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' MEMORANDUM OF LAW IN OPPOSITION TO THE GOVERNMENT'S MOTION TO DECERTIFY THE BOND SUBCLASS

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTRODUCTION

Petitioners oppose the government's motion to decertify the bond subclass, which consists of arriving asylum-seekers detained at the Buffalo Federal Detention Facility in Batavia, New York, who have passed a credible fear interview and have been imprisoned for more than six months without a bond hearing. The government argues that this Court should reverse its certification of the subclass because, after *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), the subclass now must seek bond hearings based on constitutional rather than statutory grounds. It contends that 8 U.S.C. Section 1252(f)(1) prohibits class certification to resolve the subclass's constitutional claim and that this Court's Rule 23 analysis is no longer valid. The government is wrong on both counts.

As an initial matter, Section 1252(f)(1) does not require this Court to reverse its certification of the bond subclass. This Court only needs to decide that the subclass may pursue at least one form of class-wide relief in order to maintain certification, and here, for reasons that the Ninth Circuit articulated post-remand in *Rodriguez*, class-wide injunctive relief and declaratory relief are both available. As Petitioners argued in opposing the Motion to Vacate the Preliminary Injunction, Section 1252(f)(1) does not prohibit class-wide injunctive relief in this case because it does not apply to habeas actions and in any event it does not preclude class-wide injunctive relief for a class of individuals — like the subclass members — who are in removal proceedings. Moreover, the subclass remains appropriately certified for class-wide declaratory relief, which every court to address the question has found is available notwithstanding 1252(f)(1).

Additionally, the Court's previous Rule 23 analysis remains valid even though the subclass is now pursuing solely a constitutional claim for bond hearings rather than also relying on a statutory claim. The bond subclass continues to share the same common facts and seek the

same common remedy that underlay the Court's original certification decision. Its due process claim asserting the right to a hearing presents a quintessential legal question appropriate for class-wide resolution, in line with decades of precedent. Therefore, the Court has no reason to disturb its original certification findings.

RELEVANT PROCEDURAL HISTORY

Petitioners filed this class-action challenge to the prolonged incarceration of arriving asylum-seekers without bond hearings as a habeas action raising statutory and constitutional claims. *See* First Am. Pet., ECF No. 17, Aug. 21, 2017. Shortly after the Court granted a preliminary injunction requiring bond hearings on statutory grounds, *see Abdi v. Duke*, 280 F. Supp. 3d 373, 410-12 (W.D.N.Y. 2017), it certified a subclass consisting of arriving asylum-seekers who are or will be detained at Batavia, have passed a credible fear assessment, and "have been detained for more than six months without a bond hearing before an immigration judge," *Abdi v. Duke*, 323 F.R.D. 131, 145 (W.D.N.Y. 2017).[1] The Court treated the bond subclass as a habeas class under *U.S. ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125 (2d Cir. 1974), found it satisfied the requirements of Rules 23(a) and (b)(2), and modified the preliminary injunction to apply it to the subclass. *See Abdi*, 323 F.R.D. at 136-45.

While the government's appeal of the preliminary injunction was pending, the Supreme Court decided *Jennings v. Rodriguez*, 138 S. Ct. 830, 839 (2018). Although the Supreme Court in *Rodriguez* invalidated the statutory basis for the *Abdi* injunction, it explicitly left open whether prolonged mandatory detention violates the Constitution, remanding for the Ninth Circuit to decide that issue. *Id*. at 836, 842-47, 851. In remanding, it instructed the lower courts to decide

[1] The broader class comprises "all arriving asylum-seekers who have passed a credible fear interview and who are or will be detained at the Buffalo Federal Detention Facility and who have not been granted parole." *Abdi*, 323 F.R.D. at 145.

whether the class should remain certified to resolve the constitutional claim, considering whether Section 1252(f)(1) affects the availability of class-wide injunctive and declaratory relief and whether the Rule 23 analysis remains valid. *Id.* at 851-52. As a result, the Second Circuit remanded *Abdi* to the district court to consider *Rodriguez*. *See* Order Granting Remand, 18-94 (2d Cir. Sept. 5, 2018). Since the Second Circuit remand, the government has moved to vacate the preliminary injunction, *see* Defs.' Mot. to Vacate, ECF No. 91-1, Oct. 31, 2018 ("Vacate Br."), and decertify the bond subclass, *see* Defs.' Mot. to Decertify, ECF No. 102, Dec. 13, 2018 ("Decert. Br.").[2]

ARGUMENT

This Court should deny the government's bid to reverse the certification of the subclass of arriving asylum-seekers. As the government appears to recognize, "the Court may not disturb its prior [certification] findings absent 'some significant intervening event,' or 'a showing of compelling reasons to reexamine the question.'" *Doe v. Karadzic,* 192 F.R.D. 133, 136–37 (S.D.N.Y. 2000) (internal citations omitted); *see also* Decert. Br. at 7 (citing the same "compelling reasons" standard). No such reasons for reversal exist here.[3]

[2] The government has raised overlapping issues in the two motions*, see* Reply in support of Mot. to Vacate, ECF 104, Dec. 21, 2018 ("Vacate Reply"), at 4-8, and this brief responds to both sets of arguments.

[3] Although there is no dispute that the "compelling reasons" standard governs decertification, Petitioners dispute the government's assertion that Petitioners have the burden of demonstrating Rule 23 requirements continue to be met at the decertification stage. *See* Decert. Br. at 12-13. Some courts within the Second Circuit have held that defendants bear the heavy burden of proving decertification is warranted. *See, e.g.*, *In re Vivendi Universal, S.A. Securities Litigation*, 2009 WL 855799, at *3 (S.D.N.Y. Mar. 31, 2009) ("[D]ecertifying or redefining the scope of a class should only be done where defendants have met their heavy burden of proving the necessity of taking such a drastic step.") (internal quotations omitted).

I. SECTION 1252(f)(1) DOES NOT REQUIRE DECERTIFICATION OF THE BOND SUBCLASS.

The government seeks to decertify the bond subclass based on 8 U.S.C. Section 1252(f)(1), titled "Limit on injunctive relief," which 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 [certain INA provisions including 8 U.S.C. Section 1225], other than with respect to the application of such provisions to an individual alien against whom proceedings . . . have been initiated.

But, by its terms, this section does not affect the bond subclass's ability to seek injunctive relief as a habeas class comprised of persons in removal proceedings. Nor does Section 1252(f)(1) affect the subclass's suitability for certification to seek class-wide declaratory relief, and the Court could resolve the government's decertification motion purely on that conclusion. This Court can therefore decide to uphold its certification of the subclass based on the availability of either form of relief that the subclass seeks — class-wide injunctive relief or declaratory relief — because both are available in this case.

A. Section 1252(f)(1) Does Not Affect Certification of the Bond Subclass to Seek Injunctive Relief.

As an initial matter, that the Supreme Court in *Rodriguez* remanded to the Ninth Circuit the question of whether Section 1252(f)(1) precluded class-wide injunctive relief in that case and in doing so cited its earlier decision in *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481-82 (1999) ("*AADC*"), *see Rodriguez*, 138 S.Ct. at 851, demonstrates that neither *Rodriguez* nor *AADC* decided the issue now before this Court: the availability of certifiable injunctive relief for the bond subclass. *See also Mohammed v. Reno*, 309 F.3d 95, 99 n.5 (2d Cir. 2002) (treating *AADC*'s commentary on 1252(f)(1) as dicta). Rather, the resolution of this issue turns on Supreme Court and Second Circuit precedent establishing that the Court should read

Section 1252(f)(1) narrowly so that it does not apply to this case, not in the sweeping manner proposed by the government or adopted by the cases it cited, Vacate Reply at 2 (citing, *inter alia*, *Hamama v. Homan*, 912 F.3d 869 (6th Cir. 2018)). As the Ninth Circuit correctly held in its remand decision in *Rodriguez v. Marin*, 909 F.3d 252, 256 (9th Cir. 2018), class-wide injunctive relief remains available for the subclass for two independent reasons: because Section 1252(f)(1) does not apply to habeas cases and because it does not preclude such relief for classes of people in removal proceedings.

1. *Section 1252(f)(1) Does Not Affect Certification of the Bond Subclass to Seek Injunctive Relief as a Habeas Class*.

On remand, the Ninth Circuit in *Rodriguez* correctly applied the Supreme Court's decision in *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001), to hold that Section 1252(f)(1) does not affect federal courts' authority to grant injunctive relief, including class-wide injunctive relief, in habeas cases like this one brought under 28 U.S.C. Section 2241. *See Rodriguez*, 909 F.3d at 256; *Abdi*, 323 F.R.D. at 136 (treating this case as a habeas action in certifying the class). In *St. Cyr*, the Court required Congress to provide "a clear and unambiguous statement" when it intends to restrict a habeas court's authority. 533 U.S. at 298, 305. Section 1252(f)(1) contains no such clear statement limiting a habeas court's authority to issue injunctive relief. In fact, it does not refer to habeas at all. *See Liang v. I.N.S.*, 206 F.3d 308, 318 (3d. Cir. 2000) (requiring "an explicit reference" to habeas in order to find a clear congressional intent to limit habeas authority). That 1252(f)(1) lacks a clear statement is even more apparent when contrasted with its neighboring provisions that Congress amended following *St. Cyr* to make the limitation on a

habeas court's authority explicit. *See, e.g.*, 8 U.S.C. § 1252(a)(2)(B) (limiting judicial review, including explicitly in habeas cases); 8 U.S.C. § 1252 (b)(9) (same).[4]

The government's argument that the *St. Cyr* clear-statement rule does not apply because Section 1252(f)(1) does not foreclose habeas jurisdiction in its entirety and thus does not "invoke[] the outer limits of Congress' power" to suspend habeas, Vacate Reply at 3, fails in light of Second Circuit precedent in *Liu*. In *Liu*, the Second Circuit considered whether a subsection of Section 1252 that directs "judicial review of all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States" to a petition for review process in the court of appeals precludes such review in a habeas action. *See Liu v. I.N.S.*, 293 F.3d 36, 39 n.5 (2d Cir. 2002) (citing 8 U.S.C. Section 1252(b)(9) among other subsections). The court held that habeas review was still available because the subsection did not contain a clear statement limiting a habeas court's authority as required by *St. Cyr*, rejecting the argument, similar to one the government raises here, that *St. Cyr*'s rule does not apply when a statute does not foreclose all judicial review and therefore does not raise Suspension Clause concerns. *See id.* at 37 (requiring clear statement to limit habeas authority even where the petitioner may raise the same legal issues on a petition for review); *see also Chmakov v. Blackman*, 266 F.3d 210, 215 (3d Cir. 2001) (same). Although the Sixth Circuit adopted a contrary interpretation of *St. Cyr* in *Hamama*, 912 F.3d at 879, *Liu* is the law of this circuit.[5]

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[4] The government's citation to *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938), Vacate Reply at 3, misses the mark. *Lauf* only stands for the proposition that Congress has the authority to impose limits on injunctive relief and does not undermine the rule of construction that Congress make a clear statement when imposing such limitations.

[5] Petitioners also have submitted unrebutted evidence that that subclass members would not be able to file individual cases absent availability of class-wide relief. *See* Pet'rs' Opp. to Mot. to Vacate ("Vacate Opp.") at 23-24.

Similarly, the government's alternative argument that Section 1252(f)(1) clearly bars habeas courts from issuing injunctive relief because the statute limits injunctive relief "regardless of the nature of the claim," Vacate Reply at 3, does not comport with *St. Cyr* and *Liu*. Section 1252(f)(1)'s language is not materially different from preclusive language in the INA at issue in those cases, which the Supreme Court and the Second Circuit respectively found not to limit the habeas court's authority. *See St. Cyr*, 533 U.S. at 311, 314 (holding that limitation on judicial review "notwithstanding any other provision of law" did not clearly preclude those individuals from seeking habeas review); *Liu*, 293 F.3d at 39 n.5 (same for limitation on "judicial review of all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States"). Because Congress did not clearly and explicitly extend Section 1252(f)(1)'s limitation to habeas actions, it left untouched this Court's inherent authority as the habeas court to issue class-wide preliminary injunctive relief. *See Munaf v. Geren*, 553 U.S. 674, 690 (2008) (recognizing a habeas court's authority to grant preliminary injunctive relief); *Sero*, 506 F.2d at 1125 (same for class-wide relief).

2. *Section 1252(f)(1) Does Not Affect Certification of the Bond Subclass to Seek Injunctive Relief as a Class of Individuals in Removal Proceedings.*

Additionally, regardless of whether Section 1252(f)(1) applies to habeas cases, it does not foreclose what the subclass seeks here: injunctive relief that applies only to individuals in removal proceedings. *See Rodriguez*, 909 F.3d at 256. As a textual matter, while Section 1252(f)(1) prohibits persons and entities from enjoining the relevant statutory sections facially or as-applied if they are not in removal proceedings, it explicitly permits injunctions "with respect to the application of such provisions to an individual alien against whom proceedings . . . have been initiated." Each subclass member here is an individual "against whom proceedings . . . have been initiated," and as such should be permitted to seek injunctive relief, whether individually,

jointly with other plaintiffs, or in a class action. In arguing against this reading of Section 1252(f)(1), *see* Decert. Br. at 8-10, Vacate Reply at 2, and in urging this Court to adopt the *Hamama* court's more expansive reading of the preclusive effect of Section 1252(f)(1), *see id.*, the government ignores the Supreme Court decision in *Califano v. Yamasaki*, 442 U.S. 682 (1979), as well as well-established principles and considerations of statutory construction that the *Hamama* court failed to take into account.

First, *Yamasaki* supports the availability of class-wide injunctive relief for the subclass because it establishes that statutory language referring to a single litigant should be construed to permit class actions unless Congress has clearly stated otherwise — and here, Congress has not clearly stated that class actions are unavailable for individuals in removal proceedings. *Yamasaki* involved a statutory provision allowing "any individual" to seek judicial review of a final agency decision without any indication whether it permitted or prohibited class actions. *See* 442 U.S. at 700. The Court noted that statutory provisions allowing single litigants to bring civil actions historically have been interpreted to permit class actions because that is precisely what "the Rule 23 class-action device was designed to allow." *Id*. at 700-01 (citing 28 U.S.C. § 1343 (civil rights; provides jurisdiction over civil actions "authorized by law to be commenced by any person"); 28 U.S.C. § 1361 (mandamus; empowers federal courts to compel certain Government officials and agencies "to perform a duty owed to the plaintiff")). The Supreme Court then applied a presumption that litigants enjoy access to class action mechanisms under the Federal Rules even where the statute refers to the litigant in the singular, and it required a "clear expression of congressional intent" to rebut that presumption. *See id*. at 699-700.

The government relies on the Sixth Circuit's decision in *Hamama* in arguing against the application of the *Yamasaki* presumption to 1252(f)(1), but the *Hamama* decision is flawed. The

Hamama court acknowledged *Yamasaki*'s presumption but erroneously deviated from it by distinguishing Congress's use of "any individual" in the statute in *Yamasaki* and "an individual alien" in Section 1252(f)(1). 912 F.3d at 877-78. The distinction is without a difference: critically, both statutes merely describe litigants who may bring claims in singular terms. Moreover, Congress has acted with far more clarity when it wants to ban class actions for particular litigants notwithstanding the Federal Rules of Civil Procedure, as is evident from other neighboring provisions of the INA. *Compare* § 1252(f)(1) *with* 8 U.S.C. § 1252(e)(1)(B) (banning courts from "certify[ing] a class under Rule 23 . . . in any action for which judicial review is authorized under a subsequent paragraph of this subsection").[6]

Second, the presumption against limiting a court's equitable powers also supports a *Yamasaki*-based reading of Section 1252(f)(1). The Supreme Court has required Congress to use explicit language when limiting the judiciary's inherent equitable powers, and "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.,* 328 U.S. 395, 398 (1946) ("The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.") (internal quotation marks omitted). And Section 1252(f)(1) does not explicitly bar class-wide injunctive relief for those in removal proceedings like the subclass.

[6] The government's citation to *Aguilar v. U.S. Immigration & Customs Enf't*, 510 F.3d 1 (1st Cir. 2007), Decert. Br. at 9, is inapposite. In *Aguilar*, the statutory provision prohibited civil actions by individual litigants and the plaintiffs argued that it nonetheless permitted class actions. *See Aguilar*, 510 F.3d at 16. Here, Petitioners are arguing to the contrary: that 1252(f)(1) permits individual civil actions for those in removal proceedings and therefore also permits class actions on behalf of those individuals.

Third, the presumption against limitations on meaningful judicial review of constitutional questions similarly supports the *Yamasaki*-based reading of Section 1252(f)(1). Congress must use explicit language to foreclose meaningful judicial review of constitutional questions. *See Califano v. Sanders*, 430 U.S. 99, 109 (1977) (noting the "well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed," and that the Court "will not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence"). Reading Section 1252(f)(1) to bar class-wide injunctive relief for the subclass's due process claims would effectively eliminate the review of constitutional claims for thousands of imprisoned arriving asylum-seekers who would not be able to file individual cases because of lack of familiarity with the legal system and the English language, inability to retain an attorney, and the hurdles of litigating from detention. *See* Note 5, *supra*; *Abdi*, 323 F.R.D. at 140 (recognizing that the ability of individuals to bring a lawsuit is necessarily limited by detention); *Reid v. Donelan*, 297 F.R.D. 185, 189 (D. Mass. 2014) (finding that it would be unreasonable to expect detained immigrants to challenge their detention individually given that "many do not speak English, a majority do not have counsel, and most are unlikely even to know that they are members of the proposed class"); *Gortat v. Capala Bros., Inc.*, No. 07-3629, 2012 WL 1116495, at *3 (E.D.N.Y. Apr. 3, 2012) (finding that it would be impracticable for 28 individual immigrant laborers who speak little English and lack financial resources to file individual legal actions), *aff'd*, 568 F. App'x 78 (2d Cir. 2014) (unpublished). And the reality of availability of judicial review matters: in an analogous circumstance involving the presumption of judicial review of administrative actions, the Supreme Court has avoided an interpretation of a statute that would foreclose judicial review

as a practical matter and thus subvert the presumption. *See McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991).

Fourth, Section 1252(f)(1)'s legislative history, which conveys congressional intent to protect those who are experiencing irreparable harm and is silent on prohibiting their use of class actions, also supports the *Yamasaki*-based reading of Section 1252(f)(1). Congress adopted Section 1252(f)(1) after a period in which organizations and classes of individuals who were not in removal proceedings brought preemptive challenges to the enforcement of immigration statutes. *See, e.g.*, *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 47-51 (1993) (class action brought by, *inter alia*, organizations and a class of individuals including many who were not in removal proceedings); *McNary*, 498 U.S. at 487-88 (same). Perhaps as a response to these cases, the House Committee report expressed the desire that the newly-enacted procedures remain in force while lawsuits challenging their constitutionality are litigated but that courts be permitted to issue injunctive relief "pertaining to the case of an individual alien, and thus protect against any immediate violation of rights." H.R. Rep. No. 104-469, pt.1, at 161 (1996); *see also American Immigration Lawyers Ass'n (AILA) v. Reno*, 199 F.3d 1352, 1359-60 (D.C. Cir. 2000) (inferring that "Congress meant to allow litigation challenging the new system by, and only by, aliens against whom the new procedures had been applied"). Congress thus intended that the procedures could not be facially enjoined in their entirety by individual or organizational plaintiffs who cannot show harm but that individuals in removal proceedings experiencing immediate irreparable harm — just like the subclass — could obtain injunctive relief against the ongoing application of unconstitutional procedures to them.[7] *See, e.g.*, *Ali v. Ashcroft*, 346 F.3d

[7] That history suggests that Congress used the phrase "an individual alien" to clarify that organizational plaintiffs, as opposed to the people for whom they advocate, could not obtain

873, 886-87 (9th Cir. 2003) (noting that 1252(f)(1) does not bar class-wide injunctions to stop "constitutional violations" in the "administration" of the INA), *opinion withdrawn on denial of reh'g sub nom. Ali v. Gonzales*, 421 F.3d 795 (9th Cir. 2005), *as amended on reh'g* (Oct. 20, 2005); *Grimaldo v. Reno*, 187 F.R.D. 643, 648 (D. Colo. 1999) (holding that 1252(f)(1) did not bar class-wide injunctive relief where the plaintiff class did "not seek to enjoin the operation of" the detention statutes but "to enjoin alleged constitutional violations by the INS in its administration of § 1226"); *Tefel v. Reno*, 972 F. Supp. 608, 618 (S.D. Fla. 1997) (same where the plaintiff class sought "to enjoin constitutional violations and policies and practices of the Defendants"), *vacated on other grounds*, 180 F.3d 1286 (11th Cir. 1999).

Finally, public interest and judicial economy strongly reinforce the *Yamasaki*-based reading of Section 1252(f)(1) permitting the subclass to pursue injunctive relief via a class action. As the Supreme Court recognized in *Yamasaki*, class actions are presumptively permitted because they "save[] the resources of both the courts and the parties by permitting an issue . . . to be litigated in an economical fashion under Rule 23." 442 U.S. at 701. The same is true here: without the availability of class actions as a vehicle to consolidate similar cases, courts would be crowded with multiple pro se individual requests for injunctive relief and forced to adjudicate the same issues over and over again, while delaying justice for those who remain unconstitutionally imprisoned. *See* Blau Decl. ¶ 4 (ECF No. 99-7) (showing that most habeas proceedings in the Western District are pro se); Roeck Decl. ¶ 10 (ECF No. 99-6) (showing that individual habeas proceedings for detained non-citizens who succeed in seeking a bond hearing take an average of

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broad-ranging injunctive relief. *See National Sec. Counselors v. Central Intelligence Agency*, 811 F.3d 22, 28 (D.C. Cir. 2016) (considering whether organization's small size warrants treating the plaintiff "like an individual rather than an organization").

nearly six months to resolve). It is impractical to read Section 1252(f)(1) to prohibit class actions on behalf of individuals in removal proceedings when they are permitted to bring individual actions.[8]

B. Section 1252(f)(1) Does Not Affect Certification of the Bond Subclass to Seek Declaratory Relief.

The Court should also maintain the certification of the bond subclass on the alternative or additional basis that it is properly certified for the declaratory relief sought. *See* First Am. Pet. ¶ 115 (seeking a declaration that the government may not imprison the subclass members for more than six months without a bond hearing). Section 1252(f)(1) does not affect the Court's authority to issue declaratory relief. *See* § 1252(f)(1) (referring only to "injunctive relief" and "authority to enjoin or restrain"); *Steffel v. Thompson*, 415 U.S. 452, 471 (1974) (calling declaratory judgment "a much milder form of relief than an injunction"). Both circuit courts to decide this issue have held that Section 1252(f)(1) permits classes seeking a declaration of a right to a bond hearing, whether the class consists of arriving asylum-seekers detained under Section 1225(b) or people with criminal convictions detained under Section 1226(c). *See, e.g.*, *Alli v. Decker*, 650 F.3d 1007, 1012-16 (3d Cir. 2011) (holding that 1252(f)(1) does not preclude a class seeking declaratory relief against Section 1226(c) mandatory detention); *Rodriguez v. Hayes*, 591 F.3d 1105, 1119 (9th Cir. 2010) (same as to classes under Sections 1226(c) and 1225(b)). In fact, on remand in the Ninth Circuit in *Rodriguez*, the government conceded this point. *See* Suppl.

[8] To the extent the Court disagrees with Petitioners' reading of Section 1252(f)(1) and construes the statute to prohibit it from issuing class-wide injunctive relief but to allow the Supreme Court to do so, *see* § 1252(f)(1) (carving out the Supreme Court from its preclusive reach), this construction raises unique and difficult questions about whether the section unconstitutionally expands the Supreme Court's original jurisdiction by permitting the Court to issue original relief rather than review relief issued by the lower courts through its appellate jurisdiction. *See Marbury v. Madison*, 5 U.S. 137, 174 (1803) (explaining constitutional limitations on the Court's original jurisdiction). This Court would have to resolve these difficult questions if it read Section 1252(f)(1) to preclude itself from issuing the relief sought here.

Resp'ts.' Br. at 15 n.1, *Rodriguez v. Marin*, No. 13-56706 (9th Cir. Aug. 10, 2018), ECF No. 212; *see also Rodriguez*, 909 F.3d at 256 (confirming that Section 1252(f)(1) "does not affect classwide declaratory relief"). And in *Reid v. Donelan*, No. 13-30125-PBS, 2018 WL 5269992, at *6-7 (D. Mass. Oct. 23, 2018), the court denied the government's post-*Rodriguez* motion to decertify a class of those detained under 1226(c), holding that regarding 1252(f)(1), all it needed to decide on the motion was that the section does not bar class-wide declaratory relief.

In this instance, the government argues, contrary to all authority, that 1252(f)(1) bars class-wide declaratory relief because Rule 23(b)(2) only permits such relief if it has "the same practical effect as an injunction," Defs.' Br. 10-12, and therefore, such relief here would "enjoin or restrain" the detention statutes in violation of Section 1252(f)(1). But Rule 23(b)(2) permits certification not only of "final injunctive relief" but of "corresponding declaratory relief," and to avoid redundancy the latter phrase must be given meaning separate from final injunctive relief. In fact, the Advisory Committee defined "corresponding declaratory relief" as that which "affords injunctive relief or serves as a basis for later injunctive relief." Fed. R. Civ. P. 23(b)(2) advisory committee's note to 1966 amendment (emphasis added). Although the government argues that this definition "makes clear" that the rule only permits declaratory relief that is "equivalent to an injunction," Defs.' Br. at 11, that ignores the second part of the definition. Declaratory relief of the type sought here would "announc[e] a right to an individualized hearing after prolonged detention," and class members could use this declaratory relief as a basis for later individual lawsuits for injunctive relief requiring bond hearings in their cases. *Reid*, 2018 WL 5269992, at *8 (finding a class seeking similar declaratory relief to this case to be properly certified under Rule 23(b)(2) on this basis).

The only case the government cites to support its position, *Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co.*, 98 F.R.D. 254, 271 (D. Del. 1983), Decert. Br. at 11, is readily distinguishable. There, the court denied Rule 23(b)(2) certification to a class of bottling companies seeking money damages and a declaratory judgment stating that Coca-Cola owed it retroactive price adjustments because the companies were not seeking "corresponding declaratory relief that would have the effect of enjoining the defendant from acting in the future." *Coca-Cola*, 98 F.R.D. at 263. This case illustrates that by using the phrase "corresponding declaratory relief," rule drafters intended to preclude Rule 23(b)(2) certification in cases "in which the appropriate final relief relates exclusively or predominantly to money damages." Fed. R. Civ. P. 23(b)(2) advisory committee's note to 1966 amendment; Andrew Bradt, *"Much to Gain and Nothing to Lose": Implications of the History of the Declaratory Judgment for the (b)(2) Class Action*, 58 Ark. L. Rev. 767, 799-800 (2006) (explaining that the drafters included the word "corresponding" before "declaratory relief" in order to exclude money damages actions); *see also Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 564 (2d Cir. 1968) (recognizing that "[s]ubsection (b)(2) was never intended to cover cases . . . where the primary claim is for damages," but it is applicable where "the relief sought is exclusively or predominantly injunctive or declaratory"). The bond subclass does not seek money damages, and the declaratory relief it seeks can sustain a Rule 23(b)(2) class. *See Reid*, 2018 WL 5269992, at *7-8.[9]

[9] Finally, the subclass is also properly certified for a traditional writ of habeas corpus, which the *Hamama* court has suggested is a form of relief separate from injunctive relief. *See Hamama*, 912 F.3d at 879 (noting that "there is nothing barring a class from seeking a traditional writ of habeas corpus"). While Petitioners do not seek this relief at this stage of the litigation, the subclass is properly certified to do so as an alternative at another point. *See Sero*, 506 F.2d at 1125. Therefore, even if the Court decides that Section 1252(f)(1) precludes continued certification of the subclass for class-wide injunctive relief or declaratory relief, it should still leave the habeas class certified for traditional habeas relief.

II. THE BOND SUBCLASS CONTINUES TO SATISFY RULE 23.

In addition to invoking Section 1252(f)(1), the government argues this Court should reverse its ruling that the subclass satisfies Rule 23 and the *Sero* habeas class requirements. *See Abdi*, 323 F.R.D. at 136-45. The government does not challenge this Court's findings on numerosity, typicality, or adequacy of either the class representative or class counsel, *see Abdi*, 323 F.R.D. at 139-43, but argues that the subclass's request for bond hearings lacks commonality now that the subclass is pursuing a constitutional due process claim rather than a statutory claim because the Court cannot resolve such a claim with a single class-wide remedy. Decert. Br. at 12-15; Vacate Reply at 4-8. The only district court to decide a post-*Rodriguez* motion to decertify a similar class of non-citizens seeking bond hearings found this change in the legal basis for the claim insufficient to justify decertification. *See Reid*, 2018 WL 5269992, at *4 (holding that "[*Rodriguez*]'s rejection of the statutory claim . . . does not require decertification" because the plaintiff class raised a constitutional claim from the beginning). Likewise, Petitioners have always pleaded a constitutional claim, First Am. Pet. ¶ 109, and the rejection of the statutory claim does not affect this Court's determination on commonality: that the bond subclass presents a common question of law because "[t]he conclusion that the Buffalo Federal Detention Facility is failing to provide required bond hearings would resolve the claims of those individuals," and "ordering individualized bond hearings for detainees who have been confined for longer than six months would . . . apply across-the-board to all . . . subclass members." *Abdi*, 323 F.R.D. at 141, 144.[10]

[10] In addition, even if this Court rules that bond hearings are not required for the subclass, the Court could still issue a different common remedy for the subclass, such as a reasonableness hearing at the six-month mark. *See Reid*, 2018 WL 52699992, at *5.

Nevertheless, the government argues — contrary to case law and evidence — that the subclass's due process claim cannot be resolved by a class action vehicle because "a proper due process" analysis as a general matter requires "individualized fact-specific inquiry." Decert Br. at 13. But the government's assertion ignores that whether due process requires bond hearings across the subclass, or only on an individual basis, is a common question in itself. *See Reid*, 2018 WL 5269992, at *5 (explaining that even if the answer to the class's common question posed is "no, the class still meets the commonality requirement").[11] Moreover, this broad, threshold assertion directly contradicts the Supreme Court's declaration that a due process claim to a hearing is "peculiarly appropriate" for Rule 23(b)(2) certification because such a right does not turn on "differences in the factual background of each claim." *Yamasaki*, 442 U.S. at 701 (affirming certification of a Rule 23(b)(2) class asserting a due process right to a hearing before recoupment of Social Security overpayments). The government's reliance on *Landon v. Plasencia,* 459 U.S. 21, 34 (1982), and *Lujan v. G&G Fire Sprinklers, Inc*., 532 U.S. 189, 196 (2001), to support its argument, Decert. Br. 14, fails because these cases hold only that due process requires different analyses for differently-situated individuals; neither was a class action,

[11] Similarly, the government's contention that the subclass cannot be certified because its members do not have any due process rights fails because such a question is also a common question of law in itself. *See* Vacate Reply at 8-9. Moreover, the government has failed to engage with Petitioners' arguments establishing the subclass's due process rights. *See* Vacate Opp. at 10-15; *see also Kouadio v. Decker*, No. 18-7684 (AKH), 2018 WL 6807439, at *3-5 (S.D.N.Y. Dec. 27, 2018) (Hellerstein, J.) (holding that an arriving asylum-seeker has a due process right to bond hearing); *Bermudez Paiz v. Decker*, 18-4759 (GHW) (BCM), 2018 WL 6928794, at *10-12, 15 (S.D.N.Y. Dec. 27, 2018) (report and recommendation) (same). The government's citation to *United States v. Verdugo-Urquidez* is inapposite because the case says nothing about the due process rights of asylum-seekers who are in the territory of the United States and have been screened in to pursue their asylum claims. 494 U.S. 259, 264 (1990) (holding that a foreign national who had no voluntary attachment to the United States had no Fourth Amendment rights in his home in a foreign country); *see also* Vacate Opp. at 3, 14.

and their holdings do not foreclose the possibility of a group of similarly-situated individuals presenting the same circumstances such that its members share the same due process entitlement.

Next, the government argues that specific differences among the subclass members defeat commonality because of the individualized inquiry required. But individualized facts do not necessarily defeat certification — even one common question is sufficient to maintain commonality. *See Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997) (affirming certification where factual differences "do not compromise the common question of whether, as plaintiffs allege, defendants have injured all class members by failing to meet their federal and state law obligations"); *Bolanos v. Norwegian Cruise Lines Ltd.*, 212 F.R.D. 144, 153 (S.D.N.Y. 2002) ("[T]he commonality requirement is satisfied if the class shares even one common question of law or fact, and factual differences in the claims of the class do not preclude a finding of commonality.") (internal quotation marks omitted).

Moreover, the government only suggests a few ways in which subclass members are or may be differently situated in this case, none of which defeats commonality here. First, the government argues that the subclass members have been in detention for varying amounts of time and that this defeats a common entitlement to bond hearings. *See* Vacate Reply at 5-6. But this argument misses the point that all subclass members are seeking the same entitlement to bond hearings *at six months*. As for the government's reliance on cases that refused bond hearings to individuals who are in immigration detention under Sections 1226(c) or 1225(b)(2)(A) for a longer period of time, Vacate Reply at 6, 8, those subsections apply to broad groups of often dissimilar individuals who come into custody in different ways, who may be seeking different forms of relief, and whose claims may range from frivolous to substantial. By contrast, the subclass members arrived at the border seeking asylum, passed the credible-fear

assessment by establishing they are pursuing colorable asylum claims, and are all suffering the cumulative harms of prolonged detention in jail-like conditions. *See Abdi*, 280 F. Supp. 3d at 380, 404.[12]

Second, the government argues that subclass members are differently situated in their eligibility for release, as illustrated by the outcome of the parole process. Decert. Br. at 14-15; *see also* Vacate Reply at 5-6. But subclass members' ultimate eligibility for release is not at issue here. *See Abdi*, 323 F.R.D. at 141 ("The relief requested by Petitioners in this litigation is not the ultimate release on parole or bond; rather . . . Petitioners seek compliance with certain procedural safeguards when adjudicating parole and bond determinations."). By definition, all bond subclass members have had parole denied and are therefore similarly situated in their due process entitlement to bond hearings. Indeed, this is another common question that the bond subclass shares: that the parole process insufficiently safeguards the subclass members' rights as a matter of law because it lacks a neutral arbiter and imposes the burden of proof on the detainee, rather

[12] In some of the cases the government cites, *see* Vacate Reply at 6, 8, the courts applied a five-factor test for determining whether bond hearings are appropriate, a test that considers the length of detention, responsibility for any delays in the proceedings, availability of defenses to removal, comparison of length of time in prison to time in immigration detention, and whether conditions of civil detention are different from criminal detention. *See Joseph v. Decker*, 18-2640 (RA), 2018 WL 6075067, at *10 (S.D.N.Y. Nov. 21, 2018) (setting out the five-factor test and collecting cases that apply it). This test conflates the criteria relevant to determining whether release is warranted with the criteria relevant to determining whether to hold a hearing, and in any event should not apply to arriving asylum-seekers. But even if this test were to apply, the subclass members share commonality on each of the applicable factors: they have been in detention for at least six months, which is a significant period of time, *see* Vacate Opp. at 4; they are litigating colorable claims, *see id.* at 7; they are not responsible for the delays in their proceedings, *see infra* at 20-21; and they are imprisoned in conditions that are no different from criminal detention, *see* Vacate Opp. at 4-5.

than holding the government to a clear and convincing burden that the consensus of district courts in this circuit has required. *See* Vacate Opp. at 19-20.[13]

Third, the government suggests, without any evidence, that some subclass members may have purposely delayed their removal proceedings. *See* Decert Br. at 14-15. But that consideration goes to their entitlement to release at the hearing, not whether they get the hearing in the first place. The cases that the government cites illustrate this flaw. As the Court already recognized, those cases concern eligibility for release rather than entitlement to adequate process. *See Doherty v. Thornburgh*, 943 F.2d 204, 205-06, 211 (2d Cir. 1991) (holding that the petitioner, who had already lost his bond hearing, was not entitled to release because he purposefully delayed his removal proceedings) (emphasis added); *Viknesrajah v. Koson*, No. 09-6442 (CJS), 2011 WL 147901, at *1 (W.D.N.Y. Jan. 18, 2011) (explaining that the petitioner, who had been denied parole, is bringing a due process claim to release); *distinguished in Abdi*, 323 F.R.D. at 144. Moreover, by contrast to these cases that involved individuals detained under varying circumstances under other subsections, purposeful delay is not a concern for subclass members who have every incentive to litigate their colorable asylum claims as expeditiously as possible. The record shows that delays at six months arise not from any purposeful efforts at delay but from systemic issues for which subclass members bear no responsibility, such as crowded dockets and the time it reasonably takes meritorious asylum-seekers to develop their cases. *See* King Decl. ¶ 20 (ECF No. 99-2); Phillips Decl. ¶¶ 15-16 (ECF No. 99-3); Vacate Opp. at 23. The government has presented no contrary evidence showing that class members, who

[13] Since Petitioners briefed this matter in their Opposition to the Motion to Vacate, additional courts have adopted this view. *See, e.g.*, *Hemans v. Searls*, 18-1154, 2019 WL 955353 at *9 (W.D.N.Y. Feb. 27, 2019); *Wang v. Brophy*, 17-6263-FPG, 2019 WL 112346 at *3 (W.D.N.Y. Jan. 4, 2019); *Bermudez Paiz*, 2018 WL 6928794 at *15; *Kouadio*, 2018 WL 6807439 at *5.

have an interest in seeing through their colorable claims for relief, purposely delay proceedings.[14]

Finally, the government misconstrues the Supreme Court's commonality concerns about the *Rodriguez* class's due process claim in light of *Wal-Mart Stories, Inc. v. Dukes*, 564 U.S. 338 (2011), erroneously applying them here. Decert. Br. at 14. While the Supreme Court posed that *Wal-Mart* may jeopardize the commonality of the *Rodriguez* class, that concern was explicitly linked to the class including both arriving asylum-seekers and lawful permanent residents returning from overseas travel. *Rodriguez*, 138 S. Ct. at 838-39. However, the bond subclass here includes only arriving asylum-seekers who are, as the Court previously held, similarly situated. *See Abdi*, 323 F.R.D. at 136-45. Therefore, the Court should maintain the same subclass here, just as the court did for a similarly limited class in *Reid*, 2018 WL 5269992, at *8.

CONCLUSION

This Court should deny the government's motion to decertify the bond subclass because 1252(f)(1) does not preclude class certification in this case and the class continues to satisfy Rule 23.

[14] Immigration judges, of course, have the power to prevent unnecessary delays by denying continuances in the asylum case. *See* King Decl. ¶ 21; Phillips Decl. ¶¶ 17-18. Requiring those same immigration judges to adjudicate the bond hearings at six months is far more reasonable and efficient than the government's proposal, *see* Vacate Reply at 3-4, that federal district courts, which are in a worse position to evaluate the merits or the length of an asylum case, adjudicate eligibility for release in response to individual habeas petitions that most class members would be unable to file.

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