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

REPLY IN SUPPORT OF RESPONDENTS' MOTION TO DECERTIFY THE BOND SUBCLASS

JOSEPH H. HUNT
Assistant Attorney General

WILLIAM C. PEACHEY
Director
Office of Immigration Litigation
District Court Section

STACEY I. YOUNG
Senior Litigation Counsel

s/ T. Monique Peoples
T. MONIQUE PEOPLES
Senior Litigation Counsel
Kevin Hirst
Trial Attorney
U.S. Department of Justice, Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Phone: (202) 598-8717
Facsimile: (202) 305-7000
Email: monique.peoples@usdoj.gov

Attorneys for Respondents

As demonstrated in Respondents' motion, and as *Jennings* instructs, decertification of the bond subclass is required under 8 U.S.C. § 1252(f)(1) and Rule 23. Petitioners have not presented any controlling authority or persuasive argument to the contrary. As a preliminary matter, Petitioners incorrectly attempt to shift the burden of proof. *See* ECF No. 121 at 9 n.3. Second Circuit law is clear that, in opposing Respondents' decertification motion, as in the original class certification analysis, Petitioners retain the burden to demonstrate that certification remains proper. *Mazzei v. Money Store*, 829 F.3d 260, 270 (2d Cir. 2016) ("In opposing the decertification motion, Mazzei retained the burden to demonstrate that [Rule 23] requirements were satisfied."); *see also Rodriguez v. It's Just Lunch Int'l*, No. 07-cv-9227, 2018 WL 3733944, *2 n.1 (S.D.N.Y. Aug. 6, 2018). Reassessment of the Court's certification ruling here shows that Petitioners cannot sustain their burden.

I. 8 U.S.C. § 1252(f)(1) Requires That The Bond Subclass Be Decertified.

A. Section 1252(f)(1) unambiguously applies to habeas actions.

For starters, the Court must decline Petitioners' invitation to follow yet another statutory construction ruling by the Ninth Circuit in *Rodriguez v. Marin*, 909 F.3d 252 (9th Cir. 2018). After engaging in a statutory construction analysis that was later rejected by the Supreme Court, the Ninth Circuit on remand interpreted § 1252(f)(1) in a manner that is incompatible with its plain text and controlling Supreme Court precedent. As before, Petitioners urge this Court to

follow *Rodriguez* and hold that § 1252(f)(1) does not pertain to habeas cases. And, as before, Petitioners' urging is wrong.[1]

Just as the *Rodriguez* court did, Petitioners invoke *St. Cyr*'s "clear statement rule," claiming that § 1252(f)(1) "contains no such clear statement limiting a habeas court's authority to issue injunctive relief" and "does not refer to habeas at all." ECF No. 121 at 11. This very argument was recently rejected in *Hamama v. Adducci*, 912 F.3d 869 (6th Cir. 2018). There, the Sixth Circuit found that *St. Cyr* does not prevent a straightforward application of § 1252(f)(1) because "the animating principle behind *St. Cyr* was that courts needed to tread carefully when interpreting a statute that 'invokes the outer limits of Congress' power.'" 912 F.3d at 879. "But delineating the jurisdiction of Article III courts is soundly within the powers of Congress." *Id.* Indeed, *St. Cyr* comes into play only when determining whether a statute altogether *eliminates* habeas relief—not here, where § 1252(f)(1) expressly reserves individual access to habeas relief. Courts regularly apply procedural limitations to habeas without invoking the "clear statement rule." *See, e.g.*, *Marquez-Almanzar v. Ashcroft*, No. 03-civ-1601, 2003 WL 21283418, *6 (S.D.N.Y. June 3, 2003) ("As no constitutional concerns are raised by procedural rules like § 1252(b)(5), the clear statement rule does not apply to them"). Petitioners' reliance on *Liu v. INS*, is similarly misplaced, as it simply extended *St. Cyr*'s holding to non-criminal aliens. 293 F.3d

[1] Despite Petitioners' claims, ECF No. 124, the Supreme Court's recent decision in *Nielsen v. Preap* changes nothing in this regard. *See Nielsen v. Preap*, No. 16-1363, --- S. Ct. ----, 2019 WL 1245517 (Mar. 19, 2019). Justice Alito's opinion altogether avoids the § 1252(f)(1) issue, calling it "irrelevant" and stating that the Court "need not decide" whether the lower court "overstep[ped] [§ 1252(f)(1)] by granting injunctive relief for a class of aliens that includes some who have not yet faced—but merely 'will face'—mandatory detention[.]" *Id.* at *6. The Court ultimately ordered dissolution of the lower court's injunction. *Id.* And with respect to the plaintiffs' request for declaratory relief, the Court simply stated that the lower court had jurisdiction to "entertain" it, *id.*, but the opinion lacks any discussion or analysis of the basis for its finding.

36, 41 (2d Cir. 2002). Like *St. Cyr*, *Liu* does not concern § 1252(f)(1) and the Second Circuit recognizes that *Liu* was superseded by the REAL ID Act in 2005. *See Ruiz-Martinez v. Mukasey*, 516 F.3d 102, 113 (2d Cir. 2008).

Moreover, the language in the INA provisions at issue in *St. Cyr* and *Lui—i.e.*, § 1252(a) and § 1252(b)(9)—is materially different than § 1252(f)(1)'s language. Section 1252(f)(1)'s limit on injunctive relief is applied, "[r]egardless of the nature of the action or claim," which unambiguously includes habeas claims. 8 U.S.C. § 1252(f)(1). There was no need for Congress to specifically refer to habeas jurisdiction, as nothing in § 1252(f)(1) eliminates judicial authority to grant individual habeas relief; the statute simply prevents classwide injunctive relief under the circumstances in this case. *Hamama*, 912 F.3d at 879.

B. Section 1252(f)(1) plainly precludes classwide injunctive relief.

Petitioners additionally argue that, not only is § 1252(f)(1) inapplicable to habeas cases, but it does not pertain to class actions either. ECF No. 121 at 13-18. But "[t]his argument does violence to the text of the statute . . . by reading out the word 'individual' before 'alien.'" *Hamama*, 912 F.3d at 877. Section 1252(f)(1) explicitly limits injunctive relief to "individual aliens," not classes of aliens, in removal proceedings. *Id.* at 877-78. *Yamasaki* does not compel a different result. As the *Hamama* court explained, "*Yamasaki* was about an entirely different statute," and its general rule "does not stop the Court from looking at a particular statute that uses the word 'individual' and determining that, even if the use of 'individual' does not always bar class actions, it does bar them in the particular statute at issue." *Id.* at 878. The Sixth Circuit is not alone in its reasoning. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018) ("Section 1252(f)(1) thus 'prohibits federal courts from granting *classwide* injunctive relief against the operation of §§ 1221-123[2].'") (emphasis added); *Reno v. Am.-Arab Anti-Discrimination*

Comm., 525 U.S. 471, 481-82 (1999) ("By its plain terms," § 1252(f)(1) is a bar on "*classwide* injunctive relief") (emphasis added); *Nken v. Holder*, 556 U.S. 418, 431 (2009) (same); *see also Van Dinh v. Reno*, 197 F.3d 427, 433 (10th Cir. 1999); *Tesfamichael v. Gonzales*, 411 F.3d 169, 172 n.7 (5th Cir. 2005) (citing *Hor v. Gonzales*, 400 F.3d 482, 483 (7th Cir. 2005)); *Pimentel v. Holder*, No. 10-6067, 2011 WL 1496756, *2 (D.N.J. Apr. 18, 2011); *Belgrave v. Greene*, No. 00-B-1523, 2000 WL 35526417, *4 (D. Colo. Dec. 5, 2000); *cf Aguilar v. U.S. Immigration & Customs Enf't*, 510 F.3d 1, 16 (1st Cir. 2007). On the other hand, *Rodriguez* appears to be the *sole* case that has interpreted § 1252(f)(1)'s plain terms in the manner proposed by Petitioners—and even it conflicts with the Ninth Circuit's prior acknowledgement that § 1252(f)(1) *does* preclude *classwide* injunctive relief. *Andreiu v. Ashcroft*, 253 F.3d 477, 481 (9th Cir. 2001).

Moreover, the Court should not be swayed by Petitioners' varied arguments that § 1252(f)(1) permits classwide injunctive relief, ECF No. 121 at 16-18, when on at least three occasions the Supreme Court has confirmed that its text unambiguously forecloses it. *See Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 423 (2d Cir. 2005) ("if the meaning [of statutory language] is plain, we inquire no further"). First, nothing in the prior decisions of this Court, or in *Reid* or *Gortat* pertaining to Rule 23(a) numerosity can support reading § 1252(f)(1) to allow classwide injunctive relief simply because Petitioners purport that class members would not be able to otherwise file individual cases. And despite Petitioners' claim, *see* ECF No. 121 at 12 n.5, Respondents do not concede this point. *See J.E.F.M. v. Lynch*, 837 F.3d 1026, 1038 (9th Cir. 2016) ("We recognize that a class remedy arguably might be more efficient than requiring each applicant to file a PFR, but that is not a ground for ignoring the jurisdictional statute."). The truth of the matter is that habeas cases are ordinarily litigated on an individual basis, just as Mr. Abdi initially filed his case. Second, § 1252(f)(1)'s text and legislative history demonstrate

that Congress adopted § 1252(f)(1) in direct response to a series of classwide injunctions sought by aliens and deliberately intended to eliminate judicial interference with certain statutes through classwide injunctions. *See* H.R. Rep. No. 104-469, pt. 1, at 161 (1996) ("[C]ourts may issue injunctive relief pertaining to the case of an individual alien, and thus protect against any immediate violation of [individual] rights. However, single district courts or courts of appeal do not have authority to enjoin procedures established by Congress to reform the process of removing illegal aliens from the U.S."). Third, no policy argument—whether based on supposed public interest or judicial economy—can overcome § 1252(f)(1)'s straightforward application to the classwide relief sought in this case. *Comm'r of Immigration of Port of N.Y. v. Gottlieb*, 265 U.S. 310, 313 (1924) (although case was "one of peculiar and distressing hardship, … if the plain words of the statute … leav[e] no room for construction, the courts have no choice but to follow it, without regard to the consequences"). Simply put, "Petitioners are arguing for a version of the statute that Congress simply did not write." *Hamama*, 912 F.3d at 878.[2]

C. Petitioners cannot seek classwide declaratory relief that is functionally equivalent to the classwide injunctive relief precluded by § 1252(f)(1).

Finally, Petitioners argue that, even if classwide injunctive relief is precluded, they may still pursue classwide declaratory relief without running afoul of § 1252(f)(1). As an initial matter, Petitioners are incorrect; the government did not concede this point in *Rodriguez*, as its

[2] Petitioners attempt to manufacture a constitutional crisis where none exists by arguing that reading § 1252(f)(1) as the Supreme Court has already done "raises unique and difficult questions about whether the section unconstitutionally expands the Supreme Court's original jurisdiction[.]" ECF No. 121 at 19 n.8. Hypothetically speaking, a class action seeking to declare a statute unconstitutional could reach the Supreme Court and, under § 1252(f)(1), the Court would retain authority to hold the statute unconstitutional and enjoin its operation. Also, while § 1252(f)(1) limits the availability of class actions, there is no right to a class action; it is a procedural device controlled by Rule 23 and, as such, its availability may be restricted by Congress. *Belgrave*, 2000 WL 35526417, at *4.

Rodriguez briefing plainly states that, because the Ninth Circuit had already held that classwide declaratory relief is available as a remedy for the petitioners' claim, the government would not re-litigate that issue on remand. *Rodriguez v. Marin*, No. 13-56706 (9th Cir. Aug. 10, 2018) (ECF No. 212 at 15 n.1). However, the government expressly stated that it "stand[s] by the arguments initially made to th[e] Court regarding the scope of relief available under section 1252(f)(1) and Rule 23(b)(2)." *Id.*

Here, the fact of the matter is that Petitioners' requests for injunctive and declaratory relief are essentially the same. *See* ECF No. 17, Prayer for Relief at ¶¶ 114-115. And Petitioners confirm that their requested declaratory relief would, indeed, form the basis for later injunctive relief. ECF No. 121 at 20.[3] But Rule 23(b)(2) cannot certify a class that, in all reality, would afford the very same relief that § 1252(f)(1) precludes, regardless of whether it is cloaked as injunctive relief or corresponding declaratory relief. The Supreme Court adopted this rationale in *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982), where it held that the Tax Injunction Act barred *both* declaratory and injunctive relief "because there is little practical difference between injunctive and declaratory relief"; thus, the court would be "hard pressed to conclude that Congress intended to prohibit taxpayers from seeking one form of anticipatory relief … while permitting them to seek another, thereby defeating the principle purpose of the [Act.]" *See also Samuels v. Mackell*, 401 U.S. 66, 72 (1971) (declaratory as well as injunctive relief was barred where "the declaratory relief alone has virtually the same practical impact as a

[3] This is no surprise because under Rule 23(b)(2), "'the declaratory judgment should be the equivalent of an injunction.'" *Sibley v. Diversified Collection Servs., Inc.*, No. 396-cv-0816, 1998 WL 355492, *4 (N.D. Tex. June 30, 1998) (citation omitted); *see also Coca-Cola Bottling Co. of Elizabethtown, Inc. v. Coca-Cola Co.*, 98 F.R.D. 254, 271 (D. Del. 1983) (corresponding declaratory relief must have the same effect of enjoining defendant from acting in the future); Fed. R. Civ. P. 23(b)(2) Advisory Committee Note to 1966 Amendment.

formal injunction would"). The *Hamama* court echoed this sentiment, being "skeptical" that "Petitioners would prevail" on whether § 1252(f)(1) bars declaratory relief. 912 F.3d at 880 n.8. The Sixth Circuit stated that, while "[i]t is true that 'declaratory relief will not always be the functional equivalent of injunctive relief,' … in this case, it is the functional equivalent." *Id.* (citing *Alli v. Decker*, 650 F.3d 1007, 1014 (3d Cir. 2011)). "The practical effect of a grant of declaratory relief as to Petitioners' detention would be a class-wide injunction against the detention provisions, which is barred by § 1252(f)(1)." *Id.*; *see also Pimentel*, 2011 WL 1496756, at *2-3; *Belgrave*, 2000 WL 35526417, at *4-5. This is precisely Respondents' argument here.[4] The bond subclass should, therefore, be decertified.[5]

II. Without The Presumption That § 1225(b) Detention Becomes Unreasonable After Six Months, Petitioners Cannot Satisfy Rule 23.

Petitioners assert that they meet their burden of satisfying Rule 23's commonality requirement because the bond subclass members comprise "a group of similarly-situated

[4] Moreover, any suggestion that Rule 23(b)(2) certification should *only* be denied in cases primarily seeking money damages, *see* ECF No. 121 at 21, lacks support. The 1966 Advisory Committee Note to Rule 23(b)(2) states that the Rule "does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages." That, of course, does not mean Rule 23(b)(2) certification should be granted in all other cases, and neither *Eisen* nor *Reid* suggest otherwise.

[5] Petitioners make an eleventh-hour attempt to materially change the bond subclass remedy, purporting that it can nonetheless survive as a "class certified for traditional habeas relief." ECF No. 121 at 21 n.9. Yet, Petitioners' complaint, in its current form, and the procedural posture of this case do not support such a remedy. In their concurring opinion in *Jennings*, Justices Thomas and Gorsuch identified several cues that the petitioners were not seeking traditional habeas relief: the complaint did not request issuance of any writ but, rather, sought declaratory and injunctive relief; the class was certified under Rule 23(b)(2), which applies only where the class seeks "final injunctive or corresponding declaratory relief"; the lower court issued injunctive relief that did not look like, or was styled as, a typical writ; and the injunction was applied to individuals not in custody when it was issued. *Jennings*, 138 S. Ct. at 858. Thus, even if the Court considers this issue—raised for the first time, in a lone footnote in Petitioners' opposition brief—it is doubtful that the bond subclass could stay certified for "traditional habeas relief."

individuals presenting the same circumstances" who "share the same due process entitlement." ECF No. 121 at 24. But a "rigorous analysis" of the subclass reveals that Petitioners fail to meet their burden of demonstrating that their legal claim is "of such a nature that it is capable of classwide resolution." *Wal-Mart Stores, Inc., v. Dukes*, 564 U.S. 338, 351 (2011); *see also Mathews v. Eldridge*, 424 U.S. 319, 321 (1976) ("due process is flexible and calls for such procedural protections at the particular situation demands").

Petitioners overlook the critical ways in which the subclass members' situations may differ, such that the same length of detention may be constitutionally reasonable for one detainee but unreasonable for another. One distinguishing factor would be if certain subclass members remained detained for part of the six-month period purposefully—a strategy that, for a myriad of reasons, some immigration detainees or their attorneys employ. The Second Circuit spoke directly to this scenario, finding that although a detainee's intentional delay of release may be "perfectly permissible," one who "delay[s] or perhaps prevent[s]" the release from detention cannot then allege that the intentionally prolonged time "violates substantive due process." *Doherty v. Thornburgh*, 943 F.2d 204, 211 (2d Cir. 1991); *see also Viknesrajah v. Koson*, No. 09-CV-6442 (CJS), 2011 WL 147901, at *6 (W.D.N.Y. Jan. 18, 2011) ("the delay caused by Petitioner's attempts to seek discretionary relief cannot be used by him to establish a due process violation").[6]

Petitioners identify a distinction without a relevant difference by noting that the due process interest at issue in *Doherty* and *Viknesrajah* concerned immigration detainees'

[6] In the Class Certification Order, this Court determined that *Doherty* and *Viknesrajah* are inapposite because "they arise out of claims sounding in substantive due process," which the Court elided in granting certification. ECF No. 66 at 22. Now that Petitioners' claims are being scrutinized under due process, the cases are both apposite and fatal to the continuation of their subclass claims.

"entitlement to release at the hearing, not whether they get the hearing in the first place." ECF No. 121 at 26. The reason detainees who unilaterally extend their detention are not entitled to release under due process is the same reason they lack a due process interest in a bond hearing: the act of *intentionally* prolonging one's detention cannot result in the government's requirement to act. *See Doherty*, 943 F.2d at 211. Limiting the constitutional principle outlined in *Doherty* and *Viknesrajah* in the way Petitioners propose is arbitrary and illogical.[7]

Petitioners' attempt to dismiss the possibility that subclass members may have purposefully prolonged their own detention is also unpersuasive. While some subclass members no doubt "have every incentive to litigate their colorable asylum claims as expeditiously as possible," it may *also* be true that some members have different incentives. ECF No. 121 at 26. Petitioners are correct that the government has not presented "evidence showing that class members, who have an interest in seeing through their colorable claims for relief, purposefully delay proceedings," but it is *Petitioners*' burden to demonstrate that the common question can be answered (an any violation remedied) the same way for every member of the subclass. *Wal-Mart*, 564 U.S. 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"). Petitioners have not met that burden and cannot do so at this time.

[7] The detention decision on which Petitioners most heavily rely, *Reid v. Donelan*, No. 13-30125-PBS, 2018 WL 5269992 (D. Mass. Oct. 23, 2018), is an out-of-circuit decertification order involving a materially different provision of the detention statute—8 U.S.C. § 1226(c), which concerns the detention of criminal aliens. An even more pertinent distinction is that *Doherty* is not binding authority in the District of Massachusetts, as it is here. Thus, the extension of the *Reid* court's reasoning is inappropriate.

Petitioners allege that the "record shows that delays at six months" do not "arise from any purposeful efforts at delay," but the "record" to which they point at this stage amounts to nothing more than two declarations that speak only generally about detainees in asylum proceedings. ECF No. 121 at 26, citing King Decl. ¶ 20 (ECF No. 99-2); Phillips Decl. ¶¶ 15-16 (ECF No. 99-3). Neither declaration discusses any of the individual subclass members or even addresses the possibility that some detainees seeking asylum may have reasons to impede their proceedings. *Id*. That issue, of course, requires a fact-specific individualized inquiry that further illustrates why the challenged conduct cannot "be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart*, 564 U.S. at 360.

At bottom, the subclass dynamics are unsuitable for classwide resolution of Petitioners' due process claims because Petitioners have not demonstrated that a wholesale determination of what process is due to every § 1225(b) detainee is possible.

CONCLUSION

For the foregoing reasons, Respondents ask this Court to decertify the bond subclass.

Dated: March 22, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

WILLIAM C. PEACHEY
Director, Office of Immigration Litigation

STACEY I. YOUNG
Senior Litigation Counsel

s/ T. Monique Peoples
T. MONIQUE PEOPLES
Senior Litigation Counsel
Kevin Hirst, Trial Attorney
U.S. Department of Justice, Civil Division

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2019, 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.

s/ T. Monique Peoples
T. MONIQUE PEOPLES
Senior Litigation Counsel
U.S. Department of Justice