IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-16465

Esteban Aleman Gonzalez, *et al.*,
Plaintiffs-Appellees

v.

William P. Barr, *et al.*,
Respondents-Appellants

On Appeal from the United States District Court
for the Northern District of California at San Francisco
No. 3:18-cv-01869-JSC
(Honorable Jacqueline Scott Corley
United States Magistrate Judge)

Plaintiffs-Appellees' ANSWERING BRIEF

Marc Van Der Hout
Judah Lakin
Amalia Wille
Van Der Hout LLP
180 Sutter Street, Fifth Floor
San Francisco, California 94104
Telephone: (415) 981-3000

Alison Pennington
Lisa Knox
Jesse Newmark
Centro Legal de la Raza
3400 E 12th Street
Oakland, CA 94601
Telephone: (510) 679-1608

Matthew H. Green
Law Offices of Matthew H. Green
130 West Cushing Street
Tucson, AZ 85701
Telephone: (520) 882-8852

Vasudha Talla
American Civil Liberties Union
Foundation of Northern California
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 621-2493

Michael Kaufman
American Civil Liberties Union
Foundation of Southern California
1313 West 8th Street
Los Angeles, CA 90017
Telephone: (213) 977-5232

Bardis Vakili
American Civil Liberties Union Foundation
of San Diego and Imperial Counties
P.O. Box 87131
San Diego, CA 92138-7131
Telephone: (619) 232-2121

Attorneys for Plaintiffs-Appellees

CORPORATE DISCLOSURE STATEMENT

There are no corporations involved in this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

This appeal presents two questions: whether Plaintiffs, a class of non-citizens who have been incarcerated for six months under Section 1231(a)(6), are entitled to a bond hearing before an Immigration Judge; and whether, at that bond hearing, the government bears the burden by clear and convincing evidence to demonstrate that further confinement is warranted.

The answer to both questions is provided by binding Circuit law. In *Diouf v. Napolitano* ("*Diouf II*"), this Court interpreted Section 1231(a)(6) to provide for a bond hearing before an Immigration Judge after six months of detention, in order to avoid the serious constitutional questions presented by prolonged civil detention without a bond hearing. 634 F.3d 1081, 1092 (9th Cir. 2011). In *Singh v. Holder*, this Court held that, when detention becomes prolonged, due process requires that the government bear the burden of justifying further incarceration by clear and convincing evidence. 638 F.3d 1196, 1204 (9th Cir. 2011).

The District Court's preliminary injunction order follows from a straightforward application of *Diouf II* and *Singh*. Defendants' challenge to the injunction is therefore nothing more than attempt to relitigate this Court's settled precedent. That challenge should be rejected.

First, the government argues that Section 1231(a)(6) cannot be read to authorize a bond hearing after six months because *Zadvydas v. Davis*, 533 U.S. 678

(2001), already applied the canon of constitutional avoidance to the statute. Respondents' Opening Brief ("OB") at 11–14. But this Court already considered and rejected this argument in *Diouf II*. Relying heavily on *Zadvydas*, *Diouf II* held that Section 1231(a)(6) contains two distinct—but complementary—constraints against indefinite and prolonged immigration confinement. *Diouf II* therefore does not render Section 1231(a)(6) a "chameleon" that is subject to different meanings depending on who brings the claim. OB at 13 (citing *Clark v. Martinez*, 543 U.S. 371, 382 (2005)). To the contrary, *Diouf II* adopts a uniform interpretation of the statute that applies equally to *all* individuals detained under Section 1231(a)(6).

Moreover, the government's argument cannot be reconciled with its own interpretation of Section 1231(a)(6). The government's regulations implementing the statute create procedures for people detained for lengthy periods, including hearings before Immigration Judges for people deemed "specially dangerous" at which the government bears the burden of proof by clear and convincing evidence. 8 C.F.R. §§ 241.13, 241.14. The regulations therefore demonstrate that Section 1231 can be construed to provide for immigration court hearings for detentions that exceed six months.

Second, the government claims that *Diouf II* is "clearly irreconcilable" with *Jennings v. Rodriguez* ("*Rodriguez IV*"), 138 S. Ct. 830 (2018). OB at 19–23. But *Rodriguez IV* reinforced the central reasoning in *Diouf II*: that Section 1231(a)(6)

is ambiguous and subject to the canon of constitutional avoidance. In declining to apply the avoidance doctrine to two other statutes, 8 U.S.C. §§ 1225 and 1226, *Rodriguez IV* contrasted them with Section 1231(a)(6) and found that the latter statute's text permits the application of the doctrine. As the Third Circuit and every district court to address the issue has found, *Diouf II* is consistent with *Rodriguez IV* and remains good law. *See Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 223–24 (3d Cir. 2018) ("[W]e adopt [*Diouf II*'s] limiting construction of § 1231(a)(6)" and citing *Rodriguez IV*).

The District Court therefore correctly found that Plaintiffs are likely to succeed on the merits of their claims. The government does not contest that the remaining preliminary injunction factors weigh in Plaintiffs' favor. Nor could they. The injunction simply requires the government to provide bond hearings at which Class members will be ordered released only if the government does not establish that they are a danger or flight risk warranting detention—following a rule that has been in place in the Ninth Circuit for more than eight years. The injunction prevents serious irreparable harm to Class members in the form of their unnecessary prolonged incarceration and separation from their families. The balance of equities are likewise in Plaintiffs' favor and the injunction is in the public interest because the injunction will ensure the government's compliance with the law and prevent costly and unnecessary incarceration.

This Court should affirm the District Court's order to ensure that the government complies with clear binding precedent and ceases detaining Class members in violation of their rights.

STATEMENT OF JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), as an appeal from the District Court's order granting an injunction.

This Court reviews the District Court's decision to grant or deny a preliminary injunction for abuse of discretion. *Arc of California v. Douglas*, 757 F.3d 975, 983 (9th Cir. 2014). This Court reviews legal conclusions de novo and factual findings for clear error. *See Vietnam Veterans of Am. v. C.I.A.*, 811 F.3d 1068, 1075 (9th Cir. 2016).

This Court can affirm the District Court's grant of a preliminary injunction on any ground supported by the record. *Enyart v. Nat'l Conference of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1159 (9th Cir. 2011).

ISSUES PRESENTED

1. Whether the District Court correctly concluded that *Diouf II* requires that Plaintiffs detained under Section 1231(a)(6) must be provided a bond hearing after six months.

2. Whether the District Court correctly concluded that, at a bond hearing under *Diouf II*, the government must bear the burden by clear and convincing

evidence to justify continued confinement.

Pursuant to Rule 28-2.7, Plaintiffs attach an addendum with pertinent statutes and regulations.

FACTUAL AND PROCEDURAL HISTORY

I. LEGAL BACKGROUND

Plaintiffs are detained under Section 1231(a)(6), which authorizes immigration confinement for noncitizens with an administratively final order of removal. The statute mandates detention during the initial 90-day "removal period" after the removal order becomes administratively final if the noncitizen was found inadmissible or deportable on certain grounds. *See* 8 U.S.C. § 1231(a)(2) ("Under no circumstance during the removal period shall the Attorney General release a[] [noncitizen] 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."). In contrast, continued detention "beyond the removal period" is discretionary pursuant to Section 1231(a)(6). That subsection provides that individuals "may be detained beyond the removal period" where the noncitizen "has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal." 8 U.S.C. § 1231(a)(6).

Although Plaintiffs have administratively final orders of removal, they are all pursuing defenses to removal that would allow them to remain in the United

States. The vast majority fall into the following three groups: (1) those whose prior removal order has been reinstated under 8 U.S.C. § 1231(a)(5); (2) those who have been issued an administrative removal order under 8 U.S.C. § 1228(b); and (3) those who are seeking judicial review of the Board of Immigration Appeals' ("Board" or "BIA") denial of their motions to reopen and have been issued a judicial or administrative stay of removal. A brief description of these three groups follows.

A. Reinstatement of Removal Under 8 U.S.C. § 1231(a)(5)

When the government believes that an individual who has previously been removed has unlawfully reentered the United States, the removal order may be "reinstated from its original date." 8 U.S.C. § 1231(a)(5). An individual subject to a reinstated removal order is generally foreclosed from seeking relief from removal other than withholding of removal or protection under the Convention Against Torture ("CAT"). *See id.*; *Andrade-Garcia v. Lynch*, 828 F.3d 829, 831 (9th Cir. 2016). Withholding of removal prohibits an individual's removal to a country where their "life or freedom would be threatened . . . because of [their] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A). CAT protection is afforded to those who establish that "it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2).

The regulations describe the process by which an individual subject to a reinstated removal order may seek withholding of removal or CAT protection. If, during the course of the reinstatement process, the individual expresses a fear of being harmed in the country of removal, the Department of Homeland Security ("DHS") refers the individual to an asylum officer for an interview where the officer determines whether they "ha[ve] a reasonable fear of persecution or torture." 8 C.F.R. § 208.31(e). If the individual is determined to have a "reasonable fear" of persecution, they are placed in "withholding-only" proceedings before an IJ, through which they can apply for withholding of removal and protection under the CAT. *See* 8 C.F.R. § 208.31(e); 8 C.F.R. § 208.16(b).

In the event that an asylum officer determines that an individual does not have a reasonable fear of persecution or torture, the individual is entitled to review of that decision before an IJ. *See* 8 C.F.R. § 208.31(g). If the IJ concurs with the asylum officer's determination that the individual does not have a reasonable fear of persecution or torture, the individual is not permitted to appeal that decision to the BIA; however, the individual can file a petition for review with the circuit court of appeals. *See id*. *See also* 8 U.S.C. § 1252(a)(4); *Andrade-Garcia*, 828 F.3d at 831. On the other hand, if the IJ disagrees with and vacates the officer's negative determination, the individual may apply for withholding of removal or protection

under the CAT in "withholding-only" proceedings before the IJ. 8 C.F.R. § 1208.31(g)(2).

"Withholding-only" proceedings operate just like ordinary removal proceedings under 8 U.S.C. § 1229a. As a result, an individual in "withholding-only" proceedings is entitled to the full panoply of regulatory, statutory, and constitutional rights, including an administrative appeal to the Board. *See generally* 8 C.F.R. § 1208.31. Individuals are also entitled to seek judicial review of BIA decisions denying withholding of removal or CAT protection by filing a petition for review before the circuit court of appeals. *See* 8 U.S.C. § 1252(a)(1); *Barajas-Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017). The only meaningful difference between "withholding-only" proceedings and removal proceedings conducted pursuant to 8 U.S.C. § 1229a, is that in "withholding-only" proceedings, the IJ is limited to adjudicating claims for withholding of removal and protection under the CAT.

In addition to pursuing relief based on a fear of return to their home country, individuals with reinstated removal orders may also raise legal and constitutional challenges as to the propriety of their reinstated removal orders in the court of appeals. *See, e.g.*, *Villa-Anguiano v. Holder*, 727 F.3d 873, 878 (9th Cir. 2013); *Ixcot v. Holder*, 646 F.3d 1202, 1203 (9th Cir. 2011).

Under current Ninth Circuit law, all individuals with reinstated removal orders—whether they are challenging their reinstated removal order, are in "withholding-only" proceedings, or are seeking agency or judicial review of a decision by an IJ—who are detained beyond the removal period are detained pursuant to Section 1231(a)(6). *See Padilla-Ramirez*, 882 F.3d 826, 830–32 (9th Cir. 2017).

B. Administrative Removal under 8 U.S.C. § 1228(b)

Plaintiffs also include individuals who have been issued administratively final removal orders pursuant to 8 U.S.C. § 1228(b). Their immigration proceedings are analogous to those with reinstatement orders.

The Immigration and Nationality Act ("INA") authorizes the DHS to issue a final administrative order of removal to an individual who has not been lawfully admitted for permanent residence and who has been convicted of an alleged aggravated felony. *See* 8 U.S.C. § 1228(b). As with a reinstated removal order, the removal order is administratively final upon its issuance by the DHS and may not be appealed to the BIA. 8 U.S.C. § 1228(b)(3). Moreover, just like individuals with reinstated removal orders, individuals with Section 1228(b) removal orders are generally precluded from seeking relief from removal other than withholding of removal or CAT protection. As with the reinstatement process, if an individual who is subject to a Section 1228(b) order expresses a fear of returning to the

country of removal, the individual will be referred to an asylum officer for a reasonable fear interview. 8 C.F.R. § 238.1(f)(3). The reasonable fear process for those with Section 1228(b) removal orders is identical to the process for those with reinstated removal orders, *see Padilla-Ramirez*, 883 F.3d at 830–32; 8 C.F.R. §§ 208.31(e), 238.1(e), 1208.31(e), which includes the right to seek agency and judicial review of reasonable fear determinations, and to pursue applications for withholding of removal and CAT protection. *See Barajas-Romero*, 846 F.3d 351. Individuals may also obtain judicial review of legal and constitutional challenges to the propriety of their administrative removal orders at the circuit court of appeals. 8 U.S.C. §§ 1228(b)(3), 1252(a); *Gomez-Velazco v. Sessions*, 879 F.3d 989, 992 (9th Cir. 2018).

C. Denied Motions to Reopen with Stay of Removal

Plaintiffs also include individuals who are awaiting judicial review of their motions to reopen their final removal orders before the agency, *see* 8 U.S.C. § 1229a(c)(7), and who have been issued stays of removal.

In *Diouf v. Mukasey* (*Diouf I*), 542 F.3d 1222, 1230–32 (9th Cir. 2008), the Ninth Circuit held that individuals who are awaiting judicial review of the Board's denial of their motions to reopen, and who have been issued judicial stays of removal, are detained pursuant to Section 1231(a)(6). The Ninth Circuit reaffirmed this holding in *Diouf II*, explaining that "Section 1231(a)(6) encompasses

[noncitizens] such as Diouf, whose collateral challenge to his removal order (a motion to reopen) is pending in the court of appeals, as well as to [noncitizens] 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." 634 F.3d at 1085.

II. FACTUAL BACKGROUND

A. The Government's Non-Compliance with *Diouf II*

In *Diouf II*, this Court held that Section 1231(a)(6) requires individualized bond hearings when detention under the statute exceeds six months. This Court held that "prolonged detention under § 1231(a)(6), without adequate procedural protections, would raise 'serious constitutional concerns'" and "construe[d] § 1231(a)(6) as requiring an individualized bond hearing, before an immigration judge, for [noncitizens] facing prolonged detention." *Diouf II*, 634 F.3d at 1086. This Court also explicitly recognized that Section 1231(a)(6) encompasses individuals with collateral challenges to their removal orders, as was the case with the *Diouf II* petitioner, as well as individuals "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." *Id*. at 1085.

In the years following *Diouf II*, IJs across the Ninth Circuit continued to deny prolonged detention bond hearings to individuals detained pursuant to

Section 1231(a)(6). IJs generally took the position that *Diouf II* did not apply to individuals in withholding-only proceedings. *See* SER 24–25, at ¶6; *see also* SER 29–30, at ¶6; SER 36–37, at ¶8; SER 44–45, at ¶¶ 6, 8. For individuals denied bond hearings by an immigration court, recourse to the BIA was unpredictable because Board members took inconsistent positions on *Diouf II*'s application to all individuals detained pursuant to Section 1231(a)(6). *See* SER 37, at ¶10.

The immigration courts' compliance with *Diouf II* further decreased after the Supreme Court issued its decision in *Rodriguez IV* in 2018. After *Rodriguez IV*, IJs generally took the position—as the government does here—that *Diouf II* was implicitly overruled by *Rodriguez IV*. *See* SER 63–68; *see also* SER 70–74. As a result, after *Rodriguez IV*, all the IJs presiding over the detained docket in the San Francisco Immigration Court, the third largest immigration court in the United States, were denying six-month bond hearings to individuals detained pursuant to Section 1231(a)(6). *See* SER 11, at ¶10; *see also* SER 18, at ¶5. In the Eloy Detention Center and Florence Correctional Center in Arizona, six out of the seven judges on the detained docket were denying six-month bond hearings to individuals detained under Section 1231(a)(6). *See* SER 36–37, at ¶8. In the San Diego Immigration Court, four out of five judges were denying prolonged detention bond hearings to individuals detained pursuant to Section 1231(a)(6). *See* SER 45, at ¶8.

Because of the government's noncompliance with *Diouf II*, individuals subject to prolonged incarceration under Section 1231(a)(6) often have been forced to file individual habeas actions to vindicate their right to an individualized bond hearing. Both prior to and after *Rodriguez IV*, every district court to consider a habeas petition ruled in favor of the petitioner and found that the government had unlawfully denied the petitioner a prolonged detention bond hearing in violation of *Diouf II*.[1] Despite the uniform views of the federal courts, Immigration Judges

[1] In over twenty cases prior to *Rodriguez IV*, the district courts uniformly rejected the government's position. *See Martinez-Lopez v. Sessions*, No. 17-CV-2473-CAB, 2018 WL 490748, at *3 (S.D. Cal. Jan. 19, 2018); *Villalta v. Sessions*, No. 17-CV-05390-LHK, 2017 WL 4355182, at *5–*7 (N.D. Cal. Oct. 2, 2017); *Ramon-Matul v. Sessions*, No. CV-17-02865-PHX-DGC, 2017 WL 6884314, at *3 (D. Ariz. Sept. 22, 2017); *Palma-Platero v. Sessions*, No. CV-1701484-PHX-DGC, 2017 WL 3838678, at *3 (D. Ariz. Sept. 1, 2017); *Rios-Troncoso v. Sessions*, No. CV-1701492-PHX-DGC, 2017 WL 3838686, at *3 (D. Ariz. Sept. 1, 2017), *appeal dismissed*, No. 17-17230, 2018 WL 624975 (9th Cir. Jan. 30, 2018); *Contreras-Reyes v. Sessions*, CV17-01831-PHX-JJT (ESW) (D. Ariz. July 27, 2017); *Bahena v. Aitken*, No. 117-CV-00145-JLT, 2017 WL 2797802, at *3 (E.D. Cal. June 28, 2017); *Fuentes-Barnett v. Sessions*, No. CV 17-00858-PHX-DGC (JZB), 2017 WL 1197132 (D. Ariz. Mar. 31, 2017); *Alvarado-Callejas v. Sessions*, CV17-01007-PHX-DGC, (DMF) (D. Ariz. June 6, 2017); *Velarde-Maldonado v. Sessions*, No. CV- 17-01018-PHX-JJT (MHB), 2017 WL 8231468 (D. Ariz. June 1, 2017); *Herrera v. United States Attorney Gen.*, No. CV-16-03931-PHX-DJH, 2017 WL 2963569, at *3 (D. Ariz. May 11, 2017), *report and recommendation adopted sub nom. Ana Silvia Cortes Herrera v. United States Attorney Gen.*, No. CV-16-03931-PHX-DJH, 2017 WL 2957798 (D. Ariz. July 11, 2017); *Urias-Alvarenga v. Sessions*, No. CV 17-01005-PHX-JJT (JFM), Doc. 17 (D. Ariz. May 8, 2017); *Borjas-Calix v. Sessions*, No. CV-16-685-TUC-DCB, 2017 WL 1491629, at *3 (D. Ariz. Apr. 26, 2017); *Rivas-Moreira v. Lynch*, No. CV-16-04518-PHX-DJH (BSB), Doc. 17 (D. Ariz. Mar. 2, 2017); *Gomez-Vasquez v. Lynch*, No. CV-17-00269-PHX-JJT (JFM), Doc. 11 (D. Ariz. Feb. 21, 2017); *Mendez-Cruz v. Lynch*, No. CV-16-04416-PHX-GMS (DMF), Doc. 18 (D. Ariz. Feb. 17, 2017);

continued to deny bond hearings to individuals detained under Section 1231. As a result, the vast majority of eligible immigration detainees who were unable to file habeas actions were out of luck and hundreds, if not thousands, remained unlawfully imprisoned. The instant suit followed.

B. Named Plaintiffs

Mr. Aleman Gonzalez and Mr. Gutierrez Sanchez, the named Plaintiffs in the instant matter, were two individuals detained under Section 1231(a)(6) whom the government unlawfully denied prolonged detention bond hearings.

1. Mr. Aleman Gonzalez

Mr. Aleman Gonzalez is a native and citizen of Mexico who has resided in the United States since 2000. SER 50, at ¶2. He shares custody of his two U.S.

Guardado-Quevara v. Lynch, No. CV-16-00800-PHX-PGR, 2016 WL 4136547, at *4–*5 (D. Ariz. June 27, 2016), *report and recommendation adopted*, No. CV-1600800, 2016 WL 4074113 (D. Ariz. Aug. 1, 2016); *Gonzalez v. Asher*, No. C15-1778-MJP-BAT, 2016 WL 871073, at *4 (W.D. Wash. Feb. 16, 2016), *report and recommendation adopted*, No. C15-1778, 2016 WL 865351 (W.D. Wash. Mar. 7, 2016); *Quintero v. Asher*, No. C14-958-MJP, 2015 WL 144298, at *6 (W.D. Wash. Jan. 12, 2015); *Acevedo-Rojas v. Clark*, No. C14-1323-JLR, 2014 WL 6908540, at *6 (W.D. Wash. Dec. 8, 2014); *Alvarado v. Clark*, No. C14-1322-JCC, 2014 WL 6901766, at *2 (W.D. Wash. Dec. 5, 2014); *Sanchez-Bautista v. Clark*, No. C14-1324-JLR-JPD, 2014 WL 7467022, at *3 (W.D. Wash. Dec. 3, 2014); *Giron-Castro v. Asher*, No. C14-0867-JLR, 2014 WL 8397147, at *3 (W.D. Wash. Oct. 2, 2014); *Mendoza v. Asher*, No. C14-0811-JCC-JPD, 2014 WL 8397145, at *2 (W.D. Wash. Sept. 16, 2014). Likewise, post *Rodriguez IV*, in at least nine cases, the district courts uniformly rejected the government's position that *Rodriguez IV* had implicitly overruled *Diouf II*. *See infra,* Argument Section I.C.1 at 34.

citizen daughters, ages five and three, and is their primary source of financial support. SER 50, at ¶4; SER 52, at ¶16.

On August 18, 2017, Mr. Aleman Gonzalez was arrested by the DHS at his home in Antioch, California, who then reinstated a prior order of removal that he had from April 2000. ER 36. Mr. Aleman Gonzalez expressed a fear of returning to Mexico, and the execution of the reinstated removal order was suspended per the regulatory scheme set forth at 8 C.F.R. § 208.31. ER 37. On August 30, 2017, a DHS asylum officer found that Mr. Aleman Gonzalez has a reasonable fear of persecution or torture in Mexico by members of the Zeta drug cartel. *Id*. Pursuant to 8 C.F.R §§ 208.31 and 280.16, Mr. Aleman Gonzalez's case was referred to the San Francisco Immigration court for "withholding-only" proceedings. *Id*. Mr. Aleman Gonzalez applied for withholding of removal and relief under the CAT with the Immigration Court on November 13, 2017. SER 51, at ¶9.

On February 20, 2018, after 187 days of confinement, Mr. Aleman Gonzalez requested a bond hearing before an IJ in San Francisco. ER 39. On February 27, 2018, the IJ ruled that he did not have jurisdiction to conduct a hearing and therefore refused to do so. ER 39–41. On March 15, 2018, Mr. Aleman Gonzalez appealed that decision to the BIA. SER 51, at ¶13. On July 6, 2018, after issuance of the preliminary injunction in the instant matter, the BIA dismissed Mr. Aleman Gonzalez's appeal of the IJ's February 27, 2018, decision.

2. Mr. Gutierrez Sanchez

Mr. Gutierrez Sanchez is a native and citizen of Mexico who has resided in the United States since approximately November 2015. SER 58, at ¶2. Mr. Gutierrez Sanchez was arrested and detained by the DHS on or about September 25, 2017. ER 45. Prior to his detention, he resided in San Lorenzo, California with his U.S citizen wife and two young U.S. citizen daughters. SER 58, at ¶4. Mr. Gutierrez Sanchez is the sole source of financial support for their household. *Id*.

The DHS issued a notice reinstating a prior order of removal from 2009 under 8 U.S.C. § 1231(a)(5). ER 45. Mr. Gutierrez Sanchez was given a reasonable fear interview with an asylum officer because he expressed fear of being harmed in Mexico. ER 46. At his reasonable fear interview, Mr. Gutierrez Sanchez expressed fear that, if returned to Mexico, he would be harmed as a bisexual man. Mr. Gutierrez Sanchez already experienced past torture in Mexico by organized crime on account of his sexual orientation. SER 58, at ¶3. The asylum officer found that he had a reasonable fear of persecution or torture in Mexico, and he was placed in "withholding-only" proceedings before the San Francisco Immigration Court. ER 46–47.

Mr. Gutierrez Sanchez subsequently applied for withholding of removal and relief under the CAT with the San Francisco Immigration Court on February 20, 2018. SER 59, at ¶7. On March 5, 2018, Mr. Gutierrez Sanchez filed a request with

the San Francisco Immigration Court that a bond hearing be held on or after March 24, 2018, his 180th day of detention. SER 59, at ¶8. On March 20, 2018, the IJ ruled that she did not have jurisdiction to conduct a hearing and therefore refused to do so. ER 48–49. On March 26, 2018, Mr. Gutierrez Sanchez appealed that decision to the BIA. SER 59, at ¶8. On July 17, 2018, after issuance of the preliminary injunction, the BIA dismissed the appeal.

C. The Action and District Court Decision Below

On March 27, 2018, Mr. Aleman Gonzalez and Mr. Gutierrez Sanchez filed a Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus. Plaintiffs alleged that the Government was violating the INA, the Administrative Procedure Act ("APA"), and the United States Constitution by denying them individualized bond hearings though their detention had become prolonged, i.e., extended beyond six months. On April 12, 2018, Plaintiffs filed motions for class certification and a preliminary injunction. After briefing and oral argument, on June 5, 2018, the District Court granted Plaintiffs' motions for class certification and for a preliminary injunction.[2] ER 15–33. In its order, the District Court found that Plaintiffs had "shown a likelihood of success on the merits of

[2] In a subsequent order clarifying the class definition, the District Court ordered that the Class consisted of those individuals who were subject to prolonged detention under § 1231(a)(6) and who had live claims before an adjudicative body in their removal cases. ER 4–5, 6–12.

their INA and APA statutory claims" and that the public interest, irreparable harm, and the balance of equities all weighed in Plaintiffs' favor. ER 32. As all four preliminary injunction factors weighed in favor of Plaintiffs, the District Court enjoined the government from "detaining Plaintiffs and the class members pursuant to section 1231(a)(6) for more than 180 days without providing each a bond hearing before an IJ as required by *Diouf II*." ER 33. This appeal followed.[3]

After issuance of the preliminary injunction, Mr. Aleman Gonzalez and Mr. Gutierrez Sanchez received bond hearings and were subsequently released from detention.

SUMMARY OF THE ARGUMENT

The District Court correctly followed this Court's established case law in holding that Class members detained for more than six months under Section 1231(a)(6) are entitled to a bond hearing at which the government must prove by clear and convincing evidence that additional confinement is justified. This Court has already construed Section 1231(a)(6) to provide for a bond hearing before an Immigration Judge after six months of detention, *Diouf II*, 634 F.3d at 1092, and held that due process requires the government to bear the burden by clear and

[3] In its Opening Brief, the government only challenges the District Court's grant of the motion for a preliminary injunction, and not the grant of the motion for class certification.

convincing evidence to justify continued confinement, *Singh*, 638 F.3d at 1204. The government's attempts to argue that this Court's settled precedent is no longer good law are unavailing.

First, the government asserts that the Supreme Court's decisions in *Zadvydas* and *Clark* foreclose *Diouf II*'s reading of Section 1231(a)(6). However, *Zadvydas* and *Clark* were decided before *Diouf II*, and this Court heavily relied on those decisions to construe Section 1231(a)(6) to require individualized bond hearings after six months of detention. Moreover, the government's arguments misunderstand *Zadvydas*, which found that Section 1231(a)(6) does not authorize a noncitizen's **indefinite** detention beyond six months where removal is not reasonably foreseeable. 533 U.S. at 699–701. *Diouf II* holds that even where detention is statutorily authorized, Section 1231(a)(6) requires a bond hearing to ensure that a noncitizen's **prolonged** detention is individually justified. 634 F.3d at 1092. *Diouf II* therefore imposes a distinct—but complementary—limitation on Section 1231(a)(6).

Contrary to the government's arguments, this limitation does not render Section 1231(a)(6) a "chameleon." OB at 13 (citing *Clark*, 543 U.S. at 382). *Diouf II* applies uniformly to all noncitizens subject to detention under Section 1231(a)(6), and requires that each is afforded a bond hearing after six months of detention. Because *Diouf II* does not interpret Section 1231(a)(6) to have different

meanings depending on who brings the claim, the decision is fully consistent with *Clark*.

The government's arguments concerning *Zadvydas* and *Clark* also cannot be squared with its own regulations implementing Section 1231. Those regulations authorize custody reviews by immigration officials after six months of detention, and hearings before Immigration Judges for certain individuals who have been deemed "specially dangerous." *See* 8 C.F.R. §§ 241.13, 241.14. There can therefore be no serious question that Section 1231 can be construed to require specialized procedures, including bond hearings before Immigration Judges, after six months of detention.

Second, the government claims that *Diouf II* is "clearly irreconcilable" with *Rodriguez IV*. *See* OB at 19–23 (citing *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (en banc)). But *Rodriguez IV* supports *Diouf II* by reaffirming its central reasoning: that Section 1231(a)(6) is susceptible to a limiting construction to avoid the constitutional concerns posed by lengthy confinement under the statute. Indeed, after *Rodriguez IV* was issued, the Third Circuit expressly "adopt[ed] the Ninth Circuit's limiting construction of § 1231(a)(6)" in *Diouf II*. *Guerrero-Sanchez*, 905 F.3d at 221. The government therefore not only asks this Court to overrule its settled precedent without justification, but also to depart from a Third Circuit

decision that followed *Diouf II* in part because the court was "reluctant to create [a] circuit split[ ]" without "a compelling basis." *Id*. at 227 (internal citations omitted).

Third, the government claims *Rodriguez IV* forecloses the preliminary injunction's requirement that the government bear the burden by clear and convincing evidence at a prolonged detention bond hearing. However, *Singh* held that "due process places a heightened burden of proof" on the government where significant deprivations of liberty are at stake. 638 F.3d at 1204 (internal citation omitted). Because *Rodriguez IV* expressly declined to decide any constitutional issues, it cannot disturb *Singh*'s constitutional holding. Moreover, the government's regulations implementing Section 1231 establish a "clear and convincing" standard at bond hearings for people deemed "specially dangerous." *See* 8 C.F.R. § 241.14(i)(1). Thus even if *Singh* did not establish that the Constitution requires a heightened burden of proof, Section 1231 itself can be construed to require it.

Finally, the government does not contest the District Court's holding that the three equitable preliminary injunction factors—the likelihood of irreparable harm in the absence of preliminary relief, the balance of equities, and the public interest—weigh in favor of Plaintiffs. The relief the injunction affords is modest: it requires only that the government provide a hearing at which a Class member will be ordered released if he or she does not pose a danger or flight risk warranting

their detention. The injunction therefore prevents the needless prolonged incarceration of Class members—at great personal cost to them, their family members, and communities—and eliminates costly detentions that burden the immigration system for no legitimate purpose. As a result, even were this Court to find only that Plaintiffs raised "serious questions" as to the merits of their claims, it should nonetheless affirm the preliminary injunction because the remaining equitable factors are satisfied. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

Because the District Court correctly held that Plaintiffs cannot be incarcerated without a hearing to determine whether their prolonged confinement is justified, this Court should affirm the District Court's order granting a preliminary injunction.

ARGUMENT

This Court's settled case law establishes that Plaintiffs are entitled to bond hearings after six months of detention at which the government must bear the burden by clear and convincing evidence. The District Court therefore properly issued a preliminary injunction to compel the government's compliance with the law, and prevent Class members' lengthy and unnecessary confinement.

I. Plaintiffs are Likely to Succeed on Their Claims that Their Prolonged Detention in Absence of a Bond Hearing is Unlawful

The District Court correctly found that Plaintiffs are likely to succeed on their claims that: (1) Section 1231(a)(6) must be construed to require a bond hearing after six months of detention; and (2) the government must bear the burden of proof by clear and convincing evidence at a prolonged detention bond hearing. *Diouf II* establishes that Class members are entitled to a bond hearing under Section 1231(a)(6) after six months of detention, and the government cannot meet its high burden to show that *Diouf II* is "clearly irreconcilable" with *Zadvydas*, *Clark*, or *Rodriguez IV*. Defendants also claim that Section 1231(a)(6) cannot be read to require a heightened burden of proof, but ignore that their own regulations interpreting Section 1231 require immigration court hearings at which the government bears the burden of proof by clear and convincing evidence. Regardless, *Singh* establishes that the heightened burden of proof at hearings under *Diouf II* are mandated by due process.

A. The District Court Properly Found that Plaintiffs' Claims are Controlled By *Diouf II*

The government repeatedly criticizes the District Court for "extend[ing]" *Diouf II*, "reapplying the canon of constitutional avoidance to § 1231(a)(6) a second time," and "arbitrarily rewr[iting] the statute as it pleased." *See* OB at 1, 11, 15. But the District Court simply followed *Diouf II* by finding that Section

1231(a)(6) affords Class members a bond hearing after six months of detention. The government's misguided criticisms of the District Court are therefore nothing more than an improper attempt to relitigate *Diouf II*.

While the government argues that the District Court's decision conflicts with *Zadvydas* and *Clark*, both decisions were decided prior to *Diouf II*, and this Court expressly relied on both decisions when reaching its holding. *See Diouf II*, 634 F.3d at 1087, 1087 n.8, 1088, 1091 (citing *Zadvydas*); *id*. at 1088–89, 1090 n.11 (citing to *Clark*). The government's arguments here are essentially iterations of the same arguments that were presented and rejected in *Diouf II*. *Compare* OB at 15–16 (arguing that the text of Section 1231(a)(6) cannot support a limiting construction requiring bond hearings) *with* Respondent-Appellees' Petition for En Banc Rehearing, *Diouf v. Holder*, No. 09-56774, at 17–18 (9th Cir. June 6, 2011) (same) *and* Answering Brief for Respondents-Appellees, *Diouf v. Holder*, No. 09-56774, at 31, 34–35 (9th Cir. Feb. 19, 2010) (same); *compare* OB at 16–19 (arguing that Section 1231(a)(6) cannot be construed to require a hearing before an IJ, rather than a District Court) *with* Respondent-Appellees' Petition for En Banc Rehearing, *Diouf v. Holder*, No. 09-56774, at 18 (9th Cir. June 6, 2011) (arguing that Section 1231(a)(6) cannot be construed to require a hearing before an IJ, rather than a DHS official); *compare* OB at 14 (arguing that *Zadvydas* does not support placing the burden on the government to prove the need for continued

confinement) *with* Respondent-Appellees' Petition for En Banc Rehearing, *Diouf v. Holder*, No. 09-56774, at 15 (9th Cir. June 6, 2011) (same) *and* Answering Brief for Respondents-Appellees, *Diouf v. Holder*, No. 09-56774, at 20 (9th Cir. Feb. 19, 2010) (same).

This Court should decline the government's invitation to entertain arguments that it already rejected over eight years ago, and refuse to disturb this Court's settled interpretation of Section 1231. Absent *en banc* review, *Diouf II* remains good law and is binding on both this panel and the District Court below. *See Miller v. Gammie*, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc); *Olivas-Motta v. Whitaker*, 910 F.3d 1271, 1275 (9th Cir. 2018) (holding that a three-judge panel "has no power to overrule circuit precedent").

B. *Zadvydas* and *Diouf II* Provide Complementary Interpretations of Section 1231(a)(6)

Even were this Court writing on a blank slate (which it is not), *Diouf II*'s construction of Section 1231 is strongly supported by *Zadvydas* and *Clark*, as the Third Circuit recently found in adopting *Diouf II*'s construction of Section 1231(a)(6). *See Guerrero-Sanchez*, 905 F.3d at 226.

In *Zadvydas*, the Court construed Section 1231(a)(6) to avoid the "serious constitutional problem" posed by the indefinite detention of noncitizens with final orders of removal whom the government could not remove due to repatriation issues with their countries of origin. 533 U.S. at 690. The Court construed

Section 1231(a)(6) to "contain an implicit 'reasonable time' limitation." *Id*. at 682. The Court held that the presumptively "reasonable time limitation" for indefinite detention under Section 1231(a)(6) was six months. *Id*. at 701. The Court found Section 1231(a)(6) was susceptible to a reading that imposed an implicit time limitation because the statute does not mandate detention, but rather makes it discretionary: the statute provides that immigration officials "may" detain individuals beyond the removal period. *Id*. at 697.

Moreover, the Court found the statute is silent as to the length of the detention it authorizes, unlike other relevant portions of the INA which have clear time limits. *See id*. "Indeed, if Congress had meant to authorize long-term detention," the Court held, "it certainly could have spoken in clearer terms." *Id.* As a result, the Court held that "if removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute." *Id*. at 699–700. *Zadvydas*, therefore, established a noncitizen's right to seek release from civil detention that has become *indefinite* due to the government's inability to remove him or her. *Id*. at 699–701.

Four years after it decided *Zadvydas*, the Supreme Court considered whether Section 1231(a)(6)'s limitation on indefinite detention, as described in *Zadvydas*, applies equally to "inadmissible" noncitizens. *Clark*, 543 U.S. at 378. The *Clark* Court held that the text of Section 1231(a)(6) did not distinguish between admitted

and non-admitted noncitizens, so *Zadvydas*'s interpretation of Section 1231(a)(6) applies equally to inadmissible noncitizens. The Court held this to be true even though *Zadvydas*'s statutory interpretation had relied on the doctrine of constitutional avoidance, and the constitutional concerns at issue in *Zadvydas* were not identical in the case of inadmissible noncitizens. *Id*. at 378–79. Because *Zadvydas* had already construed Section 1231(a)(6), the Court held that the same interpretation must apply equally to all individuals under the statute. *Id*. at 378.

Diouf II follows from a straightforward application of *Zadvydas* and *Clark*. In *Diouf II*, this Court considered the case of a noncitizen who had been detained under Section 1231(a)(6) for more than 180 days while pursuing a motion to reopen his removal order. While the petitioner in *Diouf II* was not subject to *indefinite* detention due to the impossibility of removal, this Court nonetheless found that his *prolonged* detention in excess of 180 days raised serious constitutional concerns, as once "detention crosses the six-month threshold and release or removal is not imminent, the private interests at stake are profound." *Diouf II*, 634 F.3d at 1091–92. Relying on *Zadvydas* and *Clark*, the Ninth Circuit held that noncitizens who have been detained for 180 days under Section 1231(a)(6) are "entitled to a bond hearing before an immigration judge." *Id.* at 1092. *Diouf II* thus applied *Zadvydas*'s and *Clark*'s conclusion that Section 1231(a)(6) is ambiguous and susceptible to a limiting construction to avoid the

constitutional issues posed by *prolonged*, though not necessarily *indefinite*, detention. *Id*. at 1086, 1087 n.8.

The government erroneously asserts that *Diouf II*'s holding violates *Clark* and *Zadvydas* in two respects. First, the government claims that reading a bond hearing requirement into the text of Section 1231(a)(6) renders the statute a "chameleon." OB at 13 (citing *Clark*, 543 U.S. at 382). But the government misunderstands the holding of *Clark*. *Clark* establishes that a statute must be interpreted consistently as to all individuals to whom it is subject, regardless of the individual constitutional concerns posed by the individual bringing a challenge under the statute. *Clark*, 543 U.S. at 378–79. Consistent with *Clark*, *Diouf II* adopts a uniform interpretation of the statute: all individuals detained under Section 1231(a)(6) are entitled to a bond hearing after six months of confinement, regardless of the particular constitutional concerns raised by any individual's case. Indeed, *Diouf II* rejected the government's argument that Mr. Diouf himself was entitled to fewer protections under the statute because he was not a lawful permanent resident. *Diouf II*, 634 F.3d at 1088 (explaining that "[b]ecause we are construing a statute under the canon of constitutional avoidance, [] whether Diouf was a legal permanent resident is irrelevant" and citing *Clark*). *See also Guerrero-Sanchez*, 905 F.3d at 224 (making clear that "our holding today necessarily applies

to *all* [noncitizens] detained under § 1231(a)(6)" and citing *Clark*) (emphasis in original).

Second, the government avers that all statutory claims challenging detention under Section 1231(a)(6) must be brought pursuant to the framework laid out in *Zadvydas*. OB at 11–14. However, *Diouf II* imposes a distinct—but complementary—limitation on the government's authority to detain under Section 1231. *Zadvydas* recognized a substantive limitation on the government's detention authority, holding Section 1231(a)(6) prohibits ***indefinite detention*** if an individual's removal is not "reasonably foreseeable" after six months of post-final order detention. 533 U.S. at 697–701. *Diouf II* adopted a procedural constraint, holding that even if a detainee's removal is reasonably foreseeable under Section 1231(a)(6), the statute only permits ***prolonged detention*** if the government can show at a hearing before a neutral decisionmaker that continued confinement is justified. *Trinidad v. Sessions*, No. 17-CV-06877-JD, 2018 WL 2010618, at *3 (N.D. Cal. Apr. 30, 2018) ("*Diouf* [*II*] and *Zadvydas* do not conflict because they address parallel, co-existing entitlements.").[4] As this Court has explained with respect to detention under Section 1226(a):

[4] Notably, *Zadvydas* also held that even where removal is reasonably foreseeable, the government must still demonstrate that such prolonged detention remains justified: "[I]f removal is reasonably foreseeable, the habeas court should consider the risk of the [noncitizen's] committing further crimes as a factor potentially

> [e]ven though [a detainee's] detention is permitted by statute because keeping him in custody ***could*** serve a legitimate immigration purpose, [a detainee] may nonetheless have the right to contest before a neutral decision maker whether the government's purported interest is ***actually*** served by detention ***in his case***. There is a difference between detention being authorized and being necessary as to any particular person.

Casas-Castrillon v. DHS, 535 F.3d 942, 949 (9th Cir. 2008) ("*Casas*") (emphasis in original). *Diouf II* ensures that Plaintiffs are likewise only detained if the government can make an individualized showing that their detention is justified by a legitimate immigration purpose.

The Third Circuit reached the same conclusion in *Guerrero-Sanchez*:

> *Zadvydas*' focus on the foreseeability of removal—and its limiting construction of Section 1231(a)(6) as authorizing detention only when removal is reasonably foreseeable—does not address or settle the due process concerns raised by the prolonged detention of a[ ] [noncitizen] like Guerrero-Sanchez, who is still pursuing a bona fide withholding-only claim that could take years to resolve.

Guerrero-Sanchez, 905 F.3d at 220. Thus, "[w]hile *Zadvydas* limited the *substantive* scope of § 1231(a)(6), it did not explicitly preclude courts from construing § 1231(a)(6) to include additional *procedural* protections during the statutorily authorized detention period, should those protections be necessary to avoid detention that could raise different constitutional concerns." *Id*. at 221 (emphasis in original). Because prolonged detention without a bond hearing would

---

justifying confinement within that reasonable removal period." *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001).

be constitutionally suspect, the Third Circuit "adopt[ed] the Ninth Circuit's limiting construction of § 1231(a)(6)": "a[ ] [noncitizen] detained under § 1231(a)(6) is generally entitled to a bond hearing after six months (*i.e.*, 180 days) of custody." *Id*. at 224–26.

The government's arguments also cannot be reconciled with their regulations. Several months after *Zadvydas* was issued, the government adopted regulations to implement the decision. *See* Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56967 (Nov. 14, 2001). Two bear mention here. First, the government amended its existing review system to require enforcement officials to assess the necessity of continued detention beyond six months for any immigrant held under the statute. *See* 8 C.F.R. § 241.13.[5] However, it did not provide for review of such determinations by a neutral Immigration Judge. Second, it created a separate review system, also to assess the necessity of continued detention beyond six months, but only for those immigrants designated as "specially dangerous." 8 C.F.R. § 241.14(f). Most important for present purposes, that system authorizes review by *Immigration Judges* at a hearing at

[5] Under the review system, officers also conduct files review at 90 days, 180 days and 18 months to determine whether continued detention is warranted based on danger and flight risk grounds. 8 C.F.R. § 241.4(k)(2)(ii)-(iii); *id*. at § 241.4(f). The reviews are conducted by DHS officials (not neutral decisionmakers), the detainee bears the burden to show that he or she is not a danger or flight risk, and there are no in-person hearings or appeals. 8 C.F.R. § 241.4(d).

which *the government bears the burden by clear and convincing evidence*. *Id*. at § 241.14(i)(1).

The government's regulations are fatal to their arguments concerning *Zadvydas* and *Clark*. The regulations create additional procedural protections beyond any described in *Zadvydas*, including the right to hearings before Immigration Judges for those designated "specially dangerous." If those regulations did not render the statute a "chameleon," then neither did *Diouf II*. Moreover, the regulations demonstrate that Section 1231(a)(6) can be construed to require hearings before Immigration Judges at which the government bears the burden of proof by clear and convincing evidence. The question is therefore not, as the government argues here, whether Section 1231(a)(6) can be construed to require *some* specialized procedures at six months. The question is *which* specialized procedures apply: those set forth in the regulations or those required by *Diouf II*.

Because this Court correctly held that the regulations place individuals at risk of prolonged incarceration without justification and raise serious constitutional concerns, Section 1231(a)(6) must be construed to require a bond hearing for Class members facing prolonged detention. *Diouf II*, 634 F.3d at 1089 ("We also disagree with the government's contention that DHS regulations provide sufficient

safeguards to protect the liberty interests of § 1231(a)(6) detainees . . . ."); *id*. at 1091 ("The regulations do not afford adequate procedural safeguards. . . .").

C. *Diouf II* Is Not "Clearly Irreconcilable" with *Rodriguez IV*

The government erroneously asserts that this Court may disregard *Diouf II* because it has been undermined by *Rodriguez IV*. A panel of this Court may only revisit a prior published decision if it is "clearly irreconcilable" with intervening authority. *United States v. Robertson*, 875 F.3d 1281, 1291 (9th Cir. 2017), vacated on other grounds, 139 S. Ct. 1543 (2019). "The 'clearly irreconcilable' standard is a high one, and as long as [this Court] 'can apply [its] prior circuit precedent without running afoul of the intervening authority[,] [it] must do so.'" *See United States v. Orona*, 923 F.3d 1197, 1200 (9th Cir. 2019) (quoting *Close v. Sotheby's, Inc.*, 894 F.3d 1061, 1073 (9th Cir. 2018)). "It is not enough for there to be some tension between the intervening higher authority and prior circuit precedent, or for the intervening higher authority to cast doubt on the prior circuit precedent." *Robertson*, 875 F.3d at 1291 (internal quotation marks and citations omitted).

The government cannot meet its high burden to demonstrate that *Diouf II* is "clearly irreconcilable" with *Rodriguez IV*. As the Third Circuit found in *Guerrero-Sanchez*, *Rodriguez IV* expressly affirmed the application of constitutional avoidance to Section 1231, and supports *Diouf II*'s construction of

the statute. This Court can therefore unquestionably apply *Diouf II* "without running afoul of" *Rodriguez IV*. *Orona*, 923 F.3d at 1200.

1. Rodriguez IV Reaffirmed the Application of the Canon of Constitutional Avoidance to Section 1231(a)(6)

In *Rodriguez IV*, the Supreme Court held that two detention statutes, 8 U.S.C. §§ 1225 and 1226, could not be construed to require bond hearings in cases of prolonged detention. *See Rodriguez IV*, 138 U.S. at 842–46, 846-48.[6] In so doing, the Supreme Court explicitly reaffirmed its prior holding in *Zadvydas* that Section 1231(a)(6) *is* amenable to the canon of constitutional avoidance, and that Section 1231(a)(6) can be construed to limit detention to a presumptively reasonable period of six months. The Court therefore buoyed *Diouf II*'s reasoning, and reinforced that it is still good law.

The Court gave several reasons why the statutes at issue in *Rodriguez IV* could not be interpreted to contain an implicit time limitation, whereas Section 1231(a)(6) can. The Court noted the "many ways in which the provision in question in *Zadvydas*, Section 1231(a)(6), differs materially from those at issue here." *Id*. at 843–44. First, the statutes interpreted in *Rodriguez IV* explicitly authorize detention for a fixed period of time: in the case of Section 1225, until the

[6] In *Rodriguez III*, this Court did not address detention under Section 1231, as it held that the district court had improperly certified a Section 1231(a) subclass. *See Rodriguez v. Robbins ("Rodriguez III")*, 804 F.3d 1060, 1085–86 (9th Cir. 2015).

end of asylum or removal proceedings for applicants for admission to the United States, and in the case of Section 1226, until the conclusion of removal proceedings for those already inside the United States. "By contrast, Congress left the permissible length of detention under § 1231(a)(6) unclear." *Id*. at 844. Second, "[Section] 1231(a)(6) is ambiguous," because its statutory phrase "*may* be detained" suggests discretion, but not unlimited discretion, to detain. *Id*. at 843. Third, Section 1231(a)(6) contains no "specific provision authorizing release," unlike Section 1225 and Section 1226. *Id*. at 844; *see also id*. at 846. Throughout the opinion in *Rodriguez IV*, the Court repeatedly underscored that "a series of textual signals distinguishes the provisions at issue in this case from *Zadvydas*'s interpretation of § 1231(a)(6)." *Id*. at 844; *see also id*. at 846–47, 850 ("As we have explained, the key statutory provision in *Zadvydas* said that the [noncitizens] in question 'may,' not 'shall,' be detained, and that provision also failed to specify how long detention was to last.").

Thus as the District Court found in granting a preliminary injunction, "far from being clearly irreconcilable with *Diouf II*'s application of the canon of constitutional avoidance to section 1231(a)(6), [*Rodriguez IV*] reaffirms the canon's application to that statute." ER 31. Indeed, the government itself concedes that "the [D]istrict [C]ourt correctly held—in accordance with [*Rodriguez IV*] and *Zadvydas*—that this discretionary 'may detain' language renders [Section]

1231(a)(6) ambiguous and thus permits the application of the canon of constitutional avoidance . . . .” OB at 20.

Consistent with the District Court’s order below, the Third Circuit and every district court to address the issue has found *Diouf II* is consistent with *Rodriguez IV*.[7] Relying on *Rodriguez IV*, the Third Circuit found that Section 1231(a)(6) “invites us to apply the canon of constitutional avoidance” because the statute “unlike other provisions in the INA, does not provide for detention for a specified

[7] *See e.g.*, *Hurtado-Romero v. Sessions*, No. 18-CV-01685-EMC, 2018 WL 2234500, at *3 (N.D. Cal. May 16, 2018) (“[B]ecause [*Rodriguez IV*] and *Diouf* [*II*] are not ‘clearly irreconcilable’ . . . the court must follow *Diouf* [*II*].”); *Mercado-Guillen*, No. 18-CV-00727-HSG, 2018 WL 1876916, at *3 (N.D. Cal. Apr. 19, 2018) (holding that “[t]he [*Rodriguez IV*] Court specifically noted the difference between the language in section 1231(a)(6) and the language in sections 1225(b) and 1226(c),” and therefore left *Diouf II* in place); *Sied v. Nielsen*, No. 17-CV-06785-LB, 2018 WL 1876907, at *5 (N.D. Cal. Apr. 19, 2018) (affirming that “[*Rodriguez IV*’s] holding regarding Sections 1225(b), 1226(a), and 1226(c) does not alter or overrule *Diouf* [*II*]’s holding that the government must provide bond hearings to [non-citizens] detained under Section 1231(a)(6)”); *Fatty v. Nielsen*, No. C17-1535-MJP-BAT, 2018 WL 2244713, at *10 n. 7 (W.D. Wash. Apr. 5, 2018) (“*Diouf II* remains good law following the Supreme Court’s decision in [*Rodriguez IV*].”); *Higareda v. Sessions*, No. CV-18-00491-PHX-SPL (DKD), Doc. 20 (D. Ariz. Apr. 5, 2018); *Baños v. Asher*, No. C16-1454-JLR, 2018 WL 1617706, at *1–*2 (W.D. Wash. Apr. 4, 2018) (holding that “*Diouf II* remains binding law” after *Rodriguez IV*); *Cortez v. Sessions*, 318 F. Supp. 3d 1134, 1144–45 (N.D. Cal. 2018) (“*[Rodriguez IV]* left in place the application of the canon of constitutional avoidance to section 1231(a)(6), the same provision at issue in *Diouf II* . . . *Diouf II* remains good law which this court is bound to follow.”); *Borjas-Calix v. Sessions*, No. CV16-00685-TUC-DCB, 2018 WL 1428154, at *6 (D. Ariz. Mar. 22, 2018) (“*Diouf* [*II*] remains good law and is binding on this court.”); *Ramos v. Sessions*, No. 18-CV-00413-JST, 2018 WL 1317276, at *3 (N.D. Cal. Mar. 13, 2018) (“Given the Supreme Court’s explicit carve-out, *Diouf*[*II*] remains good law and is binding on this Court.”).

period of time, uses the word 'may' to describe the detention authority rather than 'shall,' and lacks an express exception to detention provided for in the provision." *Guerrero-Sanchez*, 905 F.3d 208 at 223–24 (citing *Rodriguez IV*). The uniform view of the federal courts further demonstrates that *Rodriguez IV* is not "clearly irreconcilable" with *Diouf II*.

2. Rodriguez IV is Not Inconsistent with Diouf II's Construction of Section 1231(a)(6)

The Government advances several arguments that *Rodriguez IV* is in conflict with *Diouf II*, but they do not withstand scrutiny.

First, the Government cites the Supreme Court's holding that Section 1226(a) cannot be read to require "periodic bond hearings every six months in which the Attorney General must prove by clear and convincing evidence that [an individual's] continued detention is necessary" because "[n]othing in § 1226(a)'s text . . . supports the imposition of either of those requirements." *Rodriguez IV*, 138 S. Ct. at 847. However, that passage simply rejects the view that Section 1226(a) itself, unmoored from constitutional concerns, could be read to include those procedural requirements. Here, in contrast, the government's own regulations make clear that Section 1231(a)(6) can be construed to include such procedures. Moreover, as set forth *infra*, this Court's precedent establishes that the Due Process Clause requires that the government bear the burden of proof by clear and convincing evidence at prolonged detention bond hearings. Therefore, there is no

conflict between *Rodriguez IV*'s statutory holding and this Court's constitutional holdings concerning the standard and burden of proof for prolonged detention bond hearings.

Second, the government claims that after *Rodriguez IV*, Section 1231(a)(6) cannot be construed to require bond hearings because, unlike Section 1226(a), "[Section] 1231(a)(6) does not even contain the word 'bond.'" OB at 19. This argument is foreclosed by the government's own regulations, which permit release on bond through the file review authorized in Sections 241.4 and 241.13, *see* 8 C.F.R. § 241.5(b), and release via hearing before an Immigration Judge for those deemed "specially dangerous" under 8 C.F.R. § 241.14.

Moreover, as the government admits, "the operative language of § 1231(a)(6) directly mirrors that of § 1226(a). *Compare* 8 U.S.C. § 1226(a) ('an [individual] *may* be arrested and detained' (emphasis added)) *with* 8 U.S.C. § 1231(a)(6) ('an [individual] [. . .] *may* be . . . detained' (emphasis added))." OB at 18 (emphasis in original). Because Section 1226(a) authorizes bond hearings, then so too can Section 1231(a). Indeed, the language in Section 1231(a)(6) "echoes the traditional bond standard." *See Hurtado-Romero*, No. 18-CV-01685-EMC, 2018 WL 2234500, at *3 (N.D. Cal. May 16, 2018) . Section 1231 provides that noncitizens "may be detained" beyond the removal period if the Attorney General has determined that they are "a risk to the community or unlikely to

comply with the order of removal . . . .” 8 USC § 1231(a)(6). Because the Government admits that the text of Section 1231 “directly mirrors” the text of Section 1226(a) and its regulations authorize release on bond under Section 1231, Section 1231(a)(6) plainly can be construed to authorize bond hearings.[8]

Third, the Government wrongly claims that *Rodriguez IV* alters the “statutory interpretation landscape” and contains a “mode of analysis” that “undercuts the theory” of *Diouf II*. *See* OB at 19–23. Nothing in *Rodriguez IV* purports to rewrite the canon of constitutional avoidance; it simply applied it and held that statutes that contain the words “shall detain” cannot be interpreted to require a bond hearing at which an individual can win release. *See Rodriguez IV*, 138 S. Ct. at 842–51. That holding is not “clearly irreconcilable” with *Diouf II*’s holding that Section 1231(a)(6)—a statute that instead contains the words “may be detained”—be interpreted to require a bond hearing after six months of detention.

[8] The government also appears to suggest that *Rodriguez IV* holds that Section 1226(a) cannot be construed to require a bond hearing. *See* OB at 19 (“in [*Rodriguez IV*] the Supreme Court held that the discretionary ‘may detain’ language in § 1226(a) cannot plausibly be interpreted to require bond hearings . . . .”). This is obviously incorrect. *Rodriguez IV* expressly observed that noncitizens “detained under § 1226(a) receive bond hearings at the outset of detention,” 138 S. Ct. 830, 847 (citing 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1)). As the Court observed, the government itself, by regulation, has interpreted Section 1226(a) to allow for a bond hearing. *See* 8 C.F.R. § 236.1(d)(1). Nothing in *Rodriguez IV* remotely suggests that the regulations are ultra vires of the statute, or called into question the longstanding understanding that Section 1226(a) (and its predecessor statutes) provides for bond hearings. *See Rodriguez IV*, 138 S Ct. at 847–48.

The government's position also cannot be reconciled with the fact that *Rodriguez IV* reaffirmed *Zadvydas*. Were the Government correct that *Rodriguez IV* redefined the statutory interpretation "landscape" or held that statutes cannot be construed to require certain procedures not expressly enumerated in a statute, the Court would have overruled *Zadvydas*. But, as the District Court concluded, *Rodriguez IV* "specifically did not overrule *Zadvydas* and in *Zadvydas* the Supreme Court used the canon of constitutional avoidance to construe section 1231(a)(6) to include procedural requirements not specifically set forth in the statute." ER 31. As another district court explained:

> *Zadvydas* implied a presumptive 6-month limitation on detention pursuant to Section 1231(a)(6) even though the statute makes no reference to 6 months . . . *Zadvydas* also construed Section 1231(a)(6) to permit detention only so long as removal is "reasonably foreseeable," even though the statute sets no such explicit limit.

Hurtado-Romero, 2018 WL 2234500, at *3. Because *Rodriguez IV* did not disturb *Zadvydas*'s application of constitutional avoidance to construe Section 1231, it did not change the statutory interpretation "landscape" nor undermine *Diouf II*'s mode of analysis or holding.

Fourth, the government argues that *Diouf II* is clearly irreconcilable with *Rodriguez IV* because *Diouf II* "extended the procedural protections established" in *Casas*, which the government contends was abrogated by *Rodriguez IV*. OB at 21. However, *Rodriguez IV* did not purport to address the statutory interpretation

question in *Casas*: whether immigrants who were previously ineligible for a custody hearing under Section 1226(c), but who are detained pending a petition for review of their removal order and have a stay of removal, are eligible for a custody hearing before the Immigration Judge under Section 1226(a). *Casas*, 535 F.3d at 948. To the extent that *Rodriguez IV* is relevant to that question, it supports *Casas*'s construction of Section 1226(c) as limited to administrative removal proceedings.[9]

Even if *Rodriguez IV* had somehow undermined *Casas*'s statutory holding, it would not affect the soundness of *Diouf II*, which "extend[ed]" *Casas*'s holding that prolonged detention raises serious constitutional concerns, and that the canon of constitutional avoidance requires construing the immigration detention statutes to avoid those concerns if such a construction is plausible. *Diouf II*, 634 F.3d at

[9] *Rodriguez IV* explains that: "In *Demore v. Kim*, 538 U.S., at 529, 123 S.Ct. 1708 we distinguished § 1226(c) from the statutory provision in *Zadvydas* by pointing out that detention under § 1226(c) has 'a definite termination point': ***the conclusion of removal proceedings***. As we made clear there, that 'definite termination point'—and not some arbitrary time limit devised by courts—marks the end of the Government's detention authority under § 1226(c)." 138 S. Ct. at 846 (emphasis added). The Court likewise construed Section 1225 to authorize detention only pending proceedings before the immigration judge and BIA. *See id*. at 842 ("Once [removal] proceedings end, detention under §1225(b) must end as well."); *id*. at 844 ("The plain meaning of [the statute] is that detention must continue until immigration officers have finished 'consider[ing]' the application for asylum, § 1225(b)(1)(B)(ii), or until removal proceedings have concluded, § 1225(b)(2)(A)."). Thus, *Rodriguez IV* confirms that Section 1226(c) governs only during removal proceedings, and not during judicial review.

1086 ("As was the case in *Casas–Castrillon*, prolonged detention under § 1231(a)(6), without adequate procedural protections, would raise 'serious constitutional concerns.'") (quoting *Casas*, 535 F.3d at 950). Because *Rodriguez IV* did not address constitutional issues, it can have no bearing on this aspect of *Diouf II*. *Diouf II* remains good law, regardless of *Rodriguez IV*'s impact on *Casas*'s statutory construction.[10]

D. The District Court Correctly Held That, in Prolonged Detention Bond Hearings, the Government Bears the Burden of Proof by Clear and Convincing Evidence

The government asserts that "nothing at all in the text of 1231(a)(6) supports the imposition of . . . the Government bear[ing] the burden to justify further detention." OB at 19. However, Section 1231(a)(6) does not foreclose the inclusion of such procedures, as the regulations themselves already establish. As set forth above, the regulations implementing Section 1231 provide for a hearing before an Immigration Judge at which the government bears the burden of proof by clear and

[10] The government cites to *Hamama v. Adducci*, 912 F.3d 869 (6th Cir. 2018). OB at 21. However, there the Sixth Circuit concluded that Section 1252(f)(1) barred the petitioners' statutory claims for classwide injunctive relief concerning their detention. *Hamama*, 912 F.3d at 879. As the government "recognize[s,] the law in this circuit states that § 1252(f)(1) does not apply to statutory claims," and this Court remains bound this ruling absent en banc review. OB at 23 n.5 (citing *Rodriguez v. Hayes*, 578 F.3d 1032, 1046 (9th Cir. 2009)). To the extent that *Hamana* suggests that Section 1231 cannot be construed to authorize bond hearings, this Court likewise remains bound by *Diouf II* for the reasons set forth above.

convincing evidence for individuals deemed "specially dangerous." *See* 8 C.F.R. § 241.14(i)(1). Nothing in *Rodriguez IV* purports to void these regulations or otherwise preclude construing Section 1231(a)(6) to require a heightened burden of proof at prolonged detention bond hearings. *See Cortez v. Sessions*, 318 F. Supp. 3d 1134, 1146–47 (N.D. Cal. 2018) (finding that *Rodriguez IV* "did not engage in any discussion of the specific evidentiary standard applicable to bond hearings, and there is no indication that the Court was reversing the Ninth Circuit as to that particular issue.").[11]

Moreover, this Court has held that the Due Process Clause requires the government to bear the burden at a prolonged detention bond hearing. In *Singh v. Holder*, this court found that "***due process*** places a heightened burden of proof on the State in civil proceedings in which the 'individual interests at stake . . . are both particularly important and more substantial than mere loss of money.'" 638 F.3d at 1204 (emphasis added) (citing *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996);

[11] For over a century, the federal courts have construed immigration statutes to include additional procedures in order to avoid due process problems. *See Woodby v. INS*, 385 U.S. 276, 286 (1966) (construing the immigration statutes to require a "clear, unequivocal and convincing" standard of proof for deportation hearings); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950), *superseded by statute*, Supplemental Appropriation Act, 1951, 65 Stat. 1044, 1048, *as recognized in Ardestani v. INS*, 502 U.S. 129 (1991) (construing immigration statute to include procedures to avoid constitutional problem); *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903) (same).

Foucha v. Louisiana, 504 U.S. 71, 80 (1992); *Santosky v. Kramer*, 455 U.S. 745, 756 (1982); *Woodby v. INS*, 385 U.S. 276, 285 (1966)) (emphasis added); *Singh*, 638 F.3d at 1204 (observing that the Supreme Court "'repeatedly has recognized that civil commitment for *any* purpose constitutes a significant deprivation of liberty'") (quoting *Addington*, 441 U.S. at 427) (emphasis in original); *see also Rodriguez v. Robbins*, 715 F.3d 1127, 1144 (9th Cir. 2013) ("*Rodriguez II*") (observing that *Singh* was "constitutionally grounded").

The *Singh* Court went on to conclude that the application of the incorrect standard of proof was "prejudicial" in Mr. Singh's case. 638 F.3d at 1205. Because a prejudice inquiry is only required for constitutional claims, the Court's prejudice analysis confirms that the Court viewed the "clear and convincing" standard as mandated by the Constitution. *Cf. Gomez-Velazco v. Sessions*, 879 F.3d 989, 993 (9th Cir. 2018) ("[A]an individual may obtain relief for a due process violation only if he shows that the violation caused him prejudice . . . .").

Rodriguez IV does not affect the continued validity of *Singh*'s constitutional holding. In *Rodriguez IV*, the Supreme Court found the text of Section 1226(a) could not be construed to require the government to bear the burden of proof by clear and convincing evidence at a prolonged detention bond hearing. *Rodriguez IV*, 138 S. Ct. at 847–48 (explaining that "[n]othing in § 1226(a)'s text" authorizes the injunction's bond hearing requirements). But, the Supreme Court made clear it

did not resolve any constitutional issues, leaving *Singh*'s due process holding undisturbed. *Id*. at 851 (explaining that "we do not reach" "respondent's constitutional arguments on their merits").

Accordingly, the District Court correctly ordered that the government must bear the burden of proof at the bond hearings provided to Plaintiffs, consistent with *Singh* and *Rodriguez IV*.[12]

II. As the Government Concedes, the Remaining Preliminary Injunction Factors Favor Plaintiffs

The District Court found that the remaining equitable *Winter* factors—the likelihood of Plaintiffs suffering irreparable harm in the absence of preliminary relief, the balance of equities, and the public interest—weigh in favor of Plaintiffs.

[12] Should the Court conclude that the District Court erred in finding that Plaintiffs are entitled to bond hearings on statutory grounds under *Diouf II*, Plaintiffs believe the proper course of action would be to remand to the district court to decide the constitutional issue in the first instance and based on a developed factual record. After *Rodriguez IV* was remanded to this Court to consider the constitutional issues in the first instance, *see Rodriguez IV*, 138 S. Ct. at 851, this Court, in turn, remanded to the district court. *See Rodriguez v. Marin*, 909 F.3d 252, 257 (9th Cir. 2018) ("*Rodriguez V*"). In doing so, this Court maintained the *Rodriguez* injunction in place on remand. *Id*. at 256 ("Like the Supreme Court, we do not vacate the permanent injunction pending the consideration of these vital constitutional issues."). In refusing to vacate the injunction, this Court expressed its "grave doubts that ***any*** statute that allows for arbitrary prolonged detention without any process is constitutional or those who founded our democracy precisely to protect against the government's arbitrary deprivation of liberty would have thought so." *Id.* at 256 (emphasis added). Should the Court find *Diouf II* does not control Plaintiffs' statutory claim, Plaintiffs submit that the Court should similarly remand for consideration of their constitutional claims without vacating the preliminary injunction.

ER 32. On appeal, the government does not challenge those findings in their opening brief and thus has waived any challenge to them. *See Alaska Ctr. for Env't*, 189 F.3d at 858 n.4. As a result, even were this Court to find only that Plaintiffs raised "serious questions" as to the merits of their claims, it should nonetheless affirm the preliminary injunction because the balance of hardships tips sharply in Plaintiffs' favor, and the remaining equitable factors are satisfied. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011).

A. Absent Preliminary Relief, Plaintiffs Will Suffer Irreparable Harm in the Form of Prolonged Incarceration and Separation from Their Families

As the District Court properly found, absent the relief provided by the preliminary injunction, "Plaintiffs [would] face compounding harm with each additional day they [would] remain in custody without a bond hearing . . . ." ER 32 (citing *Villalta v. Sessions*, No. 17-CV-05390-LHK, 2017 WL 4355182, at *3 (N.D. Cal. Oct. 2, 2017)). This Court has previously recognized the "irreparable harms imposed on anyone subject to immigration detention" including "subpar medical and psychiatric care in ICE detention facilities, the economic burdens imposed on detainees and their families as a result of detention, and the collateral harms to children of detainees whose parents are detained." *Hernandez v. Sessions*, 872 F.3d 976, 995 (9th Cir. 2017). The Supreme Court has likewise explained that "[t]he time spent in jail awaiting trial has a detrimental impact on the individual. It

often means loss of a job; it disrupts family life; and it enforces idleness." *Barker v. Wingo*, 407 U.S. 514, 532 (1972); *accord Nat'l Ctr. for Immigrants Rights, Inc. v. I.N.S.*, 743 F.2d 1365, 1369 (9th Cir. 1984). Finally, the Government itself has documented alarmingly poor conditions in the very centers where it detains Plaintiffs. *See, e.g.*, DHS, Office of Inspector General ("OIG"), Concerns about ICE Detainee Treatment and Care at Detention Facilities (2017) (reporting instances of invasive procedures and substandard care; mistreatment, such as indiscriminate strip searches; long waits for medical care and hygiene products; expired, moldy and spoiled food; and detainees being held in administrative segregation for extended periods without documented, periodic reviews required to justify continued segregation).[13]

Continued detention would also interfere with Plaintiffs' ability to adequately prepare their immigration cases. Plaintiffs are often unable to obtain critical evidentiary support necessary to effectively present their cases. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1690 (2013) (remarking that "during removal proceedings noncitizens are not guaranteed legal representation and are often subject to mandatory detention . . . where they have little ability to collect evidence"). Plaintiffs' continued detention would make it far less likely that they

[13] *Available at* https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf (last accessed May 15, 2019).

would be able to retain counsel, which in turn would result in significantly lower grants of relief from deportation. *See, e.g.*, Ingrid Eagly & Steven Shafer, *Special Report: Access to Counsel in Immigration Court*, Am. Imm. Council (Sept. 2016) (documenting that only 14 percent of detained immigrants acquired legal counsel, compared with two-thirds of non-detained immigrants, and that immigrants with attorneys fare better at every stage of the immigration court process).[14]

The named Plaintiffs' cases highlight the type of irreparable harm that Class members would face were this court to vacate the District Court's preliminary injunction. Prior to receiving his bond hearing and being released, Mr. Aleman Gonzalez was suffering emotional hardship on a daily basis in detention due to his forced separation from his U.S. citizen daughters, who are five and two years old. SER 51, at ¶¶ 12, 15. His incarceration prevented him from seeing or speaking with his daughters, and he was at risk of losing custody of them due to a state custody proceeding scheduled while he was in immigration custody. SER 51, ¶15; SER 52, at ¶17. Similarly, Mr. Gutierrez Sanchez's U.S. citizen wife was forced to care for their two young children without Mr. Gutierrez Sanchez's support during his detention. SER 59, ¶¶ 9, 10.

[14] *Available at* https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court (last accessed May 15, 2019).

Thus, this court should affirm the District Court's finding that the preliminary injunction is necessary to prevent Plaintiffs from suffering irreparable harm as a result of their unlawful prolonged detention.

B. The Balance of Hardships Weigh Heavily in Plaintiffs' Favor

For similar reasons, the District Court found that "the harm to Plaintiffs in remaining in detention without a bond hearing clearly outweighs any 'harm' to the [g]overnment in providing bond hearings." ER 32. This is especially true here, where the majority of Plaintiffs are seeking fear-based relief and their continued and prolonged detention would impact their ability to present defenses that ultimately go to the issue of whether they face harm in their countries of removal. *Cf. Oshodi v. Holder*, 729 F.3d 883, 894 (9th Cir. 2013) (en banc) (noting that for asylum and withholding of removal applicants, "the private interest could hardly be greater" because "[i]f the court errs, the consequences for the applicant could be severe persecution, torture, or even death"); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) ("Deportation is always a harsh measure; it is all the more replete with danger when the [individual] makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country.").

The government does not, and could not, argue that they face any significant burdens in providing bond hearings for Class members. The government has been required to provide bond hearings pursuant to *Diouf II* for over eight years, and

cannot face any harm in an order merely requiring them to continue that practice. "Faced with such a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor." *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983).

C. The Injunction is in the Public Interest

As with the other two *Winter* factors, the District Court properly found that the public interest weighs in favor of Plaintiffs. ER 32.

As the District Court made clear: *Rodriguez IV* "is not clearly irreconcilable with *Diouf II*, [and therefore] the public interest weighs in favor of the [g]overnment providing Plaintiffs and the class member bond hearings as required by *Diouf II*." ER 32. After all, it would clearly not be "equitable or in the public's interest to allow [the government] . . . to violate the requirements of federal law, especially when there are no adequate remedies available." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) (quoting *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013)); *see also Hernandez*, 872 F.3d at 996 ("The public interest benefits from an injunction that ensures that individuals are not deprived of their liberty and held in immigration detention because of bonds established by a likely unconstitutional process.").

In addition, an injunction is in the public interest because of the "indirect hardship to [Plaintiffs'] friends and family members." *Golden Gate Rest. Ass'n v. City & Cty. of San Francisco*, 512 F.3d 1112, 1116 (9th Cir. 2008); *see also Leiva-Perez v. Holder*, 640 F.3d 962, 969–70 (9th Cir. 2011). As this Court has recognized, unnecessary detention places "burdens on family" such as a detainees' children's need to "receive counseling because of the trauma of their government-compelled separation from their [parents]." *Hernandez*, 872 F.3d at 996. The named Plaintiffs' cases are illustrative. Mr. Gutierrez Sanchez's immigration detention forced his U.S. citizen wife, Stephany, to go on public assistance because she could not support herself and their two U.S. citizen children without his income, which had been his family's primary source of income. SER 59, at ¶9. While detained, the family's landlord had notified his wife that the family's rent would be increased. *Id.* Because the government cash assistance she was receiving was not enough to meet their increased expenses, Mr. Gutierrez Sanchez was worried that his immigration detention would cause his family to become homeless. *Id.* Similarly, Mr. Aleman Gonzalez's brother and his family have already been displaced from the home they shared due to Mr. Aleman Gonzalez's detention, as they could not afford their rent without Mr. Aleman Gonzalez's income. SER 52, at ¶18.

Finally, the preliminary injunction is in the public interest because it will reduce expensive, unnecessary detention. The injunction requires bond hearings at which Class members will be ordered released if they are not a danger or flight risk warranting their detention. As the Ninth Circuit noted in 2017, "[t]he costs to the public of immigration detention are 'staggering': $158 each day per detainee, amounting to a total daily cost of $6.5 million." *Hernandez*, 872 F.3d at 996. "[R]educed detention costs can free up resources to more effectively process claims in Immigration Court." *Id*. *See also* U.S. Dep't of Justice FY 2020 Budget Request[15] (requesting $72.1 million to "improve [their] ability to conduct immigration hearings" and to "expand[] capacity, improve[] efficiency, and remove[] impediments to the timely administration of justice."). Thus, in this case, "the general public's interest in the efficient allocation of the government's fiscal resources favors granting the injunction." *Hernandez*, 872 F.3d at 996. Therefore, the public interest overwhelmingly favors entering a preliminary injunction.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's grant of a preliminary injunction in favor of Plaintiffs. In so doing, this Court will ensure that all Plaintiffs will continue to receive the individualized bond hearings at six

[15] *Available at* https://www.justice.gov/jmd/page/file/1142616/download (last accessed June 7, 2019).

months of detention to which they are statutorily entitled under the binding law of this Circuit. Affirming the preliminary injunction will also ensure those individuals are entitled to release unless the government establishes, by clear and convincing evidence, that the individual is a flight risk or a danger to the community.

Dated: June 10, 2019

Respectfully submitted,

s/Judah Lakin
Judah Lakin
Counsel for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a)(7)(C), and Ninth Circuit Rule 32-1, I certify that the attached answering brief is proportionately spaced, has a typeface of 14 points or more, and contains 12,698 words.

Dated: June 10, 2019

s/Judah Lakin
Judah Lakin
Counsel for Plaintiffs-Appellees

STATEMENT OF RELATED CASES, CIRCUIT Rule 28-2.6

Martinez-Banos v. Godfrey, Ninth Circuit No. 18-35640, raises the same or closely related legal issues to those presented in this appeal.

DATED: June 10, 2019

s/Judah Lakin
Judah Lakin
Counsel for Plaintiffs-Appellees