertions, the district court properly required the government to bear the burden of justifying prolonged detention at Petitioners' bond hearings. The district court had clear authority to order such relief notwithstanding Section 1252(f)(1). The district court also did not abuse its discretion in requiring IJs to consider detainees' ability to pay monetary bond and alternative conditions of release at bond hearings. That relief is consistent with Petitioners' challenges to prolonged detention and required by the Eight Amendment. The district court erred, however, in requiring the government to prove flight risk only by a preponderance of the evidence, because due process mandates a clear and convincing standard with respect to ***both*** dangerousness and flight risk.

Therefore, this Court should: (1) reverse the district court's ruling regarding when bond hearings occur and either (i) order bond hearings or reasonableness hearings at six months, or (ii) remand for the district court to determine, using the correct legal framework, the proper relief for unconstitutionally prolonged no-bond incarceration; (2) affirm the continued class certification; (3) affirm the injunction requiring IJs to consider ability to pay and alternative conditions of release; and (4) affirm-in-part and reverse-in-part as to burden of proof, and instead require the government to prove ***both*** dangerousness and flight risk by clear and convincing evidence.

I. DUE PROCESS AND THE EXCESSIVE BAIL CLAUSE REQUIRE INDIVIDUALIZED PROCESS AT SIX MONTHS OF DETENTION.

Both the Due Process Clause and the Excessive Bail Clause require ***some*** individualized process at six months to justify continued detention. That process should be a bond hearing assessing danger and flight risk. Pet.Br. 48-52; *cf. Diouf v. Napolitano*, 634 F.3d 1081, 1092-93 (9th Cir. 2011) (applying *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), and concluding that due process requires bond hearing for post-order detainees "[w]hen detention crosses the six-month threshold"). But even if this Court disagrees, at a minimum it should hold that the Due Process Clause requires a ***reasonableness*** hearing before an IJ at six months. *See* Pet.Br. 32-48. The district court erred both in rejecting six months as the constitutionally-required point for individualized process despite the overwhelming

use of that threshold in various contexts, Add.2, and in holding that IJs lack authority to conduct reasonableness hearings, Add.31-32.

A. Many Class Members are Neither Dangers nor Flight Risks and Raise Bona Fide Challenges to Removal.

The Constitution requires individualized process because, as the record below establishes, incarceration is often unnecessary to further the government's purposes in detention. Pet.Br. 6-8. The named Petitioners' cases illustrate this. *Id.*, 9-12. Of course, not ***every*** class member merits release, but Petitioners need not establish that to prevail, as they seek only individualized ***hearings*** on that question, not mass release. Nevertheless, IJs have found detention unnecessary for nearly ***half*** the class members who received bond hearings under the original injunction, recognizing they posed neither danger nor flight risk. Add.10. Class members also often won their removal cases: 27% detained during the year preceding that injunction ultimately won. Add.9. Government data from 2018 showed a similar success rate, and data from California showed even more success. Pet.Br. 7-8.

The government never disputes that IJs found detention unnecessary half the time. Instead, the government largely ignores the record evidence, instead relying on outdated and inapposite studies from 25-30 years ago to exaggerate the weight of its interests. *See* Gov.Br. 6-15. Those studies showed noncitizens with criminal convictions, who were never detained in the first place and therefore never

received a bond hearing, often failed to appear and re-offended.[1] Such studies say nothing about the risk posed by individuals released after individualized determinations by IJs, let alone about that risk ***today***, given modern GPS technologies that ensure compliance upon release. Pet.Br. 12 (GPS monitoring ensures 99% appearance rate).[2]

The government's contention that the ultimate success rate for class members is lower than 27%, Gov.Br. 13-14, fails for similar reasons. The government undercounts success rates both because it counts only cases completed "in the relevant discovery period," and therefore excludes those who will win later, Gov.Br. 13, and because it includes those confined for brief periods, who have a

[1] For example, the government quotes a statement from S. Rep. No. 104-48 (1995) that "[m]any criminal aliens who are released pending their deportation never appear for their deportation proceedings." Gov.Br. 7. But the immediately preceding language makes clear that this refers to individuals who were never taken into immigration custody in the first place due to "the INS's chronic lack of detention space," S. Rep. No. 104-48 (1995) at 23.

[2] The government also relies on outdated statements from a 1989 house hearing purportedly suggesting that bond or other alternatives to detention do not work. *See* Gov.Br. 8-9, *citing Hearing on H.R. 3333 Before the Subcomm. on Immigration, Refugees, and International Law, of the House Comm. on the Judiciary*, 101st Cong. 18 (1989) ("1989 House Hearing") at 35, 75. But the government ignores other testimony from the same hearing acknowledging that if "INS comes up with some other mode of keeping track of these people, some new technology," then detention might not be necessary. *Id.* at 75. In the 30 years since this hearing, new electronic monitoring techniques have indeed become available which the government's own data show to be highly effective. *See* Pet.Br. 12 (citing data on Alternative to Detention ("ATD") program).

far lower success rate (because they lack strong defenses that take time to litigate). Pet.Br. 7; Brief of 43 Social Science Researchers and Professors as Amici Curiae in Support of Respondents at 4-5, *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). More fundamentally, Petitioners seek only individualized process, not release; thus, even if many class members merited continued detention (which the government has not shown), mandating detention for ***everyone*** would still be unlawful for those who pose no danger or flight risk. And even if the success rate were below 27 percent, the Constitution would still require individualized process to ensure successful individuals are not needlessly imprisoned prior to winning.

The government also attempts to undermine the injustices suffered by the named petitioners, but fails. Gov.Br. 11-13. Mr. Reid was arrested after an IJ ordered his release, but the Connecticut criminal court subsequently released him on a mere notice to appear, confirming that confinement was unnecessary. Appx.541(¶¶5-8). Nor is Mr. Reid an "aggravated felon." Gov.Br. 11. An IJ concluded otherwise more than 30 months ago, thereby rendering Mr. Reid eligible for previously unavailable relief from removal. Appx.428(¶27). Similarly, after mandatorily detaining Petitioner Charles for more than a year, the government announced he was ***not*** properly subject to mandatory detention and simply released him the day before its brief in his case was due. Appx.431(¶53). An IJ ordered Arnoldo Rodriguez released on bond after more than a year and a half of detention,

based on a similar finding. Appx.431(¶55). The government deported Robert Williams after eleven months of mandatory detention, but he then won his Petition for Review. *Williams v. Barr*, 960 F.3d 68 (2d Cir. 2020). These cases illustrate the senseless cruelty of the mandatory detention regime the government defends.

Finally, the government presents a cherry-picked list of violent crimes that trigger mandatory detention, Gov.Br. 11, but ignores the numerous ***non***-violent crimes the statute also implicates, *e.g.*, gambling or theft, and ignores individuals subject to the statute who were never sentenced to incarceration. Add.10; *Nielsen v. Preap*, 139 S. Ct. 954, 978, 982 (2019) (Breyer, J., dissenting) (statute covers "those who have never been to prison and who received only a fine or probation as punishment" and crimes such as "illegally downloading music" and "possessing stolen bus transfers"). An IJ need not release every class member with a violent criminal history. But absent individualized process, individuals with minor convictions necessarily remain imprisoned for no reason.[3]

B. Supreme Court Precedent and Procedural Due Process Require Individualized Process After 6 Months

Supreme Court precedent does not "implicitly foreclose" a constitutional rule requiring hearings at six months. Gov.Br. 35-36 (citing *Jennings*, 138 S. Ct.

[3] Thus, Petitioners do not "hang their claims" on the sympathetic features of only some class members. Gov.Br. 37. Everyone deserves process so that the subset who warrant release can be identified.

830, *Demore v. Kim*, 538 U.S. 510 (2003), and *Zadvydas v. Davis,* 533 U.S. 678 (2001)). *Demore* and *Zadvydas* ***support*** that requirement, while *Jennings* declined to address it. Pet.Br. 33-37, n.11. Although Petitioners contend the individualized process should be a bond hearing, at a minimum due process requires reasonableness hearings to determine whether a bond hearing is necessary.[4] *See* Pet.Br. 32-52. The government's contrary arguments are meritless.

1. *Jennings*, *Demore*, and *Zadvydas* are Consistent With a Six-Month Rule.

The government asserts *Jennings* rejected a six-month rule, Gov.Br. 35, but *Jennings* explicitly declined to address the constitutional question presented here. 138 S. Ct. at 851.

Demore addressed a constitutional claim, but the petitioner there challenged ***initial*** detention without a bond hearing; *Demore* had no occasion to address the constitutionality of ***continued*** mandatory detention ***beyond six months***. Pet Br. 51.[5] Indeed, *Demore* relied heavily on *Carlson v. Landon*, 342 U.S. 524, 546

[4] The government claims this Court must "presume" the constitutionality of Section 1226(c). Gov.Br. 34 (citing *United States v. Morrison*, 529 U.S. 598, 607 (2000)). But *Morrison* concerned a ***facial*** challenge; neither *Morrison* nor the cases it cited for the "presumption of constitutionality," 529 U.S. at 607, applied that presumption to an ***as-applied*** challenge.

[5] The *Demore* Court believed, based on government-supplied data, that "the vast majority of aliens subject to mandatory detention were detained for no more than five months." Add.15 (citing *Demore*, 538 U.S. at 529-531). The government later admitted that this data was wrong and that the average detention length under

(1952), which also declined to address prolonged confinement. *Demore*, 538 U.S. at 523-525, 531.

Reading *Demore*, as the government does, to implicitly address prolonged detention is also misguided because the law has long recognized that lengthy confinements require more rigorous process than brief ones. For example, criminal law permits arrest and initial detention without a hearing if police have probable cause, but imprisonment beyond 48 hours requires a hearing before a judge. *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 55-56 (1991). Similarly, civil commitment "that is in fact indeterminate cannot rest on procedures designed to authorize a brief period of observation." *McNeil v. Dir., Patuxet Inst.*, 407 U.S. 245, 249-50 (1972) (suggesting "a maximum of six months" as a reasonable limit for observational civil commitment).

The Court recognized the distinction between initial and continued deprivation in *Hamdi v. Rumsfeld*, which addressed the process necessary to detain American citizens as enemy combatants. "[I]nitial captures on the battlefield need not receive … process," but "when the determination is made to ***continue*** to hold" someone, due process requires "some proceeding before a neutral tribunal to determine whether the executive's asserted justifications for that detention have

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Section 1226(c) was 382 days. *Jennings*, 138 S. Ct at 869 (Breyer, J., dissenting); Appx.427(¶24).

basis in fact and warrant in law." 542 U.S. 507, 534, 528 (2004) (plurality opinion) (citing *Zadvydas*, 533 U.S. at 690; *Addington v. Texas*, 441 U.S. 418, 425-427 (1979)) (emphasis in original)

2. The Government's Speedy Trial Analogy Fails.

The government and the district court relied on *Barker v. Wingo*, 407 U.S. 514 (1972), to oppose a six-month trigger for individualized process, but that view ignores important differences between the speedy trial context and this one. Gov.Br. 38 n.9; Add.20. The remedy for speedy trial violations in criminal law is ***dismissal of the indictment***. *Barker*, 407 U.S. at 518. Here, Petitioners do not seek ***release*** after six months, let alone dismissal of charges, but merely an individualized ***hearing*** to determine whether incarceration is required.

Barker also recognized "the right to speedy trial is a more vague concept than other procedural rights" because it is "impossible to determine with precision when the right has been denied." *Barker*, 407 U.S. at 521. In contrast, courts consistently employ time-based rules to enforce the right to individualized consideration for release. *See supra* at 8-9 (citing *McLaughlin*, 500 U.S. at 55-56; *McNeil*, 407 U.S. at 249-250; *Zadvydas*, 533 U.S. 678). Thus, requiring a six-month bond hearing threshold would not be "engag[ing] in legislative or rulemaking activity," Gov.Br. 38 n.9 (quoting *Barker*, 407 U.S. at 523), but would simply be "determin[ing] what procedures would satisfy the minimum

requirements of due process," which courts routinely do. *Landon v. Plasencia*, 459 U.S. 21, 35 (1982).

3. Due Process requires, at a minimum, some individualized process at six months.

If this Court determines that due process does not require bond hearings assessing danger and flight risk at six months, it should still find that due process requires IJs to provide some individualized process – in the form of reasonableness hearings – at that time, consistent with its suggestion in *Reid v. Donelan ("Reid IV")*, 819 F.3d 486, 502 n.5 (1st Cir. 2016). Pet.Br. 25. The government's position that there is ***no*** presumptively unreasonable period of detention without individualized process, not even after one year, is incorrect. Gov.Br. 43.

First, the government cites various statements about due process being "flexible," but none of those preclude time-based rules for providing hearings. Gov.Br. 43-44, 46 (citing, *inter alia*, *Jennings* and *Lujan v. G&G Fire Sprinklers, Inc,* 532 U.S. 189 (2001)). *Jennings*, for example, said due process is "flexible" in the context of instructing the Ninth Circuit to reconsider whether it should maintain a single class including both arriving non-citizens and long-term lawful residents. 138 S. Ct. at 839. While the flexibility of due process might require different procedures for individuals in different circumstances, it hardly follows that this flexibility forbids affording the same procedures to individuals in the same circumstance. Similarly, *Lujan* said that "the very nature of due process negates

any concept of inflexible procedures universally applicable to every imaginable situation" in order to reject the argument that the ***same*** type of process must apply before deprivation of ***different*** liberty interests. 532 U.S. at 196. Thus, these cases are entirely consistent with uniform due process rules for detainees already residing in the United States incarcerated under the ***same*** statute for the ***same*** minimum time period.

Indeed, the Supreme Court often requires consistent minimum sets of procedural protections for particular groups of individuals. For example, *Morrissey v. Brewer*, which *Jennings* cited, 138 S. Ct. at 152, addressed the process required for parolees generally, not just the parolee in that case. 408 U.S. 471, 472 (1972).[6] *See also Woodby v. INS*, 385 U.S. 276, 285, 286 (1966) (imposing "clear, unequivocal, and convincing" evidence standard in *all* deportation cases). The Supreme Court has also protected procedural rights in other contexts by mandating time-based rules. *See, e.g.*, *Maryland v. Shatzer*, 559 U.S. 98, 110 (2010) (Fifth Amendment permits police interrogation of suspects without counsel after fourteen days out of custody); *McLaughlin*, 500 U.S. at 56

[6] *Wilkinson v. Austin* quotes *Morrissey* for the language the government cites (Gov.Br. 48) and likewise addresses the process required generally for placing inmates in maximum-security confinement. *Wilkinson v. Austin*, 545 U.S. 209, 213-214, 224 (2005) (quoting *Morrissey*, 408 U.S. at 481).

(judicial evaluation of probable cause under the Fourth Amendment generally must occur within forty-eight hours after arrest).

The government also contends that its interest in keeping someone detained increases over time. Gov.Br. 45. That may be sometimes true, as when the detainee fails to challenge removability yet still appeals, but sometimes false, as when the detainee raises a bona fide challenge to removal. IJs conducting individualized hearings are best equipped to consider this issue. *Cf. Reid IV*, 819 F.3d at 500 (reasonableness factors include "foreseeability of proceedings concluding in the near future (or the likely duration of future detention)" and "likelihood that the proceedings will culminate in a final removal order").

In contrast, in all cases "[w]hen the period of detention becomes prolonged," "the private interests at stake are profound," and become stronger over time. Pet.Br. 39-41; *Diouf*, 634 F.3d at 1091, 1092; *Diop v. ICE*, 656 F.3d 221, 234 (3d. Cir. 2011) ("the constitutional case for continued detention without inquiry into its necessity becomes more and more suspect as detention continues" beyond six months); *German Santos v. Warden, Pike Cty. Corr. Facility,* No. 19-2663, 2020 WL 3722955, at *5 (3d Cir. July 7, 2020) ("[D]etention 'become[s] more and more suspect' after five months.") (citing *Diop,* 656 F. 3d at 234).

Similarly, that detention beyond one year "may be constitutionally reasonable for one detainee but unreasonable for another," Gov.Br. 47, just proves

the need for individualized hearings – although the appropriate line is six months rather than twelve. That someone's individual circumstances might, upon individualized assessment, justify detention does not mean that there should be no assessment at all. Prolonged incarceration requires hearings, and as *Zadvydas* acknowledged, it is "practically necessary to recognize some presumptively reasonable period of detention" after which the inquiry must occur. 533 U.S. at 700-701. *Zadvydas* set that period at six months. The same logic applies here. Pet.Br. 33-37, 45-47.

C. IJs Have the Authority and are Well-Positioned to Conduct Reasonableness Hearings

The government argues IJs cannot conduct reasonableness hearings because they lack jurisdiction to evaluate challenges to the constitutionality of 1226(c), Gov.Br. 39-40, but this mischaracterizes what reasonableness hearings are. IJs would only ***apply*** the constitutional standard governing whether detention has become unreasonable – a purely factual inquiry. *See* Pet.Br. 22-23.

Immigration courts routinely conduct similar factual inquiries, such as whether an arrest constitutes an egregious violation of the Fourth Amendment. *See, e.g.*, *Corado-Arriaza v. Lynch*, 844 F. 3d 74, 78 (1st Cir. 2016) (suppression inquiry examines whether "the search and seizure at issue amounted to an 'egregious violation[ ] of [the] Fourth Amendment'" (quoting *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 & n.5 (1984))). Notably, there too the

Constitution prohibits ***unreasonable*** conduct, and IJs apply that rule. The government attempts to distinguish that example by characterizing suppression cases as involving violations that are "administratively correctible" by altering immigration court procedures, Gov.Br. 40, but that characterization is false; in a suppression case, the IJ is not correcting the immigration court's procedures, but is instead evaluating whether DHS's conduct transgresses the Constitution.

This Court has previously recognized the practical wisdom of having an IJ (rather than a district court) conduct a reasonableness hearing. *Reid IV*, 819 F.3d at 502 n.5. The government notes this Court vacated *Reid IV* in light of *Jennings*, Gov.Br. 41, but *Jennings* addressed only the construction of Section 1226(c); it said nothing about the scope of an IJ's jurisdiction. This Court's conclusion that IJs can conduct reasonableness hearings remains persuasive, as it is entirely consistent with pre-*Jennings* jurisprudence *Jennings* did not disturb. *See*, *e.g.*, *Lopez-Mendoza*, 468 U.S. at 1050-51 & n.5; *Corado-Arriaza*, 844 F. 3d at 78.

D. The Eighth Amendment Applies

Mandatory detention beyond six months violates the Excessive Bail Clause of the Eighth Amendment. Pet.Br. 52-55. The government contends the Eighth Amendment does not apply (*see* Gov.Br. 48-50), but as explained below, the cases it cites are inapposite.

Carlson held "the Eighth Amendment does not require that bail be allowed under the ***circumstances of these cases***," 342 U.S. at 545-546, not that it did not apply. In *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, the Supreme Court ***declined*** to "go so far as to hold that the Excessive Fines Clause applies just to criminal cases." 492 U.S. 257, 263 (1989). Similarly, *Edwards v. Johnson* did ***not*** hold the Eighth Amendment inapplicable to deportation, but rather held it inapplicable to claims for improper use of segregation. 209 F.3d 772, 778 (5th Cir. 2000). Finally, *Avramenkov v. I.N.S.* held the Eighth Amendment inapplicable to a challenge to mandatory detention at the ***outset*** of proceedings, which is not at issue here. 99 F. Supp. 2d 210, 211-212 (D. Conn. 2000).

Thus, the Eighth Amendment does apply, and the total denial of bail the government defends cannot be reconciled with that Amendment's ancient prohibition on excessive bail. *Cf. Jennings*, 138 S. Ct. at 862 (Breyer, J., dissenting) ("it is not surprising that this Court has held that both the Fifth Amendment's Due Process Clause and the Eighth Amendment's Excessive Bail Clause apply in cases challenging bail procedures").

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FAILING TO DECERTIFY THE CLASS.

Class certification remains appropriate in this litigation for multiple reasons, and the district court did not abuse its discretion in concluding that the government failed to carry its heavy burden to justify decertification. Gov.Br. 24, 66; *Califano*

v. Yamasaki, 442 U.S. 682, 703 (1979) (certification reviewed for abuse of discretion); *Day v. Celadon Trucking Services, Inc.*, 827 F.3d 817, 829-32 (8th Cir. 2016) (defendant bears burden of proof in decertification motion); Newberg on Class Actions § 7:37 (5th ed.) (decertification is "'drastic step,' not to be taken lightly"); *Donovan v. Philip Morris USA, Inc.*, 2012 WL 957633, at *4 (D. Mass. Mar. 21, 2012) (describing defendants' "heavy burden" to justify this "drastic step") (citing cases).

First, Petitioners' central claim—that due process requires individualized review of detention at six months—satisfies Rule 23(b)(2), regardless of whether it is correct on the merits. The district court's rejection of that claim binds class members and does not support decertification.

Second, decertification is not warranted just because the district court ordered relief different from what Petitioners requested. Certification remained proper under Rule 23(b)(2) because the claim the district court remedied was common and the relief ordered—a presumption that detention without a hearing becomes unconstitutional at twelve months, and heightened procedures applicable in every reasonableness hearing—applies equally to every class member.[7]

[7] The district court ordered this relief to effectuate five "common" answers to the common questions here: (1) does the Due Process Clause require a bond hearing after six months of detention pursuant to 1226(c)? (Answer: No); (2) does the Due Process Clause require a "reasonableness hearing" before an Immigration judge

Third, the district court's injunction prescribing burdens of proof at a bond hearing provides an independent basis on which to rest class certification.

Fourth, the district court's ruling is neither speculative nor an advisory opinion. Petitioners asked the district court to determine whether mandatory detention becomes unconstitutional at a point in time. The court did so, establishing a legal rule that mandatory detention is presumed unconstitutional at twelve months.

Finally, equitable considerations, including judicial efficiency and access to justice, strongly favor preserving the class.

A. Whether Due Process Requires Individualized Process at Six Months of Detention Is a Common Question That Satisfies Rule 23(b)(2).

The principal question raised by the class is whether due process requires individualized process—either a bond or reasonableness hearing—when mandatory detention exceeds six months. Appx.269. A common answer to this question, applicable to the whole class, exists. Therefore, this case satisfies the requirements of Rule 23(b)(2), regardless of how it is resolved on the merits.

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after six months of detention under 1226(c)? (Answer: No); (3) is there ***some*** point in time at which detention is conclusively or presumptively unreasonable under the Due Process Clause? (Answer: Yes, presumptively unreasonable at twelve months); (4) does the Due Process Clause require the government to bear the burden at prolonged detention hearings and to meet that burden by clear and convincing evidence? (Answer: Yes); and (5) does the Eight Amendment bar an Immigration Judge from setting excessive bail at such hearings? (Answer: Yes).

The government wrongly argues that once the district court "reject[ed] the class's entitlement to bright-line relief," it "was obligated to decertify the class" under Rule 23(b)(2). Gov.Br. 24. Certification remains appropriate where the government is acting "on grounds that apply generally to the class" and the relief ordered applies to "the class as a whole." Fed. R. Civ. P. 23(b)(2). Here, the court issued (1) a declaratory judgment that individual detention of one year or more is presumptively unreasonable, to be determined on an individual basis in a habeas petition; and (2) an injunction providing certain procedural safeguards at bond hearings for class members whose mandatory detention is found to be unreasonably prolonged. Add.2-4. Decertification is not warranted, as the government proposes, simply because the district court did not grant the particular ***form*** of relief Petitioners sought.

The government contends decertification is necessary because the six-month bond hearing claim was "the ***only*** issue common to the class," and once Petitioners lost it, "no remaining basis existed to award 'relief respecting the class as a whole.'" Gov.Br. 25 (emphasis original) (citing Fed. R. Civ. P. 23(b)(2)). The government is twice wrong. The district court identified five common questions, *see supra* n.7, and the relief it afforded governs every class member, satisfying Rule 23(b)(2).

To the extent the government challenges commonality under Rule 23(a), it also fails. A rejection of the Class's merits claim does not undermine commonality, because it applies to all members. Certification "requires a showing that ***questions*** common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen, Inc. v. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 459 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (requiring "a common contention," the adjudication of which "will resolve an issue that is central to the validity of each one of the claims in one stroke").

B. The District Court's Declaratory Relief Order Satisfies Rule 23(b)(2) Because it Applies to "the Class as a Whole."

The government also errs in arguing the declaratory relief is not "relief respecting the class as a whole." Gov.Br. 25. The declaratory judgment provides a common answer to a common question: whether prolonged mandatory detention without any individualized process violates due process, and if so, when? The judgment also establishes class members' right to (i) a bond hearing when a habeas court determines their detention has become unreasonable; and (ii) the presumption

that detention without review of more than a year is unreasonable. Rule 23(b)(2) requires no more.[8]

The government nonetheless argues for decertification because the remedy does not "provide relief to each member of the class," presumably because it does not entitle each class member to a bond hearing. Gov.Br. 25-27 (citing *Jennings,* 138 S. Ct at 85). However, Rule 23(b)(2) does not require that every class member obtain ***individual*** relief as a result of a ***class-wide*** remedy. *See Manker v. Spencer*, 329 F.R.D. 110, 119 (D. Conn. 2018) (in challenge to Navy procedures, holding Rule 23 satisfied even where some class members "would still be denied" under corrected process, because "the merits of any individual [Navy] review is not at issue in this lawsuit. The ***process*** is what is at issue") (emphasis in original). While class members' individual outcomes in *habeas* proceedings and bond hearings will vary, this has no bearing on the court's procedural remedy for the class-wide due process claims. The relief ordered by the court satisfies (b)(2)'s

[8] In answering the common question, the district court found the central requirement of a (b)(2) class—that the Defendant "has acted or refused to act on grounds that apply generally to the class"—satisfied. Fed. R. Civ. P. 23(b)(2); NEWBERG ON CLASS ACTIONS § 4:28 (5th ed.) ("The requirement focuses on the defendant and questions whether the defendant has a policy that affects everyone in the proposed class in a similar fashion."); *see also Gomes v. Acting Sec'y, U.S. Dep't of Homeland Sec.*, No. 20-CV-453-LM, 2020 WL 2113642, at *3 (D.N.H. May 4, 2020) (provisionally certifying (b)(2) class of ICE detainees based on conclusion that "uniform, indivisible remedy"—such as "a declaratory judgment finding that respondents' policies or practices violate civil detainees' Fifth Amendment Due Process rights"—would be possible).

requirement to apply to the whole class, even if it does not entitle all class members to individually prevail.[9]

The government's reliance on dicta from *Jennings* appears to rest on an erroneous view of *Jennings* as having interpreted *Wal-Mart* as questioning the continued propriety of resolving due process claims via class actions. Gov.Br. 27 (quoting *Jennings*, 138 S. Ct at 851 (citing *Wal-Mart*)). In fact, *Wal-Mart* ***reaffirmed*** the validity of civil-rights class actions, stating: "[c]ivil rights cases against parties charged with unlawful, class based discrimination are prime examples of what [Rule 23(b)(2)] is meant to capture." 564 U.S. at 361 (internal quotation marks omitted). Since *Wal-Mart* and *Jennings*, numerous courts have recognized the propriety of certifying classes under Rule 23(b)(2) to address due process and other civil rights claims, even where class members are differently situated in their entitlement to final relief.[10]

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[9] *Trinh v. Homan* is not to the contrary. 2020 WL 3396620 (C.D. Cal. 2020); *see* Gov.Br. 28. The petitioners in *Trinh* sought a class-wide declaration that each individual class-member had satisfied a burden under *Zadvydas*, 533 U.S. 678, "in hypothetical future cases." *Trinh*, 2020 WL 3396620, at *9. The district court denied summary judgment because some class members could not actually satisfy that burden. *Id.* By contrast, the class-wide framework established by the district court here allows for assessment of individual circumstances.

[10] *See Savino v. Souza*, No. 20-10617-WGY, 2020 WL 1703844, at *8 (D. Mass. Apr. 8, 2020) (certifying (b)(2) class of immigration detainees at single facility alleging risk of COVID-19 infection in violation of substantive due process, despite significant variation among health risk factors); *Yates v. Collier*, 868 F.3d 354, 363 (5th Cir. 2017) (affirming class certification of all prisoners in overheated

Many landmark due process class actions have asserted similar rights to individualized process. *See*, *e.g.*, *Califano*, 442 U.S. 702, 704 (affirming certification of nationwide class and establishing right to hearing in cases involving recovery of excess benefits even where only some class members would be eligible for relief); *Lopez v. Williams*, 372 F. Supp. 1279, 1292 (S.D. Ohio 1973), *aff'd sub nom. Goss v. Lopez*, 419 U.S. 565, 584 (1975) (establishing right to hearing to contest school disciplinary measures for 23(b)(2) class of suspended public school students even though the reasons for their respective suspensions varied); *cf. Haitian Refugee Ctr., Inc. v. Nelson*, 694 F. Supp. 864, 876-78 (S.D. Fla. 1988), *aff'd*, 872 F.2d 1555 (11th Cir. 1989), *aff'd sub nom*. *McNary v. Haitian Refugee Center*, 498 U.S. 479, 488 (1991) (certifying Rule 23 class of applicants challenging procedures in immigration amnesty program where individual members were differently situated in eligibility for relief).

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prison alleging violations of the Eighth Amendment and disability statutes, despite variations in health and risk) (cited approvingly in *Parent/Professional Advocacy League v. City of Springfield, Massachusetts*, 934 F.3d 13, 28 (1st Cir. 2019)); *Zepeda Rivas v. Jennings*, 2020 WL 2059848, at *1 (N.D. Cal. Apr. 29, 2020) (provisionally certifying class of all ICE detainees at two separate facilities on alleged violation of due process right against unreasonable risk of infection, even though it is likely that "some people would need to be released" while others would not); *Manker v. Spencer*, 329 F.R.D. 110 (D. Conn. 2018) (certifying nation-wide class of post-9/11 veterans in challenge to procedures at military review board); *Skaar v. Wilkie*, 32 Vet. App. 156 (2019) (*en banc*) (certifying class of veterans challenging VA procedure to calculate levels of radiation exposure).

It is common and appropriate for judges managing complex class actions to decide only certain questions on a class-wide basis by setting a standard, leaving individual determinations to follow under additional procedures. For example, in so-called "*Teamsters* hearings," the district court effectively bifurcates class liability from individual relief proceedings. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 361, 371-72 (1977) (approving district court order adjudicating liability for the class and leaving it to subsequent "individual determinations [to] decid[e] which [class members] were actual victims" entitled to relief).[11] In the modern era of aggregate litigation, district courts have used bellwether trials,[12] Rule 23(c)(4) issue classes,[13] and other

[11] *Teamsters* was brought under the EEOC's Title VII authority, not Rule 23, but the Court modeled the *Teamsters* framework on a Rule 23(b)(2) class action, *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 751 (1976), and this framework is commonly used in (b)(2) classes. *See* Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 Akron L. Rev. 813, 816-818 (2004). Neither the Supreme Court's holding in *Wal-Mart* nor the Seventh Circuit's holding in *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481 (7th Cir. 2012), *see* Gov.Br. 28, calls into question this common feature of complex class cases, as the plaintiffs in both cases failed to prove liability, so the trial courts never proceeded to the individual relief stage.

[12] *See, e.g.*, *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 252 F.R.D. 83, 87 (D. Mass. 2008) (Saris, J.) (explaining that bellwether trial had afforded "the Court the opportunity to understand the complex factual and legal disputes in this difficult area of drug pricing."); Alexandra Lahav, *Bellwether Trials*, 76 Geo. Wash. L. Rev. 576 (2008).

[13] Rule 23(c)(4) issue classes that decide a common question only as to liability "will often be the sensible way to proceed." *Butler v. Sears, Roebuck & Co.*, 727

practical approaches in resolving some issues on a class-wide basis while channeling individual claims through some further process. *See e.g., In re Deepwater Horizon*, 732 F.3d 326, 329-32 (5th Cir. 2013) (describing structure of settlement for business economic loss claims); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 854 (6th Cir. 2013) ("[D]etermination of damages 'may be reserved for individual treatment with the question of liability tried as a class action.").

The district court's order here is entirely consistent with these approaches. The court set a standard governing when individual detention becomes unconstitutionally prolonged, defined the relief required when the standard is met (a constitutionally adequate bond hearing), and left it to future proceedings to apply that standard in individual cases. While the court erred in concluding that IJs cannot conduct "reasonableness hearings," Pet.Br. 31, the basic structure of relief adopted—class-wide setting of a common standard, with individualized applications of that standard—was sound and consistent with the above-mentioned common-sense practices. Because this relief applies to all class members, it

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F.3d 796, 800 (7th Cir. 2013); *see also id.* ("A class action limited to determining liability on a class-wide basis, with separate hearings to determine . . . the damages of individual class members . . . is permitted by Rule 23(c)(4)"); Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. Rev. 846, 870-71 (2017).

satisfies Rule 23(b)(2), even though members are differently situated in their ability to establish entitlement to bond hearings.

C. Class Claims About Burden and Standard of Proof Are an Independent and Sufficient Basis for Maintaining Certification.

The government ignores the common questions surrounding the standard and burden of proof in prolonged detention bond hearings. As the government itself acknowledges, Gov.Br. 16-19, Petitioners have litigated these issues for years. The District Court previously rejected these claims; Petitioners cross-appealed; and this Court did not reach the issues in its withdrawn 2016 decision. The government's failure to address these common questions is fatal to its attack on class certification. The relief ordered by the district court, setting forth the standards due process requires in any prolonged detention hearing, applies to the entire class, even if not all class members receive a detention hearing. "[T]he existence of differences among members of the Plaintiff class does not make certification improper." *Connor B. ex rel. Vigurs v. Patrick*, 272 F.R.D. 288, 297 (D. Mass. 2011). "[I]t is not uncommon . . . to certify class actions in which alleged systemic deficiencies resulted in harms that manifested themselves differently among different segments of the plaintiff class." *Id.* (citing cases). After *Wal-Mart,* the *Connor B.* court declined to reconsider the class, comprised of children in state custody, noting that the alleged "specific and overarching

systemic deficiencies within DCF that place children at risk of harm," and that impeded individualized discretionary assessment, functioned as "the 'glue' that unites Plaintiffs' claims." *Connor B., ex rel. Vigurs v. Patrick*, 278 F.R.D. 30, 34 (D. Mass. 2011).

Indeed, the district court has independently maintained a (b)(2) class based on the very same standard and burden questions at issue here, under a parallel provision of the Immigration and Nationality Act. *See Brito v. Barr*, 395 F. Supp. 3d 135, 147–48 (D. Mass. 2019) ("The class presents multiple common legal questions . . . Does due process require that the Government bear the burden of proof at a bond hearing? If so, what standard of proof must the Government satisfy?"). *Brito* class members who previously had a bond hearing subject to an improper burden and standard of proof could petition a habeas court for a new bond hearing upon an individualized showing of prejudice, mirroring the habeas relief structure for *Reid* class members. *Brito*, 395 F. Supp. 3d at 148.

That Petitioners' claims for due process protections at bond hearings ***independently*** suffice to sustain certification is further supported by *Abdi v. McAleenan,* 405 F. Supp. 3d 467 (W.D.N.Y. 2019), a case the government cites to support decertification. Gov.Br. 27-28. The *Abdi* class claimed only that due process requires bond hearings at six months. In justifying decertification of that class, the *Abdi* court distinguished *Reid*: "[T]he *Reid* court issued declaratory class

relief explaining the constitutional rights of the § 1226(c) class and granting a permanent injunction outlining the procedures to be afforded at any bond hearing held pursuant to that court's decree. . . Here, [the *Abdi*] Petitioners have sought no such relief." *Abdi*, 405 F. Supp. 3d at 482–83.

In short, the district court's conclusions regarding the standard and burden of proof at bond hearings are common answers to common questions for all class members and independently suffice to maintain the class.

D. Declaratory Relief for the Class Making Detention of one Year Presumptively Unreasonable is Appropriate.

The government argues separately that the district court issued an "advisory" opinion contravening Article III insofar as it held that confinement beyond one year would "likely" be unconstitutional absent a bond hearing, even though the certified class includes all individuals incarcerated more than six months. Gov.Br. 29-30. This Court need not consider this argument if Petitioners prevail on either of their primary contentions—that the Constitution requires bond hearings after six months, *see* Pet.Br. 45-52, or that the Constitution requires reasonableness hearings after six months, *id.*, 35-45.

If the Court rejects those contentions, it should nonetheless reject the government's advisory opinion argument. The district court's ruling is not advisory, as it provides a legal rule applicable to all class members: those confined less than one year are unlikely to establish their mandatory confinement

unconstitutional, whereas those confined more than one year are. That rule generates "common ***answers*** apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350 (internal quotation marks omitted). Indeed, courts rejecting the bright line rule Petitioners advocate have nevertheless consistently adopted guidelines, albeit usually shorter than that adopted by the district court here. *See, e.g.*, *Chavez-Alvarez v. Warden, York Cty. Prison*, 783 F.3d 469, 477-78 & n.11 (3d Cir. 2015) (specifying that bond hearings are required at some time between six months and one year to give guidance to lower courts); *German Santos*, 2020 WL 3722955 at *5 (following *Chavez-Alvarez*); *Sopo v. U.S. Atty. Gen.*, 825 F.3d 1199, 1217 (11th Cir. 2016) (bond hearing "likely [required] in the six-month to one-year window"), *vacated as moot*, 890 F.3d 952 (11th Cir. 2018).

Respondents argue the district court's ruling is infirm because there is "no live controversy" as to whether mandatory confinement beyond one year is permissible. Gov.Br. 30. This confuses the rule Petitioners advocate with the facts of class members' cases. The median length of confinement for class members is 363 days; so nearly half are held longer than one year. *See* Pet.Br. 5. The district court's declaratory judgment informs class members of the substance of their due process rights for the duration of their incarceration. Thus, there is unquestionably a "live controversy" for all class members concerning the legality of imprisonment without bond hearings beyond one year.

E. Equitable Considerations Strongly Favor Maintaining the Class.

Equitable considerations also warrant maintaining certification. *See*, *e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (drafters of Rule 23 sought to cover cases "in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated") (internal quotations and citations omitted). Decertification would undermine this purpose by allowing the parties to relitigate all the issues already decided in this case.

Class members are bound by the resolution of class claims, regardless of whether they fully prevail. *See, e.g., Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) ("a judgment in a properly entertained class action is binding on class members in any subsequent litigation"); NEWBERG ON CLASS ACTIONS § 18:29 (5th ed.). The district court's judgment resolves multiple legal issues: that Section 1226(c) mandatory detention becomes an unconstitutional deprivation of liberty at some point in time; that mandatory detention is not *per se* unreasonable at six months; and that a presumption exists that detention becomes unreasonable after one year. The judgment also identifies additional factors to guide the determination of when such detention becomes prolonged in violation of due process, and procedures binding on the government when a bond hearing is required. Add.47-48.

Because a class remains certified, the parties cannot re-litigate these issues. If the class were decertified, however, all current and future *Reid* class members would be free to re-litigate the constitutionality of 1226(c) detention under a variety of theories. Additionally, the government would escape the preclusive effect of the burden of proof to be applied when a constitutionally-adequate bond hearing is required. This anomalous result runs counter to a core purpose of class litigation in promoting efficiency via claim and issue preclusion.

Moreover, even if this Court were to affirm the district court's (incorrect) holding that detention becomes presumptively unreasonable after one year, class certification at six months remains necessary for class members to avoid deprivations of due process. The one-year presumption set forth by the district court is rebuttable, and at least one class member was denied a bond hearing despite detention of over a year. *Sabri v. Moniz*, No. 20-10837-PBS (D. Mass. June 19, 2020). On the other hand, district courts in this Circuit have twice granted bond hearings to *Reid* class members who filed habeas petitions earlier than one year, based on the totality of their individual circumstances. *See*, *e.g.*, *Da Graca v. Souza*, No. 20-CV-10849-PBS, 2020 WL 2616263, at *3 (D. Mass. May 22, 2020) (detained about eight months); *Espinal Alvarado v. Moniz*, No. 20-10309-PBS, 2020 WL 1953610, at *2 (D. Mass. Apr. 23, 2020) (detained for "almost eleven months"). As these decisions demonstrate, class members could present

compelling reasons why they should be granted *Reid* bond hearings even before they reach the rebuttable one-year presumption set by the district court.

The class should also remain certified for practical reasons. Defendants must notify class members and Petitioners' counsel when new detainees vest into the class. Appx.16(Dkt. 142). This requirement ensures class members receive notice of their *Reid* rights and can timely seek relief—either before or after one year of incarceration, depending on their circumstances. Federal litigation is "complicated and time-consuming" for imprisoned noncitizens who often speak no English, have no formal legal training, and are frequently unrepresented. *Reid IV*, 819 F.3d at 498. Similarly, class counsel needs time to gather information on newly vested class members to advise them of their *Reid* rights, how best to seek release, and to help them identify habeas counsel. Mary Holper, *The Great Writ's Elusive Promise*, Crimmigration Blog, http://crimmigration.com/2020/01/21/the-great-writs-elusive-promise (January 21, 2020) (cataloging challenges posed by federal habeas requirement for incarcerated individuals and *pro bono* counsel).

Further, habeas filings remain pending before federal district courts for lengthy periods. *See*, *e.g.*, *De Jesus v. Charles*, 1:19-cv-11476-WGY (D. Mass. 2020) (denying government motion to dismiss as moot eight months after *Reid* habeas petition filed); *Lemonious v. Streeter*, 3:19-cv-30038-MGM, Dkt. Nos. 26, 27 (D. Mass. Feb. 14, 2020) (granting petition nearly eleven months after *Reid*

habeas filed); *Evariste v. DHS*, 1:19-cv-11144-DJC, Dkt. No. 40 (D. Mass. November 11, 2019) (decision on *Reid* claim issued more than three months after petitioner moved *pro se* for bond hearing). Preventing class members from receiving notice of their *Reid* rights at six months would frustrate the counseling and efforts to secure *habeas* counsel currently undertaken by class counsel and would inevitably result in more needless incarceration.

F. Alternatively, the Class Should not be De-Certified, but Remanded for Consideration of Modification.

If, despite the arguments above, this Court believes the district court may have abused its discretion in declining to decertify, decertification by this Court would nonetheless be improper. The government did not request that relief from the district court in the year since its summary judgment decision. Gov.Br. 20-21; *cf.* Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment"); *id.* 59(e) (motion to alter or amend judgment "must be filed no later than 28 days after the entry of the judgment"); *id.*, 60(b), (c) (specifying grounds on which party may seek relief from judgment "no more than a year after the entry of the judgment or order").[14] The district court that has supervised this long-running, complex litigation should have

[14] The district court declined to grant the government's decertification motion nearly two years ago, instead granting Plaintiffs' motion to expand the class. Appx.44(Dkt. 416). Tellingly, the government did not appeal that ruling. *Cf.* Fed. R. Civ. P. 23(f) (allowing appeal from orders pertaining to class certification).

the first opportunity to consider whether, in light of its disposition of the summary judgment motions, it is appropriate to decertify the class, modify the class, or take other action in light of this Court's disposition of this appeal.

The district court may consider maintaining the class through an alternative legal framework outside Rule 23[15] or re-defining the class to include, *e.g.*, those detained twelve rather than six months. Even under a modified definition, individuals should nonetheless vest into the class ***before*** they reach any time threshold at which detention becomes presumptively unreasonable, as those detained more than twelve months plainly have relief appropriate to them.[16]

[15] Petitioners have argued throughout the litigation that the class may also be maintained as a representative habeas class pursuant to *United States ex rel. Sero v. Preiser*, 506 F.2d 1115 (2d Cir. 1974). *E.g.*, Appx.57 n.2; Appx.282(¶58).

[16] The government's conclusory assertion that the court's declaration does not "correspond" to the injunction and that therefore decertification is required is inapt. Gov.Br. 28-29. In (b)(2) classes, "[d]eclaratory relief 'corresponds' to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief." Rules Advisory Committee Notes, 39 F.R.D. 69, 102 (1966). The declaratory judgment serves as the basis for the remedial scheme the court outlined, including factors for individualized hearings and procedures for bond hearings, therefore it adequately "corresponds" to its injunctive relief.

III. THE DISTRICT COURT DID NOT ERR IN REQUIRING THE GOVERNMENT TO BEAR THE BURDEN OF JUSTIFYING PROLONGED DETENTION.

A. Section 1252(f)(1) Did Not Restrict the District Court's Authority to Require the Government to Bear the Burden of Proof.

Section 1252(f) provides, "[n]o court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain ***the operation of [8 U.S.C. 1221–32]*** other than with respect to the application of such provisions to an ***individual alien against whom [removal] proceedings have been initiated***" (emphases added). The government's claim that Section 1252(f)(1) deprived the district court of authority to require bond hearings conforming to constitutional requirements, *see* Gov.Br. 32-34, is wrong for two reasons.

First, the government ignores Section 1252(f)(1)'s exception clause, which permits injunctions granted "with respect to…an individual alien against whom [removal] proceedings have been initiated." Through the exception clause, "Congress meant to allow litigation challenging the new system by, and only by, ***aliens against whom the new procedures had been applied***." *American Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1359-60 (D.C. Cir. 2000) (emphasis added). All class members are such individuals; therefore Section 1252(f)(1) does not preclude this action.

The government appears to reject *AILA*'s holding, suggesting the exception clause does not apply to injunctions issued in class actions because it refers to "an individual alien." Gov.Br. 34. Not so. As the Ninth Circuit recently explained in detail, the word "individual" in Section 1252(f)(1) is used in contradistinction to organizations, not to foreclose class actions. Thus, the exception clause applies "where the class is composed of individual noncitizens, each of whom is in removal proceedings and facing an immediate violation of their rights, and where the district court has jurisdiction over each individual member of that class." *Padilla v. ICE*, 953 F.3d 1134, 1151 (9th Cir. 2020). *See also id*. at 1149-51 (citing, *inter alia*, neighboring provision's specific reference to class actions, caselaw interpreting Rule 23, and legislative history).

Were the government correct, Section 1252(f)(1) would prohibit not just class-wide injunctions, but any injunction affording relief to two or more individuals in removal proceedings, even where they are joined in the same case and present materially indistinguishable circumstances. Congress's use of "individual" does not require that absurd result.

Second, as the district court explained, Add.44-45, even where it applies, Section 1252(f)(1) prohibits courts only from "enjoin[ing] the operation of" certain ***statutes***, *i.e.* "[Sections 1221-1231]," not regulations or other sub-statutory

enactments. No statute specifies the burden of proof, therefore no statute was enjoined.

The government wrongly contends that the court enjoined Sections 1226(a) and (e). Gov.Br. 32-33. Section 1226(a) is entirely silent on the burden of proof. It contains no "bond procedures" allocating the burden, Gov.Br. 32; the agency made those rules. Similarly, Section 1226(e) merely limits review of the Attorney General's "discretionary judgment regarding application of [Section 1226]"; as the Supreme Court has repeatedly recognized, it does not encompass constitutional challenges to the Attorney General's detention decisions, let alone injunctions enforcing constitutional constraints on how those decisions should occur. *Demore*, 538 U.S. at 517 (plurality) (holding 1226(e) did not bar constitutional challenge); *Jennings*, 138 S. Ct. at 841 (plurality) (Section 1226(e) does not bar consideration of constitutional entitlement to individualized bond hearing); *Preap*, 139 S. Ct. at 962 (same). *Cf. Hernandez v. Sessions*, 872 F.3d 976, 987 (9th Cir. 2017) (Section 1226(e) does not bar constitutional challenge to manner of setting bond). Thus, an order requiring the agency to conform to constitutional constraints does not contravene Section 1226(e), and therefore is not barred by Section 1252(f)(1).

The government points to *Jennings*' holding that Section 1226(a) does not itself require that it bear the burden of proof, Gov.Br. 33 (citing 138 S. Ct. at 847), but that ruling is entirely consistent with the district court's conclusion that the

statute is ***silent*** on the burden. Add.44-45. And, respectfully, the Sixth Circuit's conclusion in *Hamama v. Adduci* (*see* Gov.Br. 33) that an injunction "restrain[s]" a statute in violation of Section 1252(f)(1) when it enjoins only ***regulations***, but ***not the statute***, is plainly wrong, and indeed "does violence to the text of" Section 1252(f)(1). 912 F.3d 869, 877 (6th Cir. 2018).

Had Congress wanted to forbid injunctions targeting regulations and other sub-statutory directives, it could easily have written Section 1252(f)(1) more broadly. Instead, the focus on ***statutes*** reflects Congress's concern about preemptive challenges to statutory provisions ***Congress*** enacted, rather than to ***agency*** rules. As the House Judiciary Committee stated in its Report recommending enactment of what became Section 1252(f)(1), subparagraph (f):

> limits the authority of Federal courts other than the Supreme court to enjoin the operation of the new removal procedures ***established in this legislation***. These limitations do not preclude challenges to the new procedures, but the procedures will remain in force while such lawsuits are pending. In addition, courts may issue injunctive relief pertaining to the case of an individual alien, and thus ***protect against any immediate violation of rights***.

H.R. Rep. No. 104-469, pt. 1, at 161 (emphasis added).

B. Due Process Requires That the Government Bear the Burden of Proof by Clear and Convincing Evidence.

The district court correctly held that due process requires the government to bear the burden of proof. Add.34. This holding follows from longstanding

Supreme Court precedent requiring the government to justify prolonged imprisonment by clear and convincing evidence.[17]

The Supreme Court has long made clear that, where the government seeks to deprive an individual of a "particularly important individual interest[]," *Addington*, 441 U.S. at 424, it bears the burden of proof by clear and convincing evidence. *See Santosky v. Kramer*, 455 U.S. 745 (1982) (parental termination); *Addington*, 441 U.S. at 432 (civil commitment); *Woodby*, 385 U.S. at 285, 286 (requiring "clear, unequivocal, and convincing" evidence in deportation cases); *Chaunt v. United States*, 364 U.S. 350, 354-55 (1960) (same, for denaturalization). Where the Court has permitted civil detention, it has relied on the fact that the government bore the burden of proof by at least clear and convincing evidence. *See, e.g.*, *United States v. Salerno*, 481 U.S. 739, 750, 752 (1987) (noting "full-blown adversary hearing," requiring "clear and convincing evidence" and "neutral decisionmaker"); *Kansas v. Hendricks*, 521 U.S. 346, 352-53 (1997) (jury trial and proof beyond reasonable doubt). Conversely, the Court has struck down civil detention schemes that place the burden on the detainee. *See Foucha v. Louisiana*, 504 U.S. 71, 81-83 (1992); *see also Zadvydas*, 533 U.S. at 692 (finding post-final

[17] The district court required the government prove danger by clear and convincing evidence, but required only a preponderance of the evidence for flight risk. Add.39-40. Petitioners have appealed the latter ruling for the reasons set forth in their opening brief. Pet.Br. 55-56.

order custody review procedures deficient because, *inter alia*, they placed burden of detainee). These principles apply even more forcefully to prolonged confinement, which requires stronger procedural safeguards. *See id*. at 690 (recognizing need for greater government justification as length of detention increases).

Application of the procedural due process test from *Mathews*, 424 U.S. at 335, further demonstrates that the government must bear the burden by clear and convincing evidence. Petitioners' prolonged incarceration deprives them of a "particularly important" interest. *Addington*, 441 U.S. at 424; *see also Zadvydas*, 533 U.S. at 689.

Unless the government bears the burden by clear and convincing evidence, the risk of erroneous deprivation of that liberty interest in custody hearings is impermissibly high. The government is represented at hearings by attorneys familiar with immigration court procedures, while the noncitizen is by definition detained, often unrepresented, and frequently lacks English proficiency. *See* Pet.Br. 29-30; *see also Reid IV*, 819 F.3d at 498; *Cf. Santosky*, 455 U.S. at 762-63 (requiring clear and convincing evidence at parental termination proceedings because "numerous factors combine to magnify the risk of erroneous factfinding," including that "parents subject to termination proceedings are often poor,

uneducated, or members of minority groups, and "[t]he State's attorney usually will be expert on the issues contested").

Moreover, the government's attorneys are far more able to produce documents and other evidence to meet their burden than are incarcerated class members, who would otherwise be tasked with obtaining records—including court documents, marriage and birth certificates, or actuarial risk statistics—after having spent at least six months in detention, where they have limited access to counsel, the Internet, mail, phone, and a reduced ability to pay for and store records. *See* Pet.Br. 10-11.

Finally, placing the burden on the government imposes a minimal burden. The government has borne the burden in Section 1226(c) bond hearings in Massachusetts since July 2019, pursuant to this injunction. The government has also borne the burden in Section 1226(a) bond hearings in Massachusetts since December 2019, pursuant to the injunction in *Brito v. Barr*, 415 F. Supp. 3d 258, 271 (D. Mass. 2019). It has nonetheless often met its burden to show detention was justified in Section 1226(a) and 1226(c) cases, *see, e.g.*, *Massingue v. Streeter*, No. 3:19-CV-30159-KAR, 2020 WL 1866255, at *5 (D. Mass. Apr. 14, 2020) (finding government met burden to show dangerousness); *Rubio-Suarez v. Hodgson*, No. 20-10491-PBS, 2020 WL 1905326, at *3 (D. Mass. Apr. 17, 2020) (same); *Lemonious*, Dkt. No. 49 (Mar. 4, 2020) (same for 1226(c)).

Consistent with this precedent, the two circuits to squarely address this constitutional issue have held the government bears the burden of justifying prolonged detention by clear and convincing evidence. *See German Santos*, 2020 WL 3722955, at *8 (addressing hearings for § 1226(c) detainees); *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 224 n.12 (3d Cir. 2018) (same, for individuals detained under 8 U.S.C. § 1231(a)(6)); *Singh v. Holder*, 638 F.3d 1196, 1205 (9th Cir. 2011) (same, for individuals detained under 8 U.S.C. § 1226(a)). This Court should adopt the same rule.

The government's contrary arguments fail. The government argues primarily that any bond hearings should follow the procedures applicable to initial detentions under 8 U.S.C. § 1226(a), where the detainee bears the burden. Gov.Br. 50-52. However, that cannot be squared with Supreme Court case law, which requires the government justify ***prolonged*** incarceration by clear and convincing evidence. *See supra*, 38-40. The government accuses the district court of "substitu[ting] its own preferences," Gov.Br. 52, 54, but the government's immigration power is "subject to important constitutional limitations," *Zadvydas*, 533 U.S. at 696, and "the degree of proof required…'is the kind of question which

has traditionally been left to judiciary to resolve.'" *Santosky*, 455 U.S. at 755-56 (quoting *Woodby*, 385 U.S. at 284).[18]

Nor does putting the burden on the government create anomalous results. *Contra* Gov.Br. 51, 61 (arguing that individuals detained under § 1226(c) should not receive more protections than individuals detained under § 1226(a)). The government's argument assumes due process does not ***also*** require that it justify initial detentions under § 1226(a) by clear and convincing evidence.[19] Moreover, it is hardly anomalous to require the government to bear a heavier burden for prolonged detention. The Supreme Court has repeatedly recognized that prolonged detention requires stronger procedural safeguards. *See supra* at 39-40. Moreover, as the Third Circuit noted in *Borbot v. Warden Hudson Cty. Corr. Facility*—a case on which the government itself relies, *see* Gov.Br. 56—unlike § 1226(a) detainees, § 1226(c) detainees are "detained for prolonged periods without being given ***any*** opportunity to apply for release on bond," meaning at no point has a neutral decision-maker even determined if the person's detention is actually justified based

[18] Citing 8 U.S.C. § 1226(e), the government claims it has "unreviewable discretion" to decide what hearing procedures should be provided. Gov.Br. 52. Not so; the Supreme Court and Circuit courts have explicitly held that § 1226(e) bars judicial review only of discretionary determinations, ***not*** of constitutional claims as Petitioners advance here. *See supra*, 37. *See also Saint Fort v. Ashcroft*, 329 F.3d 191, 200 (1st Cir. 2003) (reading § 1226(e) as "applying only to review of the Attorney General's discretionary judgment").

[19] Many district courts have so held. Add.34 (citing cases). The question is currently pending before this Court in several other cases. Gov.Br. 58 n.16.

on his or her facts. 906 F.3d 274, 278-79 (3d Cir. 2018) (emphasis added). Given the severe deprivation of liberty such prolonged imprisonment imposes, the government should bear a greater burden in such cases.

The government's attempt to defend its proposed rule under the *Mathews* framework also fails. First, the government argues—shockingly—that noncitizens lack ***any*** liberty interest against prolonged, arbitrary detention. Gov.Br. 55. The government claims that Petitioners assert a right to reside in the United States, and not a right against unlawful imprisonment. *Id*. But the Supreme Court rejected this very argument in *Zadvydas*, holding that even persons with no right to live in the United States have a fundamental interest in "[f]reedom from . . . physical restraint." 533 U.S. at 690. *See also id*. at 696 (explaining "[t]he choice . . . is not between imprisonment and the alien 'living at large,'" but "between imprisonment and supervision under release conditions that may not be violated").

The government further argues that putting the burden on the government will create an "information asymmetry" and "reward[]" the noncitizen for not sharing information regarding flight risk and danger. Gov.Br. 61. But as explained above, the government, who is represented by counsel at every court hearing, is plainly in a better position to access relevant evidence than the detainee.

See supra at 40-41.[20] The government also cites *Borbot* to argue the procedures currently provided under § 1226(a) suffice, Gov.Br. 56, but the Third Circuit has recently affirmed that the government must bear the burden of justifying prolonged mandatory detention under § 1226(c). *See Borbot*, 906 F.3d at 278; *German Santos*, 2020 WL 3722955, at *8.

Finally, the government argues requiring the government to bear the burden will result in flight and crime and frustrate deportations. *See* Gov.Br. 53, 56-57. But they cite no evidence that IJs will permit these results.[21]

The government's remaining arguments fail. The immigration detention cases the government cites either do not involve prolonged detention or do not even address, much less resolve, the question of burden. *See* Gov.Br. 57-58 (citing *Zadvydas*, *Demore*, *Carlson*, *Jennings*, *Preap*, and *Reno v. Flores*, 507 U.S. 292 (1993)).[22] Indeed, in *Zadvydas*, the Supreme Court found the government's post-

[20] The government cites *Rossi v. United States*, 289 U.S. 89 (1933) and *United States v. Denver & Rio Grande R.R.*, 191 U.S. 84 (1903), *see* Gov.Br. 61, but both cases simply place the burden on a party to provide rebuttal evidence in its possession to respond to the opposing party's case. The district court's ruling in no way conflicts with this principle.

[21] Moreover, although the Supreme Court has recognized the "a public interest in prompt execution of removal orders," *Nken v. Holder*, 556 U.S. 418, 436 (2009), class members by definition are detained while still challenging their removal, and many of them will never be ordered deported from U.S. Add.10.

[22] Nor does the district court's ruling restrict the government to using the "least burdensome means" to effectuate its goals, as the government claims. *See* Gov.Br.

final-order custody review procedures raised serious constitutional questions precisely because they placed the burden on the noncitizen. 533 U.S. at 692. *Demore* never addressed the burden of proof in § 1226(c). 538 U.S. at 531. And the *Flores* Court made clear the case did not involve "[t]he 'freedom from physical restraint'" at issue here. 507 U.S. at 302. The government also invokes *Jennings*, but *Jennings* held only that the text of § 1226(a) did not allocate the burden. 138 S. Ct. at 847-48 ("Nothing in § 1226(a)'s text" authorizes burden requirements). *Jennings* "[did] not reach" "constitutional arguments on their merits." *Id*. at 851.[23]

The government also asserts that *Foucha* and *Addington* do not apply to immigration detention. Gov.Br. 62. But the Supreme Court has relied on civil detention cases to determine the limits on arbitrary immigration detention. *See, e.g.*, *Zadvydas*, 533 U.S. at 690 (citing, *inter alia*, *Foucha*, *Salerno*, and *Hendricks*). And contrary to the government's suggestion, *Demore* does not hold otherwise. Gov.Br. 62 (citing *Demore*, 538 U.S. at 521–22). Nor is the government correct when it suggests a heightened burden of proof applies only to

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53 (quoting *Demore*, 538 U.S. at 528). Where an immigration judge orders release, he or she remains free to impose restrictive forms of supervision, such as electronic monitoring.

[23] Although the dissent in *Jennings* stated that "bail proceedings should take place in accordance with the customary rules of procedure and burden of proof rather than the special rules that the Ninth Circuit imposed," 138 S. Ct. at 882 (Breyer, J., dissenting), the customary rules and burdens for civil detention place the burden of proof on the government. *See supra*, 39-42.

indefinite confinement. Gov.Br. 62-63 (citing *Foucha* and *Addington*). For example, in *Salerno*, the Court upheld hearings over initial detentions under the federal Bail Reform Act based in part on the fact that the government bore the burden of proof at least by clear and convincing evidence. *Salerno*, 481 U.S. at 750.[24]

In sum, due process requires the government to justify prolonged mandatory detention by clear and convincing evidence.

C. The District Court did not Abuse its Discretion in Ordering IJs to Consider Ability to Pay and Alternative Conditions of Release.

The district court properly ordered that, in conducting the bond hearings the court held to be constitutionally required when mandatory detention is unreasonable, IJs must consider (i) a detainee's ability to pay a monetary bond and (ii) alternative conditions of detention. The district court's decision was correct, and defendants do not contend otherwise. Rather, they contend it was outside the scope of relief Petitioners requested, but this is incorrect. The decision should be affirmed or, in the alternative, remanded for further briefing.

[24] The government also cites *Maldonado-Velasquez v. Moniz*, 274 F. Supp. 3d 11 (D. Mass. 2017), but the court expressly ***declined*** to reach the merits of the petitioner's constitutional claim, on the grounds that he was not prejudiced by having to bear the burden of proof at his bond hearing. *Id*. at 13.

1. The district court's decision should be affirmed

The district court correctly concluded that both due process and the Eighth Amendment require an IJ to consider a non-citizen's "ability to pay in setting the amount of bond and alternative conditions of release such as GPS monitoring that reasonably assure the safety of the community and the criminal alien's future appearances." Add.40-41. This holding comports with authority from the Ninth Circuit and several district courts in this circuit, including decisions from the District of Massachusetts currently before this Court. *See Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017); *Brito v. Barr*, 415 F. Supp. 3d 258, 271 (D. Mass. Nov. 27, 2019) (Saris, J.), *appeal pending*; *Doe v. Tompkins*, No. 18-12266, 2019 U.S. Dist. LEXIS 22616, at *5 (D. Mass. Feb. 12, 2019), appeal pending, No. 19-1368 (1st Cir.); *Abdi v. Nielsen*, 287 F. Supp. 3d 327, 338 (W.D.N.Y. 2018); *Dubon Miranda v. Barr*, No. 20-1110, 2020 WL 2794488, at *14 (D. Md. May 29, 2020).

Due process requires consideration of ability to post money bail and consideration of alternative conditions of release. An indigent person cannot be incarcerated "for inability to post money bail" if the individual's "appearance at trial could reasonably be assured by one of the alternate forms of release." *Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir. 1978) (en banc). *Bearden v. Georgia*, 461 U.S. 660 (1983) held a state violates due process where it revokes an

individual's probation due to failure to pay a fine or restitution without first considering the reasons for the failure (including the probationer's financial circumstances) and "alternatives to imprisonment" that might serve the state's "interest in punishment and deterrence." *Id*. at 672. By not considering those factors, the government impermissibly risks imprisoning individuals "simply because, through no fault of [their] own, [they] cannot pay the fine." *Id*. at 672–73. Such imprisonment would not advance any legitimate governmental interest. *See also Turner v. Rogers,* 564 U.S. 431, 447–48 (2011) (state must demonstrate that an individual has the ability to pay child support before imprisoning him for civil contempt for failure to pay); *United States v. Ellis*, 907 F.2d 12, 13 (1st Cir. 1990) ("the government cannot keep a person in prison solely because of indigency.").

The district court's rule is also justified by application of the *Mathews* procedural due process test. *See supra* at 40-41. As to the first *Mathews* factor, it "is beyond dispute," that the private liberty interest at issue, freedom from confinement, is "'fundamental.'" *Hernandez*, 872 F.3d at 993 (*citing Foucha*, 504 U.S. at 80). As to the second factor, when the government determines what bond to set without considering a detainee's financial circumstances, or the availability of alternative conditions of release, there is a significant risk of needless detention. As to the third factor, the government has no legitimate interest in detaining

individuals who have been determined not to be a danger to the community and whose appearance at future immigration proceedings can be reasonably ensured by a lesser bond or alternative conditions. *See Pugh*, 572 F.2d at 1057 ("Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.") (quotation marks omitted). Thus, "the minimal costs to the government of such a requirement are greatly outweighed by the likely reduction it will effect in unnecessary deprivations of individuals' physical liberty." *Hernandez*, 872 F.3d at 993.

The district court was separately correct to hold that where "a criminal alien's mandatory detention becomes unreasonably prolonged and an immigration court holds a bond hearing, the Eighth Amendment prohibits setting bond in an amount greater than necessary to secure the alien's future appearances." Add.42. Here, the Eighth Amendment requires immigration officials to consider a detainee's financial circumstances and non-monetary alternatives to ensure that the terms of release are not "excessive" in relation to their purpose. *Cf. Stack v. Boyle*, 342 U.S. 1, 5, n.3 (1951) (under the Eighth Amendment, "the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant," including "the financial ability of the defendant to give bail"). Where the government's interest in preventing flight can

be addressed by release on bail, "bail must be set by a court at a sum designed to ensure that goal, and no more." *Salerno*, 481 U.S. at 754; *Stack*, 342 U.S. at 5 (stating that "[b]ail set at a figure higher than an amount reasonably calculated [to ensure the defendant's presence at trial] is 'excessive' under the Eighth Amendment").

Courts find bail amounts unconstitutionally excessive where lesser amounts or alternative conditions would prevent danger and mitigate flight risk. *See, e.g., Wagenmann v. Adams*, 829 F.2d 196, 213 (1st Cir. 1987) (finding $500 bail excessive when defendant had no criminal history and was accused of minor violations); *United States v. Leisure*, 710 F.2d 422, 428 (8th Cir. 1983) (finding bail of $1 million and $2 million cash was excessive and ordering release on lesser bond amounts and alternative conditions of supervision); *United States v. Beaman*, 631 F.2d 85, 86-87 (6th Cir. 1980) (finding $400,000 bond excessive and "should be ... substantially less" based on "facts available in this case").

The evaluation of whether bail is "set at a sum greater than that necessary" to satisfy the government's interests, *Salerno*, 481 U.S. at 753-54, must account for a detainee's ability to pay a bond and alternatives. The government's failure to provide such procedures violates Petitioners' Eighth Amendment rights.

2. The district court did not abuse its discretion in providing relief consistent with Petitioners' challenges to prolonged detention

The government argues that Petitioners "never asked for this relief," Gov.Br. 64, and therefore the district court erred in providing it. But this omits key context from the proceedings below. The government briefed this exact issue before this same district court judge in a motion for summary judgment on a habeas petition brought by a *Reid* class member that was argued on the very same day as the cross-motions at issue here. *Bonnet v. Smith*, 1:19-cv-10417-PBS, No. 19 at 15-18 (D. Mass Apr. 26, 2019). It also litigated the issue in a parallel case that was before the same judge as well. *See Brito v. Barr*, 1:19-cv-11314-PBS, No. 68 (D. Mass Aug. 29, 2019). Under those circumstances, the district court did not err – and the government certainly suffered no harm – when the court ordered that same relief on a class-wide basis.

In any event, the relief the district court ordered is consistent with Petitioners' theory of the case—that detention must be reasonably related to its purpose—as well as their prayer for relief. Petitioners' prayer sought "constitutionally valid individualized hearings," Appx.287-288, and "any other relief that this Court may deem fit and proper," Appx.288. Having reached the questions of when bond hearings are constitutionally required, and the burden required at those hearings, the district court was well within its power to

additionally specify the kind of evidence that must be considered at such hearings in order for them to be "constitutionally valid." Indeed, district courts are empowered to "grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Fed. R. Civ. P. 54(c). This is particularly the case where, as here, such relief is consistent with Petitioners' underlying constitutional theory and necessary to provide effective relief from the constitutional injury.

The district court's decision merely articulated what procedures are necessary to ensure that detention bears a "reasonable relation" to the Government's interest in protecting the public and assuring appearances at future proceedings. *Zadvydas*, 533 U.S. at 690. Just as with the questions regarding the timing of bond hearings, Add.31, and burden, Add.38-39, the requirement that IJs consider ability to pay monetary bond and alternatives to detention "guarantees that the decision to continue to detain a criminal alien is reasonably related to the Government's interest[.]" Add.41. Thus, this Court should reject the government's argument that the district court acted improperly in granting this relief and affirm.[25]

[25] Nor can the government argue that it has been deprived of a chance to brief this issue. Having chosen to cross appeal on this portion of the court's order, there was no reason for the government not to brief the claim on the merits here.

In the alternative, this Court should remand the claims to the district court, not dismiss them. Gov.Br. 64-65. The government's reliance on *United States v. Sineneng-Smith*, 140 S.Ct. 1575 (2020), Gov.Br. 64, is misplaced. *Sineneng-Smith* recognizes that the "party presentation principle is supple, not ironclad." 104 S.Ct. at 1579. And the claim dismissed there involved a "contrary theory of the case," *id.,* whereas here the claim is fully consistent with Petitioners' theory.[26] *Gonzales v. Thomas* is also inapposite (*see* Gov.Br. 64) because it concerns the scope of appellate court review of ***agency*** decisions; this is not an agency review proceeding. 547 U.S. 183, 186 (2006). Moreover, to the extent *Gonzales*'s "ordinary remand" rule applies, remand—and not dismissal—is appropriate. *Id* ("the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation") (citations omitted).

Thus, if this Court finds that the district court erred in ordering relief on claims that were not specifically pled or briefed, it should remand these claims to the district court for further briefing rather than dismiss them.

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[26] The defendant in *Sineneng-Smith* had raised "a vagueness argument and First Amendment arguments homing in on her own conduct, not that of others." 140 S. Ct. at 1581. The Court of Appeals found the criminal statute infirm on overbreadth grounds, "project[ing] that [the statute] might cover a wide swath of protected speech" of parties not before the court. *Id.* "Nowhere [in the district court] did [the defendant] so much as hint that the statute is infirm, not because her own conduct is protected, but because it trenches on the First Amendment sheltered expression of others." *Id.* at 1580.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Petitioners-Appellants' Opening Brief, this Court should reverse the district court's order and hold that (1) immigration judges should conduct bond hearings—or at a minimum, reasonableness hearings—for each class member detained beyond six months; and (2) detention pursuant to Section 1226(c) is presumptively unreasonable after six months. Alternatively, this Court should vacate and remand the portion of the district court's order regarding the proper relief for unconstitutionally prolonged no-bond incarceration to permit consideration, under the proper legal framework, of whether—and if so, when and how—immigration judges might make findings regarding the reasonableness of a class member's continued no-bond imprisonment.

Furthermore, this Court should affirm the district court's maintenance of the class as-certified and the district court's order requiring the government to prove danger by clear and convincing evidence and requiring IJs to consider ability to pay and non-monetary alternatives to cash bail. Finally, this Court should require the government to prove flight risk by clear and convincing evidence at any bond hearing involving prolonged incarceration.

Respectfully submitted,

Date: July 30, 2020

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that a true and correct copy of the foregoing Reply Brief of Appellants/Cross-Appellees has been filed with the Clerk of the Court for the United States Court of Appeals for the First Circuit via the CM/ECF system this 30th day of July 2020, to be served on the following counsel of record via ECF:

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