UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

HANAD ABDI and JOHAN BARRIOS RAMOS, on behalf of himself and all others similarly situated, Petitioners, v. KIRSTJEN M. NIELSEN, in her official capacity as Secretary of U.S. Department of Homeland Security; THOMAS BROPHY, in his official capacity as Acting Director of Buffalo Field Office of Immigration and Customs Enforcement; JEFFREY SEARLS, in his official capacity as Acting Administrator of the Buffalo Federal Detention Facility, and JEFFERSON SESSIONS, in his official capacity as Attorney General of the United States, Respondents.	Case No. 17-cv-721 (EAW)

PETITIONERS' OPPOSITION TO THE GOVERNMENT'S MOTION TO VACATE THE PRELIMINARY INJUNCTION ORDERING BOND HEARINGS FOR ARRIVING ASYLUM-SEEKERS

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INTRODUCTION

The petitioners oppose the government's motion to discontinue bond hearings for the arriving asylum-seekers in this case who established a significant possibility of eligibility for asylum based on the violence and persecution they fled, only to find themselves imprisoned at Batavia while they pursue their right to remain in this country. Last year, this Court ordered the government to provide arriving asylum-seekers imprisoned for six months or more (the bond subclass) custody hearings before immigration judges. In 85% of these hearings, judges concluded that the detainee could be released and did not deem a single detainee dangerous. Despite the evidence plainly showing that the bond subclass's detention is unnecessary, the government seeks to return to a regime that imprisons these vulnerable and traumatized people for months and even years without a hearing before a neutral adjudicator.

The Court should deny the government's motion because the detention regime it advocates violates the bond subclass's constitutional right to be free of prolonged, arbitrary imprisonment. The narrow circumstances under which courts have authorized detention without bond hearings do not apply to the bond subclass. Government officials have screened them into the United States so they can apply for asylum, and they are entitled to due process protections against imprisonment while they pursue this relief. Their prolonged detention under the existing regime violates this right because it serves no special justification and is not accompanied by the minimal procedural safeguards due process requires. The government ignores these deficiencies and asks the Court to vacate its bond injunction, relying on the Supreme Court's decision in *Jennings v. Rodriguez*. But *Jennings* explicitly declined to rule on the constitutional issue and here, due process provides an independent basis to preserve the preliminary injunction.

The government is also wrong to claim that 8 U.S.C. Section 1252(f)(1) divests this Court of jurisdiction to enter class-wide injunctive relief. That statute, which was designed to

prevent facial challenges by persons who are not in removal proceedings, does not, by its own terms, apply to this habeas case challenging the prolonged detention of persons already in removal proceedings. It also does not bar class-wide declaratory relief.

BACKGROUND[1]

Class members have all established a significant possibility of eligibility for asylum.

The arriving asylum-seekers in this case are people from all over the world who fled their homes, made long and dangerous journeys to this country, declared themselves at ports of entry seeking asylum, passed an initial screening that found a significant possibility of their eligibility for asylum, and were then imprisoned at the Buffalo Federal Detention Facility in Batavia, New York ("Batavia"). *See Abdi v. Duke*, 280 F. Supp. 3d 373, 378-381 (W.D.N.Y. 2017), *remanded* 18-94 (2d Cir. Sept. 5, 2018); *Abdi v. Duke*, 323 F.R.D. 131, 135-36 (W.D.N.Y. 2017); Barrios Ramos Decl. ¶¶ 3-11, 16 (ECF No. 38-4); H. Abdi Decl. ¶¶ 5-18 (ECF No. 38-5); Musa Decl. ¶¶ 2-3 (ECF No. 38-6); Sewoul Decl. ¶¶ 2, 7 (ECF No. 38-8); Ahmed Decl. ¶ 1 (ECF No. 38-14). At the time of filing, petitioner Hanad Abdi had been imprisoned in Batavia for over ten months and suffering from severe nightmares after he had fled the men who had killed his father and tortured him in Somalia, found his way to a U.S. port of entry to seek asylum, and established a

[1] The facts set out below are derived from evidence the petitioners submitted in support of their preliminary injunction motion and from additional evidence they have since gathered without discovery. The petitioners submit that this evidence is sufficient to support denial of the government's pending motion.

Prior to the Court entering a briefing schedule on the government's motion, the petitioners had requested they be permitted to conduct limited discovery. *See* ECF Nos. 92, 94. The Court declined to defer substantive briefing in anticipation of a discovery motion and noted that "[i]f the Court ultimately determines that limited discovery is warranted, it may well defer rendering a decision on any pending substantive motion and permit the parties to supplement their filings." Text Order (ECF 96) (Nov. 8, 2018). To the extent the Court determines that further supplementation of the factual record is important to resolving the government's motion to vacate, the plaintiffs are prepared to conduct limited discovery quickly and to supplement the record and their briefing accordingly.

significant possibility of eligibility for living in the United States. H. Abdi Decl. ¶¶ 7, 9-10, 16-17. Petitioner Johan Barrios Ramos fled Cuba after enduring incarceration there for being a political dissident, only to find himself imprisoned again in Batavia after seeking asylum at a U.S. port of entry and establishing a significant possibility of eligibility for asylum. Barrios Ramos Decl. ¶¶ 1-11, 16.

The United States, pursuant to the United Nations Protocol Relating to the Status of Refugees and the Refugee Act of 1980, has committed to protecting asylum-seekers, like the class members in this case, and cannot expel or return them to countries where they will suffer persecution. Consistent with the special protections asylum-seekers enjoy under the law, those arriving at the U.S. border without authorization to enter who indicate an "intention to apply for asylum" or express "a fear of persecution" are referred to asylum officers who conduct screenings known as credible fear interviews, whereas all others are summarily removed. *See* 8 U.S.C. §§ 1225 (b)(1)(A), (b)(1)(B)(i). Individuals who, like the class members here, establish a "credible fear of persecution" at their credible fear interviews by showing a "significant possibility" of eligibility for asylum are referred for full immigration proceedings before immigration judges while those who fail their credible fear interviews are processed for summary removal. *See id.* §§ 1225(b)(1)(B)(iii), (v). Every member of the petitioner class has passed a credible fear interview and is in full immigration proceedings. *See Abdi*, 323 F.R.D. at 145 (defining the class as "arriving asylum-seekers who have passed a credible fear interview . . ."). Once arriving asylum-seekers are screened in for full proceedings before immigration judges, they have the right to remain in the country until their cases are fully adjudicated:

> The credible fear standard is designed to weed out non-meritorious cases so that only applicants with a likelihood of success will proceed to the regular asylum process. If the alien meets this threshold, the alien is permitted to remain in the U.S. to receive a full adjudication of the asylum claim—the same as any other alien in the U.S.

H.R. Rep. No. 104-469, pt. 1, at 158 (1996); *see also* 8 U.S.C. § 1158(a) ("Any alien who . . . arrives in the United States . . . may apply for asylum . . .").

Imprisoned while litigating their asylum cases, the bond class is exposed to severe harms.

Unlike most non-citizens who are eligible for bond hearings during the pendency of their immigration proceedings under the Immigration and Nationality Act ("INA") and its implementing regulations, *see* 8 U.S.C. § 1226(a), 8 C.F.R. § 1236.1(d)(1), arriving asylum-seekers are subject to a special detention scheme codified at 8 U.S.C. § 1225(b)(1)(B)(ii) that does not authorize bond hearings no matter the length of proceedings. Rather, under the statutory scheme the only possibility for their release is through a process known as parole, which requires detainees to convince Immigration and Customs ("ICE") officials, the jailing authorities, to release them. *See* 8 U.S.C. § 1182(d)(5)(A).

The bond subclass in this case consists of all class members detained for six months or more. *Abdi*, 323 F.R.D. at 145. Prior to the entry of the preliminary injunction, every single asylum-seeker before this Court languished in prison-like conditions for prolonged periods—even possibly years, given the unbounded mandatory detention regime under which they are held. When the petitioners moved for a preliminary injunction, counsel had identified 22 bond subclass members, and their average length of detention was 387 days with the longest time in custody being 1057 days. *See* Austin Decl. ¶¶ 2, 3 (ECF No. 51-1). The Batavia detention facility, like many immigration facilities under ICE's jurisdiction, is not meaningfully different from a prison—it imposes strict restrictions on asylum-seekers' freedom of movement, including limited access to outdoor recreation, use of solitary confinement for disciplinary infractions, restricted access to personal property, multiple daily inmate "counts," and limitations on phone access, visitation, and correspondence. *See generally* U.S. Immigration and Customs Enforcement, Buffalo Federal Detention Facility Handbook (2016) (attached as Ex. C to

Declaration of Ingrid Sydenstricker); U.S. Immigration and Customs Enforcement, National Detainee Handbook: Custody Management (2016) (attached as Ex. D to Sydenstricker Decl.); U.S. Dep't of Homeland Sec. Office of Inspector Gen., Concerns about ICE Detainee Treatment and Care at Detention Facilities (2017) (reporting instances of invasive procedures, substandard care, and mistreatment, including indiscriminate strip searches, long waits for medical care and hygiene products, and, in the case of one detainee, a multiday lock down for sharing a cup of coffee with another detainee).

As described by Dr. Allen Keller, Director of the Bellevue/NYU Program for Survivors of Torture, who has decades of experience researching and evaluating incarcerated asylum-seeker and refugee populations, class members' physical and psychological health deteriorate under these conditions. *See* Declaration of Dr. Allen Keller ¶¶26-27. Dr. Keller explains that asylum-seekers experience immigration detention as prison, that prolonged immigration detention irreparably injures asylum-seekers because they are a vulnerable and traumatized population whose prior trauma is exacerbated in such prison-like conditions particularly in the absence of specialized medical care they require, that harms increase as the detention length grows and do not abate upon release, and that immigration detention often causes more distress than criminal incarceration because of the "inherent and profound uncertainty about the length of detention." *Id.* ¶¶ 24, 31, 33-36. While immigration detention is harmful no matter the length, Dr. Keller explains that its cumulative effect becomes especially pernicious for people who are incarcerated for more than six months. *See id.* ¶ 42. Class member declarations confirm that class members are enduring conditions of confinement that exacerbate their pre-existing trauma, including protracted separation from spouses, children, and other loved ones, *see* Declaration of Joseph Baptiste ¶¶ 4-6, 8-9, H. Abdi Decl. ¶ 39, and suffering from worsening medical and

psychological conditions, including post-traumatic stress disorder, anxiety and depression, headaches, dizziness, nose bleeds, and hospitalization for aggravated health issues, *see, e.g.*, Barrios Ramos Decl. ¶ 16; H. Abdi Decl. ¶¶ 37-38; Touray Decl. ¶¶ 2, 6 (ECF No. 38-11); S. Abdi Decl. ¶ 7 (ECF No. 38-12); Nor Decl. ¶¶ 5-6 (ECF No. 38-15).

Detention also hampers asylum-seekers from adequately preparing for their asylum hearings. *See* Musa Decl. ¶ 10; Mohamed Decl. ¶ 11 (ECF No. 38-7); Flezinord Decl. ¶ 8 (ECF No. 38-10); S. Abdi Decl. ¶ 8; Hirsi Decl. ¶ 9 (ECF No. 38-13); Ahmed Decl. ¶ 6; Hernandez Decl. ¶ 10 (ECF No. 38-16). A former immigration judge and immigration lawyers who regularly appear at the Batavia Immigration Court confirm that detained asylum-seekers face significant challenges in collecting documentary evidence, contacting witnesses, obtaining medical evaluations, and acquiring and communicating with counsel. Declaration of Hon. Carol King ¶¶ 23-24; McLean Decl. ¶¶ 11-12 (ECF No. 38-18); Declaration of Nicholas Phillips ¶¶ 5-14. Dr. Keller explains that given the heightened trauma that asylum-seekers experience in immigration detention, they are often unable to describe their trauma histories and develop trusting relationships with their lawyers, both of which inhibit their ability to succeed in their cases. *See* Keller Decl. ¶ 38. Both Dr. Keller and the immigration lawyers explain that desperation and despondency can lead some asylum-seekers with meritorious cases to give up their right to seek asylum altogether and accept removal to countries where their lives could be in danger. *See id.* ¶ 39; Phillips Decl. ¶ 14.

The bond subclass has demonstrated a significant likelihood of winning both bond and asylum.

When immigration judges have scrutinized ICE's rationale for denying parole and imprisoning subclass members, they have consistently found those justifications lacking. Under this Court's preliminary injunction, they have conducted 20 bond hearings for subclass members and in 17 of those cases (85%) they rejected the government's arguments and set bond. *See*

Sydenstricker Decl. ¶ 4. In the remaining three cases, immigration judges denied release based on flight risk, not dangerousness, concerns. *See id.* ¶ 5.

Not only do subclass members routinely secure bond at hearings, historically 61% of represented arriving asylum-seekers who have been imprisoned at Batavia for over six months have been granted asylum, which is consistent with the fact that they established a "significant possibility," 8 U.S.C. § 1225(b)(1)(B)(iii), of winning asylum at their credible fear interviews. *See* Declaration of David Hausman ¶ 8.[2] It is no coincidence that the bond subclass is pursuing meritorious claims for relief. Litigating meritorious cases takes time and immigration judges grant continuances—that is, postponements of hearings—in cases where they determine that more time is necessary to adequately prepare the case and the litigant is not unduly delaying the case. King Decl. ¶ 20; Phillips Decl. ¶¶ 16-18. Evidence must be obtained from overseas; country conditions experts must produce reports; and in many cases, *pro bono* medical experts must document physical harm and interview detainees with psychological trauma to corroborate testimony, especially when asylum-seekers' trauma histories inhibit them from adequately testifying about their experiences of persecution, torture, or death. *See* King Decl. ¶ 17; Phillips Decl. ¶¶ 6-7, 11-12. Delays also are often inevitable in the backlogged immigration court system. *See* King Decl. ¶¶ 25-28.

ARGUMENT

The government has moved to vacate the portion of this Court's preliminary injunction requiring that arriving asylum-seekers detained for more than six months receive bond hearings at which the government bears the burden of justifying detention by clear and convincing evidence, 280 F. Supp. 3d at 410-12, and that further requires, as clarified, that immigration

[2] Every indigent detainee with a first appearance at the Batavia Immigration Court is now entitled to free counsel in their immigration proceedings. *See* Phillips Decl. ¶ 3.

judges consider detainees' ability to pay and alternatives to detention, *Abdi v. Nielsen*, 287 F. Supp. 3d 327, 345 (W.D.N.Y. 2018). In support of its motion, the government does not contest the Court's earlier conclusions that "[p]etitioners have established irreparable harm," "[t]he most important prerequisite to issuing a preliminary injunction," 280 F. Supp. 3d at 403-04, and that the government is not unduly burdened by the bond injunction, *see id.* at 410 (recognizing that bond hearings do not "compel [the government] to release any detainees . . . it simply means that certain procedural safeguards must be followed when considering the detention of these individuals").

Rather, the only preliminary injunction factor the government discusses is likelihood of success on the merits, relying on the Supreme Court's intervening decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), which removes the statutory basis upon which this Court relied, and on an assertion that Section 1252(f)(1) bars this Court from granting any bond-hearing relief. But the government's reliance on *Jennings* is misplaced, as the Court expressly left unresolved whether the Due Process Clause entitles the bond subclass to hearings this Court previously ordered, *id.* at 851, and core due process principles and precedent independently establish a basis to preserve those hearings. The government also misconstrues Section 1252(f)(1) when it asserts that statute bars this Court from reviewing the bond subclass's constitutional claims.

I. THE SUBCLASS REMAINS LIKELY TO PREVAIL ON THE RIGHT TO THE BOND HEARINGS THIS COURT PREVIOUSLY ORDERED.

That the government cannot civilly confine a person without justifying its decision in a hearing before a neutral adjudicator, by clear and convincing evidence, is a bedrock principle of due process. *See Foucha v. Louisiana*, 504 U.S. 71, 81-83 (1992) (requiring individualized hearing to continue involuntary civil confinement); *Addington v. Texas*, 441 U.S. 418, 431

(1979) (requiring government to meet clear and convincing standard to justify civil confinement); *United States v. Salerno*, 481 U.S. 739, 750-55 (1987) (upholding civil pretrial detention scheme because it required custody hearings and justification of detention by clear and convincing evidence). Relying on *Foucha, Salerno*, and its other civil confinement jurisprudence, the Supreme Court in *Zadvydas v. Davis*—a case involving the prolonged detention of non-citizens with criminal histories who had completed and lost their legal challenges to remain in the country, but who could not as a practical matter be deported in the foreseeable future—applied the due process principle that civil confinement must be strictly limited in the immigration context. 533 U.S. 678, 690-91, 699-701 (2001).

These cases formed the basis for the emphatic conclusion by the only Justices in *Jennings* to address the due process rights of non-citizens that asylum-seekers exactly like those before the Court have a due process right to bond hearings. *See* 138 S. Ct. at 860-69 (Breyer, J., dissenting to statutory holding) (noting that "[f]reedom from arbitrary detention is as ancient and important a right as any found within the Constitution's boundaries" and that "[n]o one can claim, nor since the time of slavery has anyone [] successfully claimed, that persons held within the United States are totally without constitutional protection"). Recognizing these principles, two district courts in this circuit have concluded, post-*Jennings*, that arriving asylum-seekers subject to prolonged detention have a constitutional right to bond hearings where the government must justify detention by clear and convincing evidence. *See, e.g.*, *Lett v. Decker*, --- F. Supp. 3d ---, 2018 WL 4931544, at*5-6 (S.D.N.Y. Oct. 10, 2018); *Perez v. Decker*, 18-CV-5279 (VEC), 2018 WL 3991497, at *6 (S.D.N.Y. Aug. 20, 2018); *see also Rodriguez v. Marin*, --- F.3d ---, 2018 WL 6164602, at *3 (9th Cir. Nov. 19, 2018) (declining to vacate injunction giving arriving asylum-seekers detained for more than six months bond hearings, remanding case to district court, and

expressing "grave doubts that any statute that allows for arbitrary prolonged detention without any process is constitutional").

As explained below, asylum-seekers who have passed credible fear interviews and been allowed to enter the country to seek asylum are, like the immigrants in *Zadvydas*, entitled to freedom from prolonged, arbitrary detention. The narrow exceptions where the law authorizes detention without meaningful process do not apply to them: they have due process rights against imprisonment, unlike the petitioner whose potentially indefinite detention *Shaughnessy v. U.S. ex. rel. Mezei*, 345 U.S. 206, 212 (1953) upheld; and their prolonged detention without bond hearings lacks special justification, unlike the brief mandatory detention of non-citizens convicted of certain crimes *Demore v. Kim*, 538 U.S. 510, 531 (2003), upheld. Instead, due process supports the continuation of this Court's preliminary injunction.

A. The Bond Subclass Has a Due Process Interest Against Imprisonment.

The Due Process Clause protects all "persons," including non-citizens, "within the jurisdiction of the United States . . . from deprivations of life, liberty, or property without due process of law." *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). The due process interests afforded to non-citizens, including in immigration detention, include "[f]reedom from imprisonment," which "lies at the heart of the liberty that the [Due Process] Clause protects." *Zadvydas* 533 U.S. at 690.

In assessing the due process interests of the bond subclass, it is essential to recognize that they are a unique group of non-citizens who declared themselves at the border and subsequently passed credible fear interviews by establishing a significant possibility of winning asylum. *See* 8 U.S.C. §§ 1225 (b)(1)(A), (b)(1)(B)(i), (iii), (v). By passing this threshold test, the government screened them into the country to pursue their right to claim asylum in a full adjudication before an immigration judge. *Id.* Their right to pursue asylum is no different from that of any other non-citizen who is applying for asylum from within the United States. *See* H.R. Rep. No. 104-469, pt.

1, at 158 (1996) (stating that after passing credible fear screenings, a person is "permitted to remain in the U.S. to receive a full adjudication of the asylum claim—*the same as any other alien in the U.S.*" (emphasis added)).

The government nonetheless likely will contend, relying on *Mezei*, that the bond subclass members have no due process arising out of their confinement. But Second Circuit law forecloses any such contention. In a case that is directly on point, the Second Circuit has held that asylum-seekers who have passed credible fear screenings and who are entitled to pursue asylum under the Refugee Act may "avail themselves of the due process clause of the [F]ifth [A]mendment to challenge the restrictions and the related conduct of the United States government." *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1341, 1345 (2d Cir. 1992) (*"HCC"*), *vacated as moot sub nom. Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 918 (1993). Noting due process compelled its holding because the petitioners had been "'screened in'— that is, found by the governmental officials to have a credible fear of persecution," the Second Circuit in *HCC* ordered the government to provide Haitian arriving asylum-seekers detained on Guantanamo access to counsel. *Id.* at 1345, 1346. [3] Specifically, the Court stated that by establishing a credible fear of persecution in their home country, the Haitians held on Guantanamo were "akin to being asylees," which the Court understood to mean persons pursuing

[3] While the Second Circuit decided *HCC* before Congress instituted credible fear interviews as a statutory matter for arriving asylum-seekers, federal officers from the Immigration and Naturalization Service had interviewed *HCC* class members to determine if they had a "credible fear of persecution upon return to Haiti," screening in those who did so they could pursue asylum claims and screening out those who did not. *See HCC*, 969 F.2d. at 1354. Though not the same statutory process, this interview was functionally equivalent to the credible fear interview that now exists under Section 1225(b).

asylum from within the United States, by virtue of which they were entitled to due process protections. *Id.* at 1333, 1346. [4]

Although vacated as moot by settlement, *HCC* remains "strong persuasive authority." *United Nat'l Ins. Co. v. Waterfront N.Y. Realty Corp.*, 948 F. Supp. 263, 268 (S.D.N.Y. 1996); *see Silverman v. Miranda*, 213 F. Supp. 3d 519, 530 (S.D.N.Y. 2016). Moreover, the trifecta of Second Circuit cases that *HCC* relied on to reach its conclusion remains binding precedent. First, in *U.S. ex. rel. Paktorovics v. Murff*, the Second Circuit held that refugees who were paroled into the country by Presidential invitation—much like the bond class members who were invited into the country to pursue their asylum claims after passing the credible fear interview—were entitled to certain procedures in their exclusion proceedings because they had "effect[ed] a change in [] status . . . sufficient to entitle him to the protection of our Constitution." 260 F.2d 610, 614 (2d Cir. 1958). Second, in *Chun v. Sava*, the Court held that an asylum-seeking stowaway arrested before entering the country could not be deported without being given an asylum hearing in light of the "dictates of procedural due process." 708 F.2d 869, 876-77 (2d Cir. 1958). The Court explained that "a refugee who has a well-founded fear of persecution in his homeland has a protectable interest recognized by both treaty and statute, and his interest in not being returned may well enjoy some due process protection not available to an alien claiming only admission." *Id.* (footnotes and internal quotations omitted). Third, in *Augustin v. Sava*, the Court held that an asylum-seeker should receive an asylum hearing because "despite the unavailability of due process protections in most exclusion proceedings . . . it appears likely that some due process protection surrounds the determination of whether an alien has sufficiently shown that return to a

[4] On remand, the district court confirmed that this due process right includes the core "liberty interest in not being arbitrarily or indefinitely detained." *See Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028, 1045 (E.D.N.Y. 1993).

particular country will jeopardize his life or freedom so as to invoke the mandatory prohibition against his return to that country." 735 F.2d 32, 37 (2d Cir. 1984).

Even though each of these three cases involved the right to fair access to the asylum process, they support the finding that arriving asylum-seekers who have passed a credible fear interview have the core due process interest in freedom from imprisonment. Not only does detention itself present the most fundamental of liberty interests the Due Process Clause protects, *Zadvydas*, 533 U.S. at 690 (declaring that "[f]reedom from imprisonment . . . lies at the heart of the liberty that the [Due Process] Clause protects"), detention also impinges on fair access to asylum because, as this Court has found, it prevents class members "from adequately preparing for their asylum hearings before an immigration judge." *Abdi*, 280 F. Supp. 3d at 404; *id.* at 405 (further explaining that "[t]he prolonged nature of these detentions has limited the detainees' capacity to contact friends and family in their native countries" and "ha[s] hampered the detainees' preparation for upcoming asylum hearings, *which undermines the very purpose of providing asylum-seekers a hearing*." (emphasis added)). The record amply illustrates the myriad ways that detention impedes asylum proceedings, including in access to counsel, access to documents, and in the psychological effects on the asylum-seeker. *See supra* at 4-6. United Nations guidance, which the Supreme Court has looked to in understanding the government's obligation under the Refugee Act, *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 439 (1987), also confirms that imprisonment of asylum-seekers should be minimized to meet international obligations to protect asylum-seekers. *See* United Nations High Commissioner for Refugees, Detention Guidelines ¶ 14 (2012) (attached as Ex. E to Sydenstricker Decl.) ("These rights taken together—the right to seek asylum, the non-penalisation for irregular entry or stay and the rights to liberty and security of person and freedom of movement—mean that the detention of asylum-

seekers should be a measure of last resort, with liberty being the default position."); Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention and Protection* ¶ 124 (2001) (attached as Ex. F to Sydenstricker Decl.) (noting that "[d]etention will often deprive the asylum seeker of an opportunity to present his or her case, or to have the assistance of counsel" and concluding that "detention of refugees and asylum seekers is an exceptional measure").

HCC and its supporting cases also provide the foundation for why arriving asylum-seekers' constitutional status is distinguishable from that of the petitioner in *Mezei*, a case where the Supreme Court held a non-citizen excluded from the U.S. and detained at the threshold of entry to the country could not challenge his detention under the Due Process Clause. 345 U.S. at 212. *Mezei* involved a petitioner who was on "different footing" from other non-citizens within the U.S. and is distinguishable from the bond subclass for two reasons. First, the petitioner in *Mezei* was subject to prolonged detention after he conclusively lost his legal right to remain in the U.S. and no country would accept him back after he lost his immigration case. 345 U.S. at 213. By contrast, the arriving asylum-seekers here are actively litigating their cases, and most of them will win the right to remain in this country. *See supra* at 7. Second, the bond subclass, unlike Mr. Mezei, is not on the threshold of initial entry since they have passed a significant credible fear screening and are now practically and by congressional design, screened in and on equal footing in their immigration proceedings with other non-citizens who are fully in the jurisdiction of the United States. *See supra* at 3, 10-11. For these reasons, *Mezei* is inapposite,[5]

[5] Much of *Mezei*'s constitutional reasoning also has been undermined or overruled by developments in civil confinement and immigration law over the last half-century, including *Zadvydas*, which draws a clear distinction between the government's limited authority to detain and the government's plenary authority to deport. *See* 533 U.S. at 695; *see also Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981) (distinguishing *Mezei* in part

and what instead controls this case is the Second Circuit case law that applies to arriving asylum-seekers.[6]

B. Given Their Due Process Interest Against Imprisonment, Arriving Asylum-Seekers Cannot Be Held in Prolonged Detention Without Bond Hearings.

Given that bond subclass members have a liberty interest against detention, the next question is whether they can be subject to prolonged mandatory detention under Section 1225(b), which offers no opportunity for a hearing no matter how long the detention. To satisfy due process, as the Supreme Court explained in *Zadvydas,* prolonged immigration detention must have "a special justification" to "outweigh[] the individual's constitutionally protected interest in avoiding physical restraint." 533 U.S. at 690 (internal quotations omitted). In two recent cases concerning the Due Process Clause and civil detention of immigrants, the Court recognized that such a justification exists only when detention bears "a reasonable relation to the purpose for which the individual was committed" and that the purpose for imprisoning a person in relation to immigration proceedings is to mitigate flight risk and danger to the community. *Zadvydas*, 533 U.S. at 690 (internal citations omitted); *Demore*, 538 U.S. at 527-28. Consistent with this, most

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because "[d]ue process is not a static concept, it undergoes evolutionary change to take into account accepted current notions of fairness"); *Perez v. Decker*, No. 18-CV-5279 (VEC), 2018 WL 3991497, at *3 (S.D.N.Y. Aug. 20, 2018) (finding *Mezei* does not apply given changes in the statutory scheme); *cf. Boumediene v. Bush*, 533 U.S. 723, 766 (2008) (holding that constitutional rights against detention extend to non-citizen enemy combatants held overseas under U.S. control). Additionally, petitioners raise to preserve the argument that, contrary to *Guzman v. Tippy*, 130 F.3d 64 (2d Cir. 1997), which interpreted *Mezei*, *Mezei* applies only to the national-security context. *See Mezei*, 345 U.S. at 216 ("[T]o admit an alien barred from entry *on security grounds* nullifies the very purpose of the exclusion proceeding . . . .") (emphasis added); *Rosales-Garcia v. Holland*, 322 F.3d 386, 414 (6th Cir. 2003) (en banc) (limiting *Mezei* to national security context).

[6] The petitioners recognize that this Court in passing suggested that they may have limited due process rights. *Abdi*, 280 F. Supp. 3d at 411, *Abdi*, 287 F. Supp. 3d at 336. But the Court did not delve into the issue and neither of the cases that this Court cited, *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) and *Correa v. Thornburgh*, 901 F.2d 116 (2d Cir. 1990), discusses the due process rights of the unique group of asylum-seekers who are class members in this case.

non-citizens in detention while in removal proceedings are given access to bond hearings to test these justifications on an individual basis, including, currently, asylum-seekers *identical* to the bond subclass but for the fact that they entered the country without inspection at the border instead of declaring themselves at a port of entry. *See* 8 U.S.C. § 1226(a); *Matter of X-K-*, 23 I. & N. Dec. 731 (BIA 2005).

The Supreme Court has upheld the facial constitutionality of mandatory detention without bond hearings only where it has found sufficient justification, such as when it upheld the brief detention under 8 U.S.C. Section 1226(c) of immigrants in removal proceedings because of certain criminal convictions. *See Demore* 538 U.S. at 530. But the arriving asylum-seekers before this Court are plainly distinguishable from *Demore* for two reasons.

First, in *Demore* the Court stressed that Congress made factual findings sufficient to justify detention without bond hearings. *See id.* at 518-21. The congressional record supporting Section 1226(c) in *Demore* included "a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens" and "evidence that one of the major causes of the INS' failure to remove deportable criminal aliens was the agency's failure to detain those aliens during their deportation proceedings." *Id.* at 518, 519. Similarly, in a Cold-War era case involving immigration detention, the Supreme Court upheld the detention of petitioners who were deportable for their communist activities based on Congress's "understanding of [the detainees'] attitude toward the use of force and violence . . . to accomplish their political aims." *Carlson v. Landon*, 342 U.S. 524, 541 (1952).

In contrast, Congress never identified any justification for subjecting arriving asylum-seekers who have established a likelihood of prevailing in their asylum claims to mandatory detention. In fact, the legislative history is as silent on the need for the detention of persons like

the bond subclass as it is detailed in extolling the virtues of the credible fear process in identifying meritorious asylum cases. *See e.g.*, H.R. Rep. No. 104-469, pt. 1, at 158 (1996) ("The credible fear standard is designed to weed out non-meritorious cases so that only applicants with a likelihood of success will proceed to the regular asylum process."); *id.* at 229 ("A 'credible fear of persecution' means that it is more probable than not that the alien is telling the truth and the alien has a reasonable possibility of establishing eligibility for asylum.").

Nor does any evidence outside of the congressional record support the mandatory detention of bond subclass members. The bond subclass does not present a categorical danger to the community: it plainly does not consist of "specially dangerous individuals," *Zadvydas*, 533 U.S. at 691, since not a single subclass member was deemed dangerous by an immigration judge in a bond hearing under this Court's injunction, *see* Sydenstricker Decl. ¶ 5. Neither do class members present a categorical flight risk: they have an obvious incentive not to abscond since they have prevailed at threshold screenings and are likely to win relief – in fact, 61% of represented arriving asylum-seekers detained for more than six months went on to prevail on their relief. *See* Hausman Decl ¶ 8; King Decl. ¶ 36 (noting that merits of claim in an asylum case is a good indicator of lack of flight risk). Asylum-seekers also have the lowest rates of *in absentia* removal orders of people in removal proceedings. *See* U.S. Dep't of Justice Executive Office of Immigration Review, Statistics Year Book Fiscal Year 2017 at 33, *available at* https://www.justice. gov/eoir/page/file/1107056/download. Here, immigration judges set bond in 85% of bond hearings held under this Court's injunction, Sydenstricker Decl. ¶ 4, confirming that most subclass members do not pose a flight risk or a danger to the community.

Second, in *Demore* the Supreme Court upheld detention without bond because the Court understood detentions under those regimes to typically be "brief." *Demore*, 538 U.S. at 523.

Taking pains to distinguish itself from the prolonged detention at issue in *Zadvydas*, the Court explained the detention it was upholding was typically "very limited" lasting "an average of 47 days" in "85% of [] cases" with no appeal and an "average of four months" "[i]n the remaining 15% of cases" where there was an appeal. *Demore*, 538 U.S. at 529, 529 n.12; *id.* at 528 (citing *Zadvydas*, 533 U.S. at 690-91); *see also Carlson*, 342 U.S. at 526 (explaining the case before it did not involve "the problem of . . . unusual delay in deportation hearings").

Here, the bond subclass's detention is anything but brief, and all of the subclass members are pursuing the relief that they are entitled to pursue under the Refugee Act. By definition, every class member has spent at least six months in custody when they become eligible for a bond hearing under this Court's injunction. Before the Court's injunction, subclass members detained past six months had spent an average of more than a year in custody. *See* Austin Decl. ¶¶ 2, 3 (ECF No. 51-1). Whatever due process may require at the moment of initial detention, its requirements become more stringent as the "period of confinement grows." *Zadvydas*, 533 U.S. at 701; *McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 249 (1972) ("If the commitment is properly regarded as a short-term confinement with a limited purpose . . . then lesser safeguards may be appropriate, but . . . the duration of the confinement must be strictly limited.").

C. Arriving Asylum-Seekers Are Entitled to the Bond Hearings this Court's Preliminary Injunction Requires.

Given that no justification exists for categorically denying arriving asylum-seekers of the core due process right of a hearing, the remaining question before the Court is whether arriving asylum-seekers are likely to be entitled to the particular hearings that the preliminary injunction requires. Answering this question starts with the Supreme Court's recognition that "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotations

omitted); *see also Armstrong v. Manzo*, 380 U.S. 545, 550 (1965) ("[T]here can be no doubt that at a minimum [the Due Process Clause] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."). Consistent with this, well-established due process law supports the conclusion that arriving asylum-seekers are entitled to bond hearings with the specific procedural protections ordered by this Court and to those hearings once their detention extends to six months.

As to the procedural protections of the preliminary injunction, the balancing of relevant interests identifying what due process requires—private interests, government interests, and risk of erroneous deprivation, *see Mathews*, 424 U.S. at 335—starkly favors continuing the injunction. The private interest against detention in prison-like conditions is high, as confirmed by Dr. Keller's medical opinion that the physical and psychological harms that asylum-seekers experience worsen over time and are particularly detrimental for those incarcerated for over six months. Keller Decl. ¶ 42; *see also supra* at 4-5 (describing conditions at Batavia); *Muniz v. Hoffman*, 422 U.S. 454, 477 (1975) ("It is not difficult to grasp [] that six months in jail is a serious matter for any individual."). As for the risk of erroneous deprivation, that plainly is established given the fact that, in 85% of hearings conducted under this Court's order, judges found the detainee should be released with bond. *See* Sydenstricker Decl. ¶ 4. Finally, the government is not burdened by providing bond hearings because they are not resource-intensive and they in fact bring efficiency to the immigration system. King Decl. ¶¶ 22-36; Phillips Decl. ¶¶ 20.

As a constitutional matter, courts repeatedly have required hearings with the same elements ordered by this Court in other civil detention cases, including immigration detention cases, where the balance of interests for due process purposes are similar. First, civil detention

requires at minimum a hearing before a neutral officer. *See Foucha*, 504 U.S. at 81-83 (holding that State cannot continue to civilly detain an individual based on his antisocial personality absent a determination of dangerousness made in a civil commitment proceeding); *see also Salerno*, 481 U.S. at 750-51 (upholding pretrial detention scheme with a custody hearing). And such a hearing is exactly what the Second Circuit ordered when confronted with prolonged immigration detention. *Lora v. Shanahan*, 804 F.3d 601, 616 (2d Cir. 2015), *cert. granted, judgment vacated*, 138 S. Ct. 1260 (2018) (mem.).[7] Second, courts require the government to bear the burden of justifying detention with "clear and convincing" evidence. *See Foucha*, 504 U.S. at 81-83; *Addington v. Texas*, 441 U.S. 418, 431-32 (1979); *see also Singh v. Holder*, 638 F.3d 1196, 1200, 1204 (9th Cir. 2011) (holding that due process requires the government to bear a clear and convincing burden of proof at prolonged detention bond hearings relying on, *inter alia*, the Supreme Court's civil confinement case law in *Addington* and *Foucha*); *Hechavarria v. Sessions*, 15-CV-1058, 2018 WL 577642, at *8 (W.D.N.Y. Nov. 2, 2018) (Vilardo, J.) (same, collecting cases).[8] Finally, courts require that confinement review include adequate consideration of alternatives to detention and a detainee's financial circumstances. *See Hernandez v. Sessions*, 872 F.3d 976, 992-93 (9th Cir. 2017); *Hechavarria*, 2018 WL 5776421, at *9 n. 13 (finding that "[w]hether detention is necessary to serve a compelling regulatory purpose requires consideration of whether . . . release on bond in an amount that the petitioner can reasonably afford, would also address those purposes"); *Hernandez v. Decker*, 18-CV-5026 (ALC), 2018

[7] *Lora* remains "strong persuasive authority in this Circuit." *Hernandez*, 2018 WL 3579108, at *6 (internal quotations omitted).

[8] Courts have also concluded, post-*Jennings*, that due process requires the government to bear a clear and convincing burden under Section 1226(a). *See Martinez v. Decker*, 18-cv-6527 (JMF), 2018 WL 5023946, at *5 (S.D.N.Y. Oct. 17, 2018); *Darko v. Sessions*, 18-Civ-5675 (ER), 2018 WL 5095671, at *6 (S.D.N.Y. Oct. 19, 2018).

WL 3579108, at *12 (S.D.N.Y. Jul. 25, 2018) (relying on *Abdi* in finding ability-to-pay requirement in prolonged immigration detention context).

The parole process plainly is not an adequate substitute for bond hearings since it does not include these procedural safeguards. Instead, the detainee bears the burden of convincing ICE, the jailing agency, that it should exercise its discretion and grant release, *see* 8 U.S.C. § 1182(d)(2)(5); ICE can deny such requests simply by checking a box on a form, *see, e.g.*, Parole Denial, attached as Ex. B to Sydenstricker Decl. Many courts in this Circuit have concluded that parole cannot substitute for bond hearings. *See Ahmed v. Decker*, No. 17-CV-0478 (AJN), 2017 WL 6049387, at *7 (S.D.N.Y. Dec. 4, 2017) (collecting cases); *see also Rodriguez v. Robbins*, 715 F.3d 1127, 1144 (9th Cir. 2013) ("[T]he discretionary parole system available to § 1225(b) detainees is not sufficient to overcome the constitutional concerns raised by prolonged mandatory detention."); *cf. Chun*, 708 F.2d at 876-77. 877 n. 27 (holding Field Director review insufficient and that stowaway was entitled to asylum hearing based on risk of erroneous deprivations due to inadequate process).

As for the timing of hearings, while the petitioners submit that due process may well require hearings before six months, the requirement certainly has set in by the six-month mark, the only issue before this Court.[9] Six months is a significant amount of time to spend incarcerated. *See* Keller Decl. ¶ 42; *Muniz*, 422 U.S. at 477. The Supreme Court in *Zadvydas* adopted a bright-line six-month rule for presumed release from post-removal-order detention "for the sake of uniform administration." 533 U.S. at 700-01. And the Second Circuit in *Lora* similarly adopted this bright-line approach to require bond hearings at six months for non-

[9] This Court need not now determine either the facial validity of Section 1225(b) or the constitutionality of detentions under that statute that last for shorter periods of time.

citizens with criminal histories, holding that "bright-line rules provide clear guidance and ease of administration to government officials." 804 F.3d at 615. The Supreme Court also has set six months as the outer limit on criminal sentences courts can impose without jury trials, *see Baldwin v. New York*, 399 U.S. 66, 69 (1970), and has set other bright-line constitutional rules in custodial and detention contexts, *see, e.g.*, *Maryland v. Shatzer*, 559 U.S. 98, 110 (2010) (adopting bright-line 14-day-limit for custodial interrogations because "case-by-case adjudication" would be "impractical" and "law enforcement officers need to know with certainty and beforehand" what conduct is unlawful); *County of Riverside v. McLaughlin*, 500 U.S. 44, 55-56 (1991) (adopting bright-line 48-hour rule for probable cause hearings explaining that requiring "prompt" hearings is a "vague standard [without] sufficient guidance" that "put[s] federal judges in the role of . . . overseeing local jailhouse operations").

Recently, in *Sigal v. Searls*, this Court also recognized that six months of detention is "more likely to be 'unreasonable,' and thus contrary to due process than detention of less than six months," but held that the petitioner's detention was reasonable under the particular circumstances of that case. *See* 1:18-cv-389, 2018 WL 5831326, at *7 (W.D.N.Y. Nov. 7, 2018) (Wolford, J.). *Sigal* is distinguishable from this case in several fundamental ways. First, unlike the arriving asylum-seekers before this Court, the petitioner was subject to mandatory detention under Section 1226(c) because of his criminal history, meaning that this Court's entire analysis was framed by *Demore*. *Id.* at *5 (upholding the petitioner's detention based in part on the understanding that he was part of a group whose detention "Congress had deemed" "necessary and reasonable").

Second, the petitioner in *Sigal* made "no showing . . . regarding the potential merits of" his case, *id.* at *6, but the bond subclass members are likely to succeed on their asylum claims

having passed credible fear screenings, and historical data shows that 61% of represented persons like the bond subclass went on to actually win their cases. *See* Hausman Decl. ¶ 8.

Third, unlike in *Sigal*, systemic delay rather than "litigation strategy" causes prolonged detention of the bond subclass. 2018 WL 5831326, at *5-6. When asylum cases last longer than six months, systemic reasons such as the time needed to prepare adequate cases and docket congestion generally apply, and any delays specific to individuals are managed by immigration judges who have clear authority under the INA, its implementing regulations, and agency guidance to refuse continuances, particularly when cases last longer than six months. *See* King Decl. ¶¶ 20-21, Phillips Decl. ¶¶ 15-19.

Finally, this Court upheld detention in *Sigal* relying in part on an administrative review that involved careful consideration and a meaningful response. *Sigal*, 2018 WL 5831326, at *7. But the bond subclass has received nothing similar. *Compare id.* ("The Decision to Continue Detention provided to Petitioner set forth specific, individualized considerations supporting the decision not to release him from custody . . . . DHS noted Petitioner's criminal history, as well as the fact that while detained at the Buffalo Federal Detention Facility, he had been sanctioned for fighting and refusing to obey staff orders.") *with* Parole Denial, attached as Ex. B to Sydenstricker Decl. (stating only that "[i]mposition of a bond or other conditions of parole would not ensure, to ICE's satisfaction, . . . appearance at required immigration hearings pending the outcome of your case"). There was also no evidence in the record in *Sigal*, as there is here, that an administrative review results in erroneous deprivations in 85% of cases.

As a practical matter, without this Court's injunction, the bond subclass will revert to the constitutionally untenable and lengthy detention that existed prior to the injunction. *See* Austin Decl. ¶¶ 2, 3 (explaining bond subclass members were detained for an average of over a year).

Arriving asylum-seekers are unlikely to be able to adequately vindicate their constitutional rights through individual habeas litigation because courts routinely take nearly half a year (and in some cases significantly longer) to decide such cases all the while adding to time in prison beyond six months. *See* Declaration of Victoria Roeck ¶ 10; *Lora*, 804 F.3d at 615 ("[S]ome habeas petitions . . . are not adjudicated for years."). Most immigration detainees will have no choice but to litigate these complicated cases *pro se*, also reducing their chances of success. *See* Declaration of Amanda Blau ¶ 4 (73% of immigration habeas cases decided in this district involve *pro se* litigants).[10] There is every indication that without continued injunctive relief the subclass will suffer the very harms this Court sought to avoid in issuing its injunction.

II. 8 U.S.C. § 1252(f)(1) DOES NOT DIVEST THIS COURT OF JURISDICTION TO PRESERVE THE PRELIMINARY INJUNCTION.

Section 1252(f)(1) states that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [Sections 1221- 1232] other than with respect to the application of such provisions to an individual alien against whom [removal] proceedings [] have been initiated." The government argues this statute "deprives the Court of jurisdiction" because the "[p]etitioners seek to enjoin operation of § 1225(b)'s explicit terms on a class-wide basis." Gov Br. at 9 (ECF No. 91-1). The government is wrong and this Court has jurisdiction as the Ninth Circuit found in *Rodriguez* on remand. *See* 2018 WL 6164602, at *3. (holding that "it is clear" that jurisdiction for the claim exists).

[10] It is simply not realistic for detainees—especially those already struggling with asylum hearings—to prevail on habeas without counsel. *See* Roeck Decl. ¶ 9 (finding case outcomes vary based on whether detainee was represented); Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 Hastings L.J. 363, 401 (2014) (collecting cases discussing how "[h]abeas proceedings . . . are difficult to navigate without counsel," and "[m]any detainees lack the language or research skills necessary to successfully pursue this procedure").

First, this Court retains jurisdiction since Section 1252(f)(1) permits enjoining or restraining the operation of laws with respect to "an individual alien against whom [removal] proceedings [] have been initiated." The class members are all individuals already in removal proceedings and, as such, every one of them falls within Section 1252(f)(1)'s exception. *See id.* (holding that the court is not divested of jurisdiction by 1252(f)(1) for this reason); *see also Jennings*, 138 S. Ct. at 875 (Breyer, J., dissenting). Second, Section 1252(f)(1) does not apply to habeas actions since Congress can divest courts of habeas jurisdiction only by making "specific and unambiguous" references to repealing habeas, *I.N.S. v. St. Cyr*, 533 U.S. 289, 299 (2001) (internal citation omitted), and this statute contains no such "specific and unambiguous" reference to repeal. *See* 2018 WL 6164602, at *3. Third, Section 1252(f)(1) does not apply because the injunctive relief sought does not enjoin the "operation" of Section 1225(b). Rather, if the Court preserves its preliminary injunction, it will enjoin the unlawful application of the statute only in cases lasting more than six months, still allowing for the statute's operation in cases lasting shorter periods. Finally, Section 1252(f)(1) does not limit the Court's ability to issue class-wide declaratory relief and the government has not argued otherwise. *See id.*; *Alli v. Decker*, 650 F.3d 1007, 1016 (3d Cir. 2011); *Reid v. Donelan*, 13-30125-PBS, 2018 WL 5269992, at * 6 (D. Mass. Oct. 23, 2018).

CONCLUSION

For the foregoing reasons, the petitioners respectfully request that the Court preserve the preliminary injunction in its entirety and deny the government's motion to vacate.

Respectfully submitted,

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