IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

HANAD ABDI and JOHAN BARRIOS RAMOS, on behalf of themselves and all others similarly situated, Petitioners, v. KIRSTJEN M. NIELSEN, Secretary of the U.S. Department of Homeland Security, *et al.*, Respondents.	CIVIL NO. 17-CV-00721-EAW

MEMORANDUM OF LAW IN SUPPORT OF
RESPONDENTS' MOTION TO DECERTIFY THE BOND SUBCLASS

INTRODUCTION

Respondents hereby move, pursuant to Federal Rule of Civil Procedure 23, to decertify the bond subclass. Recent Supreme Court precedent requires decertification. On February 27, 2018, the Supreme Court held that 8 U.S.C. § 1225(b) could neither be plausibly interpreted as implicitly placing a six-month limit on detention nor requiring periodic bond hearings for aliens in immigration detention. *Jennings v. Rodriguez*, 138 S. Ct. 830, 842-45 (2018). Rather, the *Jennings* court held that, subject to release on parole, § 1225(b) unambiguously authorizes detention of applicants for admission until the end of their applicable asylum or removal proceedings. The *Jennings* court further held that the plain text of a detention statute similar to § 1225(b) cannot support requiring the government to bear the burden in bond hearings or requiring immigration judges to consider alternative conditions of release and an alien's ability to pay in determining bond. *Id.* at 847-48.

Consequently, the *Jennings* court reversed the Ninth Circuit's ruling on the respondents' statutory claims and remanded the case for further consideration of the constitutional arguments in light of the Supreme Court's directive. So, too, has the Court of Appeals for the Second Circuit remanded this case for the Court's further consideration in light of *Jennings*. However, *before* addressing the merits of Petitioners' remaining constitutional claims, *Jennings* instructs the Court to *first* "reexamine whether respondents can continue litigating their claims as a class," and sets forth the legal paradigm for doing so. 138 S. Ct. at 851. Consistent with the Supreme Court's mandate in *Jennings*—and *before* consideration of the merits of Petitioners' constitutional claims—Respondents now seek decertification of the bond subclass.

RELEVANT PROCEDURAL BACKGROUND

This habeas action commenced on July 28, 2017, when Hanad Abdi filed a petition for a writ of habeas corpus in the Western District of New York challenging the denial of his request for parole and prolonged detention at the Buffalo Federal Detention Facility ("BFDF") in Batavia, New York. *See* ECF No. 1. On August 21, the petition was amended to include a second petitioner, Johan Barrios Ramos, and to seek class-wide relief on behalf of a putative class of individuals detained at BFDF challenging the denial of their requests for parole and a subclass of those individuals detained beyond six months. *See* ECF No. 17. Petitioners contend that their parole denials violate 8 U.S.C. § 1182(d)(5)(A), 8 C.F.R. § 212.5, and the Due Process Clause of the Fifth Amendment. *Id.* at ¶¶ 106, 107. They further challenge their prolonged detention without a bond hearing as violative of 8 U.S.C. § 1225(b) and the Due Process Clause. *Id.* at ¶¶ 108, 109. Petitioners assert jurisdiction under 28 U.S.C. § 1331 (federal question), § 1651 (All Writs Act), §§ 2201-02 (declaratory judgment), and § 2241 (habeas corpus). *Id.* at ¶ 5.

1. The Court's Order

On November 17, 2017, the Court entered an order, *inter alia*, granting Petitioners' motion for a preliminary injunction. *See* ECF No. 56 (the "Order"). With respect to the bond claims, the Court found the reasoning articulated by the Ninth Circuit in *Rodriguez v. Robbins* persuasive,[1] as well as the Second Circuit's rationale in *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015)[2] and the reasoning used by the district courts that had applied *Lora* to § 1225(b) detention. Order at 24-30. Employing the same logic of the Ninth Circuit in *Rodriguez II* and *III*, the Court concluded that § 1225(b) does not permit indefinite detention, but rather must be construed under the constitutional avoidance doctrine to require a bond hearing after six months where the government bears the burden to justify continued detention by clear and convincing evidence. *Id.* at 30, 66-68. The Court nevertheless repeatedly acknowledged that this precise issue was then-pending before the Supreme Court in *Jennings* and that a ruling in *Jennings* "could impact the appropriateness of this Court's ruling in this case." *Id.*; *see also id.* at 24 n.6, 61.

The Court also concluded that 8 U.S.C. § 1252(f)(1) did not preclude the class-wide injunctive relief sought by Petitioners. Instead, the Court held that "§ 1252(f)(1) is inapplicable to Petitioners' request for relief," reasoning that "Petitioners do not seek to enjoin the operation of [§ 1225(b)], but rather Respondents' violation of [§ 1225(b)]." *Id.* at 63. After concluding that Petitioners meet the other requirements for a preliminary injunction and that pre-certification class-wide injunctive relief is appropriate, the Court ordered Respondents to, *inter alia*, provide

[1] More specifically, the Court relied on *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013) ("*Rodriguez II*"), and *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015) ("*Rodriguez III*"). *See* Order at 24-30.

[2] The judgment in *Lora* was later vacated and the appeal was eventually dismissed as moot. *See Shanahan v. Lora*, 138 S. Ct. 1260, 2018 WL 1143819 (Mar. 5, 2018); *Lora v. Shanahan*, 719 F. App'x 79 (2d Cir. Mar. 30, 2018).

members who have been detained beyond six months with individualized bond hearings, with Respondents bearing the burden to justify continued detention by clear and convincing evidence. *Id.* at 65-66. Respondents appealed the Order to the Second Circuit on January 11, 2018. *See* ECF No. 74.

2. The Court's Class Certification Order

Shortly after entry of the Order, the Court certified a class pertaining to Petitioners' parole claims and a subclass pertaining to their bond claims. *See* ECF No. 66. The subclass is defined as: All arriving asylum-seekers who are or will be detained at the Buffalo Federal Detention Facility, have passed a credible fear interview, and have been detained for more than six months without a bond hearing before an immigration judge. *Id.* at 23.

With respect to the Rule 23(a)(2) commonality requirement, the Court concluded that "common questions will 'generate common answers apt to drive resolution of the litigation'" because "[t]he conclusion that the Buffalo Federal Detention Facility is failing to provide required bond hearings would resolve the claims of those individuals." *Id.* at 14. Similarly, the Court found the typicality requirement of Rule 23(a)(3) satisfied because the claims of the named representative and subclass members all "arise out of Respondents' failure to follow the dictates of the … implicit bond hearing requirement in 8 U.S.C. § 1225(b)." *Id.* at 16. In ruling that Rule 23(b)(2) certification was proper, the Court rejected Respondents' argument that the bond subclass's claims require a fact-specific analysis not amenable to classwide resolution. Rather, the Court reasoned that Respondents' argument and cited cases were "inapposite" because they pertained to "claims sounding in substantive due process." *Id.* at 22. The Court explained:

> As the Court held in its November 17, 2017, Decision and Order (Dkt. 56), the availability of an implicit bond hearing requirement is based upon the constitutional avoidance doctrine, which is a canon of *statutory* construction that enables a litigant to vindicate his or her *statutory* rights; it does not

> create constitutional rights. *See Clark v. Martinez*, 543 U.S. 371, 382 (2005). In any event, the implicit bond hearing requirement is a time-restricted *process* right, arising only after the passage of six months' time, and requires no particular *substantive* outcome at the hearing before the immigration judge. In other words, the proposed subclass members have no responsibility to justify the availability of the bond hearing itself; once the six-month time limit has expired, it becomes Respondents' statutory obligation to hold a hearing and carry the burden of demonstrating—by clear and convincing evidence—why continued detention is warranted.

Id. at 22-23 (emphasis in original).

3. The Court's Clarification Order

On February 9, 2018, the Court clarified that the Order additionally requires that, at bond hearings ordered by the Court, immigration judges consider alternative conditions of release and an alien's ability to pay. *See* ECF No. 83 (the "Clarification Order"). Once more, the Court relied on *Lora* and *Rodriguez III* to hold that the constitutional avoidance doctrine mandates that the Court construe § 1225(b) to avoid the due process concerns discussed in *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017), and to ensure that the conditions of release will be reasonably related to the governmental interest in securing detainees' appearance at future hearings. Clarification Order at 9-17. Thus, in addition to the requirements imposed by the Order, the Clarification Order mandates that, when conducting bond hearings for subclass members, immigration judges take into account alternative conditions of release and the alien's ability to pay. *Id*. at 29. The Court ordered the re-calendaring of bond hearings for those subclass members who had already received bond hearings and were issued bond, but remain detained. *Id.* Respondents filed an amended notice of interlocutory appeal on February 15, 2018, to include the Clarification Order in the pending appeal. *See* ECF No. 84.

4. The Supreme Court's Decision in *Jennings v. Rodriguez*

On February 27, 2018, the Supreme Court issued a decision in *Jennings*. The Supreme Court reversed the Ninth Circuit's ruling that 8 U.S.C. §§ 1225(b), 1226(a), and 1226(c) require bond hearings after six months of immigration detention as a matter of statutory construction. With respect to § 1225(b), the *Jennings* court held that, subject to release on parole, §§ 1225(b)(1) and (b)(2) unambiguously authorize detention of applicants for admission until the end of applicable asylum or removal proceedings. 138 S. Ct. at 842-45. The Supreme Court further rejected the Ninth Circuit's imposition of procedural requirements that went well beyond the initial bond hearing, noting that nothing in the statutory text of § 1226(a) requires the government to bear the burden in bond hearings or that certain factors must be considered by an immigration judge. *Id.* at 847-48.

The Supreme Court declined to decide the respondents' constitutional claims in the first instance and remanded the case for further consideration of those claims. "*Before* the Court of Appeals addresses those claims, however," *Jennings* instructed that "it should reexamine whether respondents can continue litigating their claims as a class." *Id.* at 851 (emphasis added). "Specifically, the Court of Appeals should *first* decide whether it continues to have jurisdiction despite 8 U.S.C. § 1252(f)(1)." *Id.* (emphasis added). If the Court of Appeals concludes that it can only issue classwide declaratory relief—not classwide injunctive relief—then it should decide whether that remedy can sustain the class on its own. *Id.* Next, *Jennings* advised the Court of Appeals to also consider "whether a Rule 23(b)(2) class action continues to be the appropriate vehicle for respondents' claims in light of *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)." *Id.* The Court of Appeals should similarly consider "whether a Rule 23(b)(2) class

action litigated on common facts is an appropriate way to resolve respondents' Due Process Clause claims." *Id.* at 852.

5. The Second Circuit's Remand

On April 11, 2018, the Second Circuit issued an Order to Show Cause why Respondents' appeal of this Court's preliminary injunction rulings should not be remanded for the district court's further consideration in light of *Jennings*. *See* No. 18-94 at Doc. 49. After both parties consented to remand, on September 5, 2018, the Second Circuit ordered the appeal remanded to the district court "for further consideration in light of the Supreme Court's decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018)." *See* No. 18-94 at Doc. 72.

LEGAL STANDARD

Federal Rule of Civil Procedure 23(a) requires that a class be represented by named plaintiffs who can establish that: (1) the class is so numerous that joinder of all of its members is impracticable; (2) the case involves questions of fact or law that are common to all class members; (3) the named plaintiffs' claims are typical of those of the class; and (4) the named plaintiffs will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). Under Rule 23(b)(2), a class may be maintained only if all of the requirements of Rule 23(a) are satisfied and "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

Like certification, class decertification is discretionary, and the court remains free to modify it in the light of subsequent developments in the litigation. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982). A court may reconsider its class certification order if compelling reasons substantially cast doubt on the composition of the class such as the class representative lacks a live claim, and changes in the law have occurred. *Kremens v. Bartley*, 431 U.S. 119, 130 (1977); *Hartman v. Duffey*, 19 F.3d 1459, 1470, 1474–75 (D.C. Cir. 1994).

ARGUMENT

I. Section 1252(f)(1) Eliminates the Court's Jurisdiction to Enjoin the Normal Operation of § 1225(b) on a Classwide Basis.

As *Jennings* instructs, the Court should *first* reconsider whether § 1252(f)(1) presents a jurisdictional hurdle to Petitioners' request for classwide injunctive relief on their due process claim—their sole remaining bond claim. The Court previously denied the import of § 1252(f)(1), reasoning that Petitioners did not seek to enjoin the operation of § 1225(b), only violations of the statutory and regulatory framework. Order at 62. However, *Jennings* concluded that "[t]his reasoning does not seem to apply to an order granting relief on constitutional grounds." 138 S. Ct. at 851.

The text of § 1252(f)(1) is clear that the Court lacks jurisdiction to convert the statutory injunction here into a constitutional one. Section 1252(f)(1) plainly states:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [8 U.S.C. §§ 1221-1232], other than with respect to the application of such provisions to an individual alien against whom proceedings … have been initiated.

8 U.S.C. § 1252(f)(1). The Supreme Court has confirmed that § 1252(f)(1) is a bar on "*classwide* injunctive relief against the operation of §§ 1221-1231" with a carve out that applies to "*individual* cases." *Reno v. Am-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481-82 (1999) ("*AADC*") (emphasis added). The provision is unmistakably entitled "limit on injunctive relief," and inescapably prohibits class-based injunctions while preserving individual access to a habeas writ and all forms of equitable relief.

Despite the clear import of § 1252(f)(1), on remand, the Ninth Circuit in *Rodriguez* found that "it is clear" it has jurisdiction for three reasons. *Rodriguez v. Marin*, 909 F.3d 252 (9th Cir. 2018). First, it reasoned that "[a]ll of the individuals in the putative class are 'individuals against

whom proceedings under such part have been initiated' and are pursuing habeas claims, albeit as a class, which nowhere appear affected by § 1252(f)(1)." *Id.* Second, the Ninth Circuit found that even if § 1252(f)(1) precludes classwide injunctive relief, it does not affect classwide declaratory relief. *Id.* And third, it concluded that § 1252(f)(1) does not bar habeas class actions because it lacks a clear statement repealing habeas jurisdiction. *Id.* The Ninth Circuit's reasoning is not grounded in law and Respondents, once again, urge the Court to reject it. Such logic disregards the Supreme Court's recognition that § 1252(f)(1) "prohibit[s] … *classwide* injunctive relief" and ignores the statute's express reference to preserving relief for "an *individual* alien against whom proceedings … have been initiated." *AADC*, 525 U.S. at 481-82; 8 U.S.C. § 1252(f)(1) (emphasis added). Surely, Congress could not have intended for courts to evade § 1252(f)(1)'s limitation by blurring the relevant distinction between class and non-class based litigation and simply recharacterizing precluded class actions as a conglomeration of permissible actions by individual aliens. *Cf. Aguilar v. U.S. Immigration & Customs Enf't*, 510 F.3d 1, 16 (1st Cir. 2007) (rejecting petitioners' attempt to "merely conglomerat[e] individual claims" and "drap[e] individual claims in the mantle of a class action" in an effort to dodge the INA's channeling requirements). Moreover, as discussed in the section below, Petitioners cannot sustain the bond subclass based on the prospect of classwide declaratory relief, alone—especially where the declaratory relief sought mirrors the very same injunctive relief that is prohibited by § 1252(f)(1). Additionally, the Ninth Circuit's finding that § 1252(f)(1) is inapplicable to habeas class actions is inconsistent with the statute's clear applicability

"[r]egardless of the nature of the action or claim." 8 U.S.C. § 1252(f)(1).[3] The Ninth Circuit's reasoning is therefore unpersuasive as well as non-binding.

A proper reading of § 1252(f)(1) reveals that Petitioners seek exactly what the statute prohibits. They essentially ask the Court to sustain, on constitutional grounds, the preliminary injunctive relief already in place—i.e., bond hearings for all subclass members detained beyond six months, with the government bearing the burden to justify continued detention and requiring immigration judges to consider specific factors in determining bond. Instead of the practical operation of § 1225(b), which the Supreme Court has held unambiguously authorizes detention of applicants for admission until the end of their applicable asylum or removal proceedings, the Court's injunction interjects into § 1225(b) a new six-month cap, new standards and burdens governing bond determinations, and imposes new criteria that immigration judges must consider at bond hearings. Hence, the Court's injunction undoubtedly enjoins and restrains the practical operation of § 1225(b) on a classwide basis. Section 1252(f)(1) thus requires, not only that the Court's classwide injunction on Petitioners' statutory bond claims is vacated, but that the Court conclude that it necessarily lacks jurisdiction to grant classwide injunctive relief on their constitutional bond claims as well.

II. The Bond Subclass Cannot be Sustained on Declaratory Relief, Alone.

If § 1252(f)(1) precludes jurisdiction to grant classwide injunctive relief, then a bond subclass cannot be sustained only on declaratory relief either. *See Jennings*, 138 S. Ct. at 851 (if court concludes that it cannot issue classwide injunctive relief, next step should be to consider

[3] While the *Rodriguez* court did not remand the question of jurisdiction, it nevertheless left for the district court to decide "in the first instance" "whether § 1252(f)(1) precludes classwide injunctive relief, and if so, whether the availability of declaratory relief can sustain the class." 909 F.3d at 252, n.1.

propriety of classwide declaratory relief alone). Rule 23(b)(2) allows certification of classes that seek "final injunctive relief or *corresponding* declaratory relief." Fed. R. Civ. P. 23(b)(2) (emphasis added). The Advisory Committee defines "corresponding declaratory relief" as any remedy that "as a practical matter . . . affords injunctive relief or serves as a basis for later injunctive relief." Fed. R. Civ. P. 23(b)(2) Advisory Committee Note to 1996 Amendment; *see also* 7AA Fed. Prac. & Proc. Civ. § 1775 (3d ed.). The Advisory Committee's definition makes clear that the purpose of the Rule 23(b)(2) class was to enjoin certain action or inaction on a classwide basis and that any declaratory relief issued under this provision should be equivalent to an injunction. *See id.*; *see also Coca-Cola Bottling Co. of Elizabethtown, Inc. v. Coca-Cola Co.*, 98 F.R.D. 254, 271 (D. Del. 1983) (refusing to certify a Rule 23(b)(2) class where "[d]etermination of the[] issues would not result in corresponding declaratory relief that would have the effect of enjoining the defendant from acting in the future"). Because Rule 23(b)(2) only allows declaratory relief that has the same practical effect as an injunction, and § 1252(f)(1) bars classwide injunctive relief, Petitioners cannot obtain either injunctive or declaratory relief.

The Supreme Court in *Jennings* echoed this point when it suggested that if § 1252(f)(1) prohibits classwide relief, then it would equally prohibit corresponding declaratory relief. *See Jennings*, 138 S. Ct. at 851 ("if the Court of Appeals concludes that it may issue only declaratory relief, then the Court of Appeals should decide whether that remedy can sustain the class on its own") (citing Rule 23(b)(2) (requiring "that final injunctive relief or *corresponding* declaratory relief [be] appropriate respecting the class as a whole") (emphasis in original)).

Petitioners here request, in part, that this Court:

> 114. Order the respondents to provide the prolonged detention sub-class members a bond hearing before an immigration judge where the Government bears the burden of justifying further detention by clear and convincing evidence.

115. Declare that the respondents may not detain the prolonged detention sub-class members for six months or more without providing them a bond hearing before an immigration judge where the Government bears the burden of justifying further detention by clear and convincing evidence.

See ECF No. 17, Prayer for Relief at ¶¶ 114-115. The declaratory relief Petitioners seek here is quintessential "corresponding declaratory relief" as defined by the Advisory Committee because it essentially affords injunctive relief, serves as a basis for later injunctive relief, or is identical to the injunctive relief sought. Consequently, § 1252(f)(1) must be applied to bar both Petitioners' requested injunctive *and* declaratory relief.

III. Petitioners' Due Process Claims Are Not Capable of a Uniform Disposition and Uniform Remedy.

Aside from these insurmountable obstacles, Petitioners cannot demonstrate that their due process claims can be answered or remedied on a common basis. *See Jennings*, 138 S. Ct. at 851-52 (after reconsidering import of § 1252(f)(1), instructing lower court on remand to then re-examine certification in light of Rule 23(b)(2) and *Wal-Mart*). To proceed as a Rule 23(b)(2) class, Petitioners must demonstrate, among other things, that there are "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2), (b)(2). In determining whether a question of law is common to the class, it is not enough simply to ask the same question. "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). Furthermore, to satisfy Rule 23(b)(2), Petitioners must show that relief "is available to the class as a whole" and that the challenged conduct is "such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Id*. at 360. Accordingly, Petitioners have the burden of demonstrating that the factual differences in the subclass here are immaterial, and that the

question can be answered (and any violation remedied) the same way for every member of the subclass. *See id.* at 350 (The common legal problem "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims *in one stroke*." (emphasis added)); *cf. Califano v. Yamasaki*, 442 U.S. 682, 701 (1979).

Petitioners "must affirmatively demonstrate" "that there are *in fact* . . . common questions of law." *Wal-Mart*, 564 U.S. at 350. Similarly, the Court must "probe behind the pleadings before coming to rest on the certification question," including a "rigorous analysis" that the prerequisites of Rule 23(a) have been satisfied." *Id*. at 351. "Frequently that 'rigorous analysis' will entail some overlap with the merits of the . . . underlying claim" because "the class determination . . . involves considerations that are enmeshed in the factual and legal issues comprising the . . . cause of action." *Id.*

Petitioners' due process claims fall far short of these requirements. A proper due process analysis mandates an individualized fact-specific inquiry that is not, and cannot be, conducted via the class action vehicle. It is well established that "due process is flexible and calls for such procedural protections as the particular situation demands." *Matthews v. Eldridge*, 424 U.S. 319, 321 (1976). Due process claims, such as the ones here, are wholly unsuitable for classwide resolution due to the fact-specific analysis required in each individual case. Indeed, the Supreme Court recently reiterated in *Jennings* that a class action may not be the proper vehicle to resolve due process claims because of the flexibility inherent in a due process analysis. 138 S. Ct. at 852 (remanding to the Court of Appeals to consider this question).

Among the factors that must be assessed in each individual subclass member's case are the "interest at stake for the individual, the risk of an erroneous deprivation of the interest

through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982). The individual characteristics of the subclass members and the varied procedural protections available to them make it impossible for the Court to answer the due process question the same way for each of them. *See Lujan v. G&G Fire Sprinklers, Inc*., 532 U.S. 189, 196 (2001) ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."). For example, one particular subclass member may be denied parole and detained beyond six months for reasons that are completely inapplicable to another subclass member. Not to mention that Second Circuit precedent mandates a case-specific due process analysis in this particular immigration context. Second Circuit law is clear: an alien may not rely on delays due to his litigation strategy to establish a due process violation. *Doherty v. Thornburgh*, 943 F.2d 204, 211 (2d Cir. 1991); *Viknesrajah v. Koson*, No. 09-cv-6442, 2011 WL 147901, *6 (W.D.N.Y. Jan. 18, 2011). While the Court previously rejected application of this precedent to Petitioners' statutory claims, by the Court's own logic, *Doherty* and its progeny are controlling in the context of Petitioners' due process claims. *See* ECF No. 66 at 22. Determining whether a subclass member has violated *Doherty* would involve delving even further into the unique facts of each detainee's immigration proceedings to weed out any subclass members who have unilaterally prolonged their own detention and who are not, therefore, entitled to relief. Because some facts and legal arguments may apply to discrete members of the subclass, but not others, Petitioners' due process claims cannot be resolved "in one stroke." *Wal-Mart*, 564 U.S. at 350.

Absent claims that are capable of uniform disposition, the Court cannot grant a common remedy. The answer to and remedy for the subclass claims must be the same for all subclass members—not merely some of them; the subclass's entitlement to relief accordingly must rise or fall on the basis of shared characteristics, not characteristics found only in some. *Id.* at 360 (challenged conduct must be "such that it can be enjoined or declared unlawfully only as to all of the class members or as to none of them"). The bond subclass misses the mark because it lumps together all asylum-seeking arriving aliens who passed a credible fear interview and are detained beyond six months—even those who for various reasons have been denied parole and even those who have taken action to impede their own immigration proceedings. Under these circumstances, there is no "single injunction or declaratory judgment [that] would provide relief to each member of the class." *Jennings*, 138 S. Ct. at 852 (quoting *Wal-Mart*, 564 U.S. at 360). Nor is it "true that the complained-of 'conduct is such that it can be enjoined or declared unlawful as to all of the class members or as to none of them.'" *Id.* These deficiencies require decertification of the bond subclass.

IV. The Court Should Decertify the Bond Subclass Because it is Premised on an "Implausible Construction" of 8 U.S.C. § 1225(b).

Finally, as a practical consideration, the Court should decertify the bond subclass because it is based on an implausible construction of § 1225(b). The Court certified the subclass based on the fundamental premise that common questions will generate common answers—namely, whether Respondents failed to provide bond hearings that were statutorily required by § 1225(b). ECF No. 66 at 14, 22-23. Accordingly, the Court certified the class under Rule 23(b)(2), finding that Petitioners were likely to succeed on their statutory challenge to § 1225(b). *Id.*; Order at 61-63.

However, the Supreme Court clearly rejected the Court's application of the canon of constitutional avoidance to § 1225(b). This renders the subclass appropriate for decertification. In *Jennings*, the Supreme Court held that § 1225(b) unambiguously authorizes detention of applicants for admission until the end of their applicable asylum or removal proceedings. Section 1225(b), thus, cannot be plausibly construed by the Court to contain an implicit temporal limitation.

Because the bond subclass is premised on the erroneous conclusion that § 1225(b) authorized bond hearings after six months of detention—a conclusion that the Supreme Court has clearly rejected—the Court should decertify the subclass.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court grant their motion and decertify the bond subclass.

Dated: December 13, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2018, I filed the foregoing document with the Clerk of the Court through the Court's ECF system, which will send a notice of electronic filing to all counsel of record.

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