No. 18-1233

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

USAMA JAMIL HAMAMA, et al.,
Petitioners-Appellees,

v.

THOMAS HOMAN, Deputy Director and
Senior Official Performing the Duties of the Director,
U.S. Immigration and Customs Enforcement, et al.,
Respondents-Appellants.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
D.C. No. 2:17-cv-11910

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DISCLOSURE OF CORPORATE AFFILIATIONS

Appellants are officers of the United States sued in their official capacities and are therefore not required to make these disclosures under 6 Cir. R. 26.1(a).

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellants respectfully request oral argument. The issues in this case are important, and the Court's consideration of those issues would be aided by oral argument. The Court has scheduled oral argument for April 25, 2018.

INTRODUCTION

This Court should vacate the district court's preliminary injunction granting sweeping relief to broad classes of detained aliens who were ordered removed from the United States long ago. The district court's injunction orders bond hearings on a class-wide basis for Iraqi nationals with final removal orders detained under the authority of 8 U.S.C. § 1231 and for Iraqi nationals in reopened removal proceedings detained under the authority of 8 U.S.C. § 1226(c). That injunction rests on interpretations of the relevant statutes that are seriously misguided and should be rejected, especially in light of the Supreme Court's recent decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

First, this Court should vacate the district court's injunction requiring bond hearings, on a class-wide basis, for petitioners detained under section 1231. These aliens have been ordered removed from the United States, and section 1231 expressly provides that the government "shall detain [an] alien" during the period devoted to effecting their removal. 8 U.S.C. § 1231(a)(2). Yet the district court held that petitioners are likely to succeed on their claim that an alien subject to "prolonged detention" under section 1231(a)(6)—a situation created by the district court's *own* stay on removal—is entitled to an "individualized hearing[ ] on the issue of release" and is "to be released on bond unless the government can establish" by clear and convincing evidence that the alien is "a flight risk or a danger to the community." Op. and Order Granting

Prelmin. Inj. ("Op."), RE 191, Page ID #5335, 5361. That ruling defies the statutory text, which shows that aliens detained under section 1231(a)(6) are not entitled to bond hearings—especially not after six months of detention. Section 1231(a)(6) authorizes the government to detain post-removal-order aliens until their removal is no longer significantly likely in the reasonably foreseeable future. The Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), requires only that an alien may, once he has demonstrated that removal is no longer reasonably foreseeable, be released on an order of supervision. The district court thus erred by interpreting section 1231 to entitle aliens to a bond hearing at any time, and in particular at a presumptive six-month mark.

Second, this Court should vacate the district court's preliminary injunction ordering that criminal aliens detained under the detention authority of section 1226(c) receive bond hearings. Criminal aliens must be detained during administrative removal proceedings under section 1226(c), which provides that the government "shall take into custody" certain criminal aliens while they are in removal proceedings and may not release them during that time. 8 U.S.C. § 1226(c). The district court nonetheless held that such aliens should be deemed detained under the detention authority of section 1226(a), a discretionary pre-removal-order detention provision that allows for bond hearings. *See* Op., RE 191, Page ID #5337–41. The court accepted petitioners' arguments that section 1226(c) "does not apply to detention pending reopened removal proceedings" and that section 1226(c) "does not apply to individuals who," like

petitioners, "were living in the community prior to detention." *Id.*, Page ID #5338–39. Both conclusions are erroneous. The first conclusion relies on a view of statutory interpretation that the Supreme Court has emphatically and recently rejected. And there is similarly no basis for the second view. There is no time limit on detention under section 1226(c) at all. Section 1226(c)'s text provides no basis for construing an arbitrary presumptive six-month time limitation on mandatory pre-removal-order detention. *See Jennings*, 138 S. Ct. at 846 ("[T]he conclusion of removal proceedings . . . —and not some arbitrary time limit devised by courts—marks the end of the Government's detention authority under § 1226(c)."). Here too, the district court's injunction cannot stand.

Third, even if some bond hearings were warranted, the Court should vacate the district court's order shifting and elevating the burden of proof for the bond hearings that it ordered. The district court held that class members detained under section 1226(c) are entitled to treatment under section 1226(a), which permits release on bond where the detainee is able to prove that he is neither a flight risk nor a danger. But the Supreme Court recently rejected the view that section 1226(a) requires the government to bear the burden of proof at bond hearings, much less by clear and convincing evidence, when detention becomes prolonged. *See Jennings*, 138 S. Ct. at 847. So there is no basis for the heightened burden imposed by the district court, let alone for criminal

petitioners in reopened removal proceedings, who are actually detained under section 1226(c) and thus are not eligible for release on bond.

For these reasons, this Court should vacate the district court's injunction—or at least modify it. And this Court should direct that, if the district court considers any constitutional challenges to detention on remand, the district court should assess whether it even has jurisdiction to issue injunctive relief based on those challenges and whether class-wide treatment is warranted on petitioners' constitutional claims at all.

STATEMENT OF JURISDICTION

This is an appeal from a preliminary injunction. Petitioners' operative habeas petition invokes 28 U.S.C. § 2241, *et seq.*, as the basis for the district court's jurisdiction over the claims at issue in this appeal. Second Am. Habeas Corpus Class Action Pet. and Complaint, RE 118, Page ID #2963. The district court entered the injunction at issue on January 2, 2018. Op., RE 191, Page ID #5318. The government filed a timely notice of appeal on March 2, 2018. *See* Notice of Appeal, RE 247, Page ID #6182; Fed. R. App. P. 4(a)(1)(B). The Court has jurisdiction over this appeal under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

This case presents three issues for review:

(1) Did the district court err in granting preliminary injunctive relief requiring bond hearings, on a class-wide basis, for petitioners with final removal orders who are subject to detention under the authority of 8 U.S.C. § 1231, when their detention has become "prolonged," which the district court concluded presumptively occurred at the six-month mark?

(2) Did the district court err in granting preliminary injunctive relief requiring bond hearings, on a class-wide basis, for petitioners who are criminals subject to mandatory detention under the authority of 8 U.S.C. § 1226(c), when their detention has become "prolonged," which the district court concluded presumptively occurred at the six-month mark?

(3) Even if bond hearings were warranted, should the district court's injunction still be vacated or modified, given that the district court required the federal government to bear the burden of proving flight risk or dangerousness, and to do so by clear and convincing evidence at the ordered bond hearings, even though there is no basis in the statute for placing such a heightened burden on the government?

STATEMENT OF THE CASE

A. Legal Framework

The Immigration and Nationality Act (INA) provides procedures for determining whether an alien who is present in the United States is removable from the country and whether a removable alien is eligible for relief from removal. *See* 8 U.S.C. § 1229a (procedures governing removal proceedings). An alien present in the United States may be removed if the alien is inadmissible to or deportable from the United States. *See* 8 U.S.C. §§ 1182 (categories of inadmissible aliens), 1227(a) (categories of deportable aliens), 1225 (removal of inadmissible arriving aliens), 1228 (expedited removal of aliens committing aggravated felonies), and 1229a (removal proceedings). In general, aliens who are subject to removal after lawful admission to the United States, as well as certain aliens present in the country without having been admitted, are entitled to such removal procedures. *See id.* § 1229a. The Department of Homeland Security (DHS), exercises its prosecutorial discretion in deciding whether to initiate removal proceedings against an alien and (with some statutory exceptions) whether to detain a person for such proceedings. *See id.* § 1226(a). After the initiation of removal proceedings, an immigration judge determines whether an alien is removable and, if so, whether to order him removed or to grant relief. A removal order becomes final "upon the earlier of—(i) a determination by the Board of Immigration Appeals affirming such

order; or (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals." *Id.* § 1101(47)(B).

The INA authorizes the federal government to detain an alien who falls into one of the categories described above, both during removal proceedings and after a final removal order has been entered. Several statutes authorize such detention. The procedures governing an alien's detention depend on (among other things) whether the alien is subject to a final removal order and whether the alien has committed certain crimes.

Three sources of detention authority are central to this appeal: 8 U.S.C. § 1226(a), 8 U.S.C. § 1226(c), and 8 U.S.C. § 1231.

Section 1226(a) generally governs detention "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). Section 1226(a) provides that "[e]xcept as provided in subsection (c)" of section 1226, an immigration officer "may" release on bond an alien detained during removal proceedings, *id.* § 1226(a), and such an alien may be released on bond if he "demonstrate[s] to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding," 8 C.F.R. § 236.1(c)(8). Detention under section 1226(a) is thus discretionary. An alien who is denied bond (or who believes it was set too high) may, "at any time" during removal proceedings, ask an immigration judge for a redetermination of the officer's decision.

Reno v. Flores, 507 U.S. 292, 309 (1993); *see* 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1). "The burden is on the alien to show to the satisfaction of the Immigration Judge that he or she merits release on bond." *In re Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006); *see In re Adeniji*, 22 I. & N. Dec. 1102, 1111–13 (B.I.A. 1999).

The Secretary of Homeland Security's authority to release an alien on bond does not apply, however, to criminal aliens detained under 8 U.S.C. § 1226(c). *See* 8 U.S.C. § 1226(a) (authority to release applies "[e]xcept as provided in subsection (c)"). Section 1226(c) instead mandates detention of certain criminal and terrorist aliens until their removal proceedings have been completed, without allowing release on bond. Under section 1226(c), the Secretary "shall take into custody any alien who" has committed an enumerated crime or act that presents a risk to national security "when the alien is released" from custody. *Id.* § 1226(c)(1). Qualifying crimes include aggravated felonies and certain crimes involving moral turpitude. *See id.* § 1226(c)(1)(A)–(D); *see also id.* §§ 1182(a)(2), (a)(3)(B), 1227(a)(2)(A)–(D), (a)(4)(B). An alien detained under section 1226(c) is permitted to challenge the basis for that classification before an immigration judge. *See* 8 C.F.R. § 1003.19(h)(2)(ii); *In re Joseph,* 22 I. & N. Dec. 799 (B.I.A. 1999). If section 1226(c) governs an alien's detention, the Secretary "may release" the alien during his removal proceedings "only if" release is "necessary" for witness-protection purposes and "the alien satisfies the [Secretary]" that he "will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled

proceeding." 8 U.S.C. § 1226(c)(2). The Supreme Court sustained section 1226(c)'s mandatory detention requirement against a due process challenge in *Demore v. Kim*, 538 U.S. 510 (2003).

If at the end of removal proceedings the alien is ordered removed, then authority to detain shifts over to 8 U.S.C. § 1231. *See* 8 U.S.C. § 1231(a)(1)(A) (governing detention "when an alien is ordered removed"). Section 1231 provides that aliens with final removal orders must be detained during a 90-day removal period. *See id.* § 1231(a)(2). The removal period begins on the latest of three dates: (1) the date the alien's removal order becomes administratively final; (2) if an order is judicially reviewed and the court enters a stay, the date of the court's final order; or (3) if the alien is detained (except under an immigration process), the date of release from detention. *Id.* § 1231(a)(1)(B). This initial removal period lasts for 90 days, and may be extended if "the alien fails or refuses to make timely application in good faith for travel" or "acts to prevent the alien's removal." *Id.* § 1231(a)(1)(C).

Once the presumptive 90-day removal period expires, section 1231(a)(6) provides that the Secretary of Homeland Security "may" continue to detain aliens who have been ordered removed because they have committed certain crimes or because they have been determined to be "a risk to the community or [are] unlikely to comply with the order of removal." 8 U.S.C. § 1231(a)(6). In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court interpreted section 1231(a)(6)'s permissive detention scheme

in light of constitutional concerns with potentially indefinite detention when removal could not be effectuated, to presumptively allow detention for six months past the point of his final removal order. *Id.* at 701. After six months, if "the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," the government must show that detention continues to be reasonable in aid of removal. *Id.* "This 6-month presumption . . . does not mean that every alien not removed must be released after six months." *Id.* If an alien detained for six months does not satisfy the initial burden or if the government rebuts the alien's showing, the alien "may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.*

Regulations in turn set out procedures for review of detention under section 1231(a)(6). Under those regulations, if the removal period is about to expire and the alien cannot be removed during that period, an immigration officer will conduct an initial custody review to determine whether the alien should be detained after the removal period. 8 C.F.R. § 241.4(k)(1)(i). If the alien is not released or removed within 90 days of the end of the removal period, U.S. Immigration and Customs Enforcement (ICE), a DHS component, conducts a second post-order custody review. *Id.* § 241.4(k)(2)(ii). An alien may seek further review of his or her detention if there is "good reason to believe there is no significant likelihood of removal to the country to which he or she was ordered removed, or to a third country, in the reasonably

foreseeable future." *Id.* § 241.13(a). The relevant regulation sets out procedures for the alien to request review of his or her detention; it directs ICE to "consider all the facts of the case including" several specified factors; and if ICE denies review, it requires ICE to set out its reasons in a written decision. *Id.* § 241.13(d)–(g).

B. Factual Background

For many years it was difficult for the government to remove Iraqi nationals from the United States to Iraq. Schultz Decl., RE 81-4, Page ID #2006. From 2009 through 2016, for example, Iraq would accept only those of its nationals who had unexpired passports and only those returning via commercial flights. *Id.*, Page ID #2007. As a result, many Iraqi nationals who had been ordered removed remained in the United States under ICE's supervision. TRO Op., RE 2, Page ID #498–99.

After renewed discussions between the United States and Iraq in 2017, however, Iraq "agreed to the . . . return of its nationals subject to final orders of removal through use of chartered flights." Schultz Decl., RE 81-4, Page ID #2006. In April 2017, ICE conducted its first charter removal mission to Iraq since 2010, to remove eight Iraqi nationals. *Id.*

A second charter mission was scheduled for late June 2017. *Id.* In mid-June 2017, ICE began taking into custody about 200 Iraqi nationals with final removal orders, to prepare to remove them. Jurisdiction Op., RE 64, Page ID #1226. Nationwide, over 1,400 Iraqi nationals were subject to final removal orders as of July

24, 2017, the date the district court issued the first of two preliminary injunctions at issue in these consolidated appeals. *See* Mot. for Preliminary Injunction, RE 77, Page ID #1717.

C. Procedural Background—Preliminary Injunction on Removal

On June 15, 2017, petitioners filed a putative class-action habeas petition and a motion for a temporary restraining order in the Eastern District of Michigan, asking the district court to halt their removal to Iraq based on allegedly changed conditions in that country. *See* Habeas Petition, RE 1, Page ID #1–26; TRO Motion, RE 11, Page ID #45–80. Petitioners alleged that ISIS had taken over Iraq's second-largest city in June 2014, committing slaughter and atrocities and forcing the flight or forcible conversion of thousands of Christians and other residents. Habeas Petition, RE 1, Page ID #1–24; TRO Mot., RE 11, Page ID #45–175.

After the district court entered a temporary stay of removal, *see* Order, RE 32, Page ID #497–502, petitioners filed an amended habeas petition, in which they sought to represent a putative class of "all Iraqi nationals in the United States with final orders of removal, who have been, or will be, arrested and detained by ICE as a result of Iraq's recent decision to issue travel documents to facilitate U.S. removal." First Am. Habeas Corpus Class Action Pet., RE 35, Page ID #538. The amended petition made four claims challenging the government's efforts to remove petitioners to Iraq before the conclusion of adjudication on petitioners' claims that they cannot lawfully be removed

from the country because of changed country conditions in Iraq. *See id.*, Page ID #541–44. Petitioners also moved for a preliminary injunction, asking the court to stay the removal of petitioners and putative class members so that they can file motions to reopen their immigration proceedings to pursue changed-country-conditions claims. Pet'rs' Mot. Prelim. Inj., RE 77, Page ID #1745.

On July 24, 2017, the district court issued an opinion and order granting petitioners a nationwide preliminary injunction preventing the government from enforcing final removal orders against Iraqi nationals and requiring the government to produce extensive discovery. *See* Removal Op., RE 87, Page ID #2355–56. By order, the stay of removal continues through the final disposition of the putative class members' motions to reopen, relief applications, and all timely appeals. *Id.* The validity and scope of the July 24, 2017 injunction is the subject of the appeal in No. 17-2171.

D. Procedural Background—Preliminary Injunction on Detention

While proceedings under the removal injunction have continued, the government has detained affected Iraqi nationals under (so far as is relevant to resolution of this appeal) the authority provided in two statutes. First, the government detained some nationals under the authority provided by 8 U.S.C. § 1231 to detain aliens who are subject to final removal orders. Using that authority, the government has detained persons who have not prevailed on a motion to reopen immigration proceedings and who therefore remain subject to a final removal order. Detention of

such aliens is governed by 8 U.S.C. § 1231(a)(6). Second, the government has detained some Iraqi nationals under the authority provided by 8 U.S.C. § 1226(c) to detain certain aliens falling within a subsection of the INA specified in that statute. The Iraqi nationals detained under section 1226(c) have succeeded in having their removal orders reopened—and so are not subject to a final removal order and the detention authority of section 1231—but have criminal convictions or qualifying activities that render them subject to mandatory detention pending a decision on removal. *See* 8 U.S.C. § 1226(c)(1). The government intends to effectuate removals of the Iraqi nationals still subject to final removal orders once the district court's stay is lifted. Schultz Decl., RE 158-2, Page ID #4130–31.[1]

In October 2017, petitioners filed a second amended habeas petition and class-action complaint, adding claims challenging their detention while their removals were enjoined by the district court's first injunction. Second Am. Habeas Corpus Class Action Pet. and Complaint, RE 118, Page ID #2957. This petition contains three detention-related claims relevant to this appeal. The government moved to dismiss the

[1] The government has also detained a small number of Iraqi nationals under other mandatory detention provisions, such as those in 8 U.S.C. § 1225(b). These detainees are not the subject of the injunction at issue in this appeal. *See* Pet'rs' Withdrawal Req. Mod. Subclass Def., RE 265, Page ID #6445.

second amended habeas petition under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Mot. Dismiss Second Am. Pet., RE 135, Page ID #3271.[2]

Petitioners then moved for a preliminary injunction seeking relief on their detention-related claims. Pet'rs' Mot. Prelim. Inj. Detention Issues, RE 138, Page ID #3338. For Count Four of the operative habeas petition (which petitioners call their "*Zadvydas* Claim"), petitioners contended that they are subject to indefinite post-removal-order detention, held unlawful by *Zadvydas v. Davis*, 533 U.S. 678 (2001), because there is no significant likelihood of removal in the reasonably foreseeable future. *Id.,* Page ID #3379. Petitioners asked that they be ordered released unless the government provides "individualized evidence" showing that "[i]t is significantly likely" that an individual's proceedings "will be concluded within nine months from the detainee's entrance into ICE custody." *Id.*, Page ID #3384. On Count Five (which petitioners call their "Prolonged Detention Claim"), petitioners contended that Iraqi nationals detained under section 1231 or under section 1226(c) have been subject to unreasonably prolonged immigration detention. Pet'rs' Am. Mot. Prelim. Inj. Detention Issues, RE 138, Page ID #3384–88. Petitioners asked that these nationals be released unless the government conducts individualized bond determinations or

[2] The government re-asserted its argument that the district court lacked subject-matter jurisdiction over the entirety of petitioners' claims, having already filed its notice of appeal from the district court's first preliminary injunction order. Notice of Appeal, RE 108, Page ID #2812–13.

provides "individualized evidence of danger or flight risk." *Id.,* Page ID #3388. On Count Six (styled "the Section 1226/Mandatory Detention Claim"), petitioners contended that, during reopened removal proceedings, they are subject to detention under 8 U.S.C. § 1226(a) (which allows for discretionary release on bond) rather than under the mandatory detention authority of section 1226(c), and seek a declaration to that effect. *Id.,* Page ID #3388–92, 3349.

Petitioners also moved to certify a primary class and several subclasses under Federal Rule of Civil Procedure 23(b)(2). Pet'rs' Am. Mot. Class Cert., RE 139, Page ID #3734. The proposed primary class covered Iraqi nationals subject to final removal orders who have been or will be detained for removal by ICE. *Id.,* Page ID #3734–35. Petitioners' proposed subclasses corresponded to each of the three detention claims. *Id.,* Page ID #3735–37.

On January 2, 2018, the district court issued an opinion addressing petitioners' preliminary-injunction motion, the government's motion to dismiss, and petitioners' class-certification motion. *See* Op., RE 191, Page ID #5318. The court "defer[red] ruling" on whether to grant petitioners injunctive relief on their claim (the *Zadvydas* claim in Count Four) that "they are being unlawfully detained because there is no significant likelihood of removal in the reasonably foreseeable future." *Id.,* Page ID

#5328–35.[3] The district court then issued the injunctive rulings that are central to this appeal. *See id.,* Page ID #5335–47; *see also* Page ID # 5360–62. The court issued related rulings on the motion to dismiss and on class certification. *See id.,* Page ID #5347–60.

First, the district court granted petitioners preliminary injunctive relief on the detention claim for section 1231 detainees (Count Five)—the claim that, "even if their removal is reasonably foreseeable," they are nonetheless entitled "to receive individualized hearings on the issue of release." *See* Op., RE 191, Page ID #5335; *see id.* #5335–37, 5346–47. The court held that petitioners are likely to succeed on their claims that an alien subject to "prolonged detention" under the detention authority of 8 U.S.C. § 1231(a)(6)—which, as explained above, allows for detention after the 90-day removal period that ordinarily applies to an alien ordered removed—is entitled to an "individualized hearing[ ] on the issue of release" and is "to be released on bond unless

[3] The court found that the current record did not enable it to "determin[e] whether Iraq will accept repatriation of the class," Op., RE 191, Page ID #5332, so it deferred ruling on the *Zadvydas* claim "pending further discovery" on "whether Iraq will accept repatriation of the class," *id.*, Page ID #5332, 5335—and thus whether there is a "significant likelihood of removal in the reasonably foreseeable further," as necessary to resolve a *Zadvydas* claim. *Id.*, Page ID #5328, 5334–35. The court denied the government's motion to dismiss as to the *Zadvydas* claim. *Id.,* Page ID #5347. And it ruled that the Rule 23 requirements were satisfied for this claim, *see id.*, Page ID #5347–52, 5353–57, and certified a subclass relevant to that claim, consisting of "[a]ll Primary Class members, who are currently or will be detained in ICE custody, and who do not have an open individual habeas petition seeking release from detention." *Id.*, Page ID #5359.

the government can establish that" the alien is "a flight risk or a danger to the community." *Id.*, Page ID #5335; *see id.*, Page ID #5335–37, 5361.

In reaching that holding, the district court relied on *Zadvydas*'s statement that a "habeas court should consider the risk of the alien's committing further crimes as a factor potentially justifying confinement," 533 U.S. at 700, and on the Ninth Circuit's decisions in *Casas-Castrillon v. DHS*, 535 F.3d 942 (9th Cir. 2008), and *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011). *See* Op., RE 191, Page ID #5335–37. *Casas-Castrillon* held that "the prolonged detention of an alien" who was initially detained under the pre-removal-order detention authority of 8 U.S.C. § 1226(c) "would be constitutionally doubtful" after the "alien's administrative proceedings are over." 535 F.3d at 951 (quoting *Zadvydas*, 533 U.S. at 690; some internal quotation marks omitted). *Diouf* extended *Casas-Castrillon*'s holding to post-removal-order detention under section 1231(a)(6), concluding that, as a matter of constitutional avoidance, the provision should be interpreted to require "an individualized bond hearing, before an immigration judge, for aliens facing prolonged detention under that provision." *Diouf*, 634 F.3d at 1085. Noting that those cases involved "circumstances where detention was prolonged, but removal was reasonably foreseeable," the district court here "ch[ose] to follow" those cases, concluding that petitioners needed only to "demonstrate the unreasonableness of their detention" to obtain release. Op., RE 191, Page ID #5337.

Second, the district court granted petitioners preliminary injunctive relief on their mandatory-detention claim for section 1226(c) detainees (Count Six)—that petitioners purportedly detained under the detention authority of 8 U.S.C. § 1226(c) are entitled to bond hearings. *See* Op., RE 191, Page ID #5337–41, 5346–47. The court held that petitioners detained under section 1226(c) (which does not provide for bond hearings) should be deemed detained under the authority of section 1226(a) (which does). *See id.,* Page ID #5337–41.

The court reached that holding for two independent reasons. First, the court concluded that section 1226(c) "does not apply to those who have their motions to reopen granted." Op., RE 191, Page ID #5341. Relying on the Supreme Court's decision in *Demore v. Kim*, 538 U.S. 510 (2003), and the Ninth Circuit's decision in *Casas-Castrillon*, the district court concluded that mandatory detention under section 1226(c) "is meant to be brief," *id.*, Page ID #5338, yet petitioners are going to be detained "well beyond" a brief period. *Id.,* Page ID #5339. The court therefore concluded that petitioners should "be deemed held under § 1226(a)." *Id.* Second, the district court alternatively concluded that section 1226(c) "does not apply to individuals who," like petitioners, "were living in the community prior to detention." *Id.*; *see id.,* Page ID #5339–41. The court noted that "[t]he terms of § 1226(c) plainly state that mandatory detention is only authorized for those who are taken into custody by DHS 'when . . . released' from their criminal sentence." *Id.,* Page ID #5341 (quoting 8 U.S.C.

§ 1226(c)). Because petitioners "were taken into custody" for removal to Iraq "years after their release from criminal sentences," the district court deemed them "to be held pursuant to § 1226(a)." *Id.,* Page ID #5341.

Addressing both the prolonged detention claim and the mandatory detention claim, the court concluded that the remaining injunctive factors supported relief. *See* Op., RE 191, Page ID #5346–47. Petitioners had "met their burden regarding irreparable harm" because "[d]etention has inflicted grave harm on numerous detainees for which there is no adequate remedy at law." *Id.,* Page ID #5346. The court believed that the "balance of equities" favored preliminary relief because without that relief, detainees would "continue to experience" the "harms" of detention. *Id.* And the court concluded that the public interest in "the core value of liberty" supported preliminary relief too. *Id.,* Page ID #5347. The court also denied the government's motion to dismiss as to those detention claims, having ruled that they were likely to succeed on those claims. *Id.,* Page ID #5347; *see also id.,* Page ID #5362.

Third, the district court then partially granted petitioners' class-certification motion and ordered injunctive relief in line with its certification decision. *See* Op., RE 191, Page ID #5347–60. As relevant to this appeal, the district court determined that class certification under Rule 23(b)(2) was proper because the relief petitioners sought uniformly applied to all three subclasses, namely, "the Government's uniform decision to detain each putative class member without granting release due to a lack of removal,

or without granting an individualized hearing on the issues of danger or flight risk." *Id.,* Page ID #5356. The court further concluded that the "preliminary relief" sought was suitable for class treatment "because all affected detainees are being given the same habeas relief: the right to a bond hearing unless the Government can present some specific evidence why a particular detainee should not be entitled to that right." *Id.*, Page ID #5357–58. The district court deferred ruling on petitioners' "primary class"—defined as "[a]ll Iraqi nationals in the United States who had final orders of removal at any point between March 1, 2017 and June 24, 2017, and who have been, or will be, detained for removal by ICE"—but certified subclasses corresponding to the two claims on which the court granted petitioners preliminary injunctive relief. *Id.,* Page ID #5359–60. Relevant here, the court certified a subclass corresponding to petitioners with section 1231 claims under Count Five (the court called this the Detained Final Order subclass) and a subclass corresponding to petitioners with section 1226(c) claims under Count 6 (the court called this the Mandatory Detention subclass). *See id.,* Page ID #5359–60. (Those subclasses excluded those who "have an open individual habeas petition seeking release from detention." *Id.*).

For these subclasses, the court ordered the government to release, no later than February 2, 2018, any detained member of the subclasses who had been detained, as of January 2, 2018, for six months or more, unless a bond hearing for any such detainee was conducted on or before February 2, 2018. *See* Op., RE 191, Page ID #5360–61.

The court ordered that petitioners whose detention exceeds six months at some point after January 2, 2018, "shall be released no more than 30 days after the six-month period of detention is completed, unless a bond hearing" has been held. *Id.*, Page ID #5361. Ruling on "the reasonableness of detention" for the section 1231(a)(6) and section 1226(c) claims, *id.,* Page ID #5342; *see id.,* Page ID #5341–46, the court "conclud[ed] that any presumption of reasonableness ends after six months," *id.*, Page ID #5343, and ordered that in bond hearings the immigration judge "shall release the detainee under an appropriate order of supervision unless the Government establishes by clear and convincing evidence that the detainee is a flight or public safety risk." *Id.,* Page ID #5343–44 (citing *Rodriguez v. Robbins*, 715 F.3d 1127, 1131 (9th Cir. 2013)). The court allowed the government to "present evidence that specific individuals have significantly contributed to the unreasonable length of detention" because of bad-faith tactics. *Id.*, Page ID #5344.

Relevant here, the district court amended its injunction order by adding the additional requirement that "[t]hose Mandatory Detention Subclass members who have not yet been detained for six months are entitled to a bond hearing under ordinary scheduling practices, if they request one, under 8 U.S.C. § 1226(a)." Order, RE 201, Page ID #5449. It is unclear how the court's amended order affects the court's prior ruling that detention under section 1226 was subject to a reasonable time limitation, and specifically, "any presumption of reasonableness ends after six months." *Compare*

Op., RE 191, Page ID #5343, *with* Order, RE 201, Page ID #5449. The order amending the injunction also imposed several ongoing obligations on the government, including: (1) immigration courts holding bond hearings pursuant to the order must accept an EOIR-28, Notice of Entry of Appearance before the Immigration Court, from affected detainees' counsel; (2) the government must provide notices of scheduled bond hearings "as soon as practicable" to class counsel, the detainee, and immigration counsel; and (3) the government must provide bi-weekly disclosures of data to petitioners' counsel on all bond hearings held pursuant to the injunction and any appeals of those bond decisions. Order, RE 201, Page ID #5447.

E. Intervening Supreme Court Decisions

Since the district court entered its second injunction, the Supreme Court has acted in two immigration detention cases heavily relied upon by petitioners and the district court in support of the injunction. *See*, *e.g.*, Op., RE 191, Page ID #5340, 5343.

First, on February 27, 2018, the Supreme Court issued a decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). 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. On section 1225(b), *Jennings* held that, subject to possible release on parole, sections 1225(b)(1) and 1225(b)(2) unambiguously require detention of applicants for admission until the end of applicable asylum or removal proceedings. *Id.* at 842. The Supreme Court further

rejected the Ninth Circuit's imposition of procedural requirements that went well beyond those applicable in an initial bond hearing, noting that nothing in the text of section 1226(a) required that the government bear the burden in bond hearings or that certain factors must be considered by an immigration judge. *Id.* at 847.

The Supreme Court in *Jennings* declined to decide the aliens' constitutional claims in the first instance and remanded the case for further consideration of those claims. 138 S. Ct. at 851. The Supreme Court directed that, on remand, the Ninth Circuit first "reexamine whether respondents can continue litigating their claims as a class" in light of 8 U.S.C. § 1252(f)(1), Federal Rule of Civil Procedure 23(b)(2), and *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). *Id.* at 851–52.

Second, on March 19, 2018, the Supreme Court granted review of the Ninth Circuit's decision in *Preap v. Johnson*, 831 F.3d 1193 (9th Cir. 2016), on the question "whether a criminal alien becomes exempt from mandatory detention under 8 U.S.C. § 1226(c) if, after the alien is released from criminal custody, the Department of Homeland Security does not take him into immigration custody immediately." *Nielsen v. Preap*, No. 16-1363, 2018 WL 1369139 (Mar. 19, 2018).

SUMMARY OF THE ARGUMENT

This Court should vacate the district court's preliminary injunction granting sweeping relief on statutory grounds to broad classes of detained aliens who were ordered removed from the United States.

I. This Court should vacate the district court's injunction requiring bond hearings, on a class-wide basis, for petitioners detained under 8 U.S.C. § 1231. The district court held that petitioners are likely to succeed on their claims that an alien subject to "prolonged detention" under 8 U.S.C. § 1231(a)(6) is entitled to an "individualized hearing[ ] on the issue of release" and is "to be released on bond unless the government can establish that" the alien is "a flight risk or a danger to the community." Op., RE 191, Page ID #5335. That ruling defies the statutory text, which shows that aliens detained under section 1231(a)(6) are not entitled to bond hearings—especially not after six months of detention. Section 1231(a)(6) authorizes the government to detain post-removal-order aliens "until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). Section 1231(a)(6) thus allows an alien to be released on an order of supervision after six months if he demonstrates that removal is no longer reasonably foreseeable and the government does not rebut that showing, *id.* at 699–700, and implementing regulations provide for ICE to make such determinations. There is no basis for construing section 1231(a)(6) also to provide for a second mechanism

(bond hearings before an immigration judge) to obtain release. The district court thus erred by holding that a presumptive six-month limit applies to such detention, at which point the alien is entitled to a bond hearing.

II. This Court should vacate the district court's preliminary injunction ordering that petitioners detained under the detention authority of 8 U.S.C. § 1226(c) receive bond hearings. The district court held that petitioners who ICE has detained under section 1226(c), which mandates detention for criminal aliens while they are in removal proceedings, should instead be deemed detained under the authority of section 1226(a), a discretionary pre-removal-order detention provision allowing for bond hearings. *See* Op., RE 191, Page ID #5337–41. As the Supreme Court squarely held in *Jennings*, the text of section 1226(c) provides no basis for a presumptive six-month time limitation on mandatory pre-removal-order detention. The district court further concluded that, because petitioners were living in the community before their recent apprehension for removal, they were not taken into immigration custody "when . . . released" from criminal custody, 8 U.S.C. § 1226(c), and thus cannot be subject to mandatory detention. That conclusion conflicts with the statutory text and structure, the objective underlying that text, and the Board of Immigration Appeals' reasonable determination that this language does not limit section 1226(c)'s authority.

III. Even if some bond hearings were warranted, this Court should vacate the district court's order shifting and elevating of the burden of proof for the bond hearings

that it ordered. The district court ruled that petitioners detained under section 1226(c) are entitled to treatment under section 1226(a), which permits release on bond where the detainee is able to prove that he is neither a flight risk nor a danger. Yet the district court inverted that burden—placing it on the government—and required the government to satisfy that burden by clear and convincing evidence. *See* Op., RE 191, Page ID #5343–44. The Supreme Court in *Jennings* rejected the view that section 1226(a) requires the government to bear the burden of proof at bond hearings, much less by clear and convincing evidence. Nothing in the text of section 1226(a) "even remotely supports the imposition of" a requirement that "the Attorney General must prove by clear and convincing evidence that the alien's continued detention is necessary." *Jennings*, 138 S. Ct. at 847. There is no basis for the heightened burden imposed by the district court.

IV. After vacating the district court's injunction, the Court should provide instructions for any further proceedings on remand. The Court should direct that, in considering any constitutional challenges on remand, the district court should evaluate at least two points. First, the Court should direct the district court to resolve whether it has authority to issue a class-wide injunctive remedy at all. *See* 8 U.S.C. § 1252(f)(1) ("Regardless of the nature of the action or claim . . . 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."). Second, the Court should instruct the district court to assess whether class-wide relief is consistent with Federal Rule of Civil Procedure 23, given the individualized facts and circumstances of the detained aliens here.

STANDARD OF REVIEW

"Whether the movant is likely to succeed on the merits is a question of law . . . review[ed] de novo." *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (per curiam). Although the district court's decision to issue a preliminary injunction is reviewed for an abuse of discretion, *S. Glazer's Distribs. of Ohio, L.L.C. v. Great Lakes Brewing Co.*, 860 F.3d 844, 854 (6th Cir. 2017), a district court necessarily abuses its discretion when it commits an error of law, *Yoder & Frey Auctioneers, Inc. v. EquipmentFacts, L.L.C.*, 774 F.3d 1065, 1071 (6th Cir. 2014). District-court factual findings are reviewed for clear error. *See Max Trucking, L.L.C. v. Liberty Mut. Ins. Corp.*, 802 F.3d 793, 803 (6th Cir. 2015).

ARGUMENT

This Court should vacate the district court's injunction. The district court erred in construing the relevant statutes to require bond hearings for petitioners with final removal orders and for criminal petitioners subject to mandatory detention. Even if some bond hearings are warranted, the district court erred in shifting and elevating the

burden of proof applicable in those hearings. This Court should provide instructions clarifying the nature of further proceedings on remand, if petitioners pursue any constitutional claims, particularly as to injunctive relief and class-wide treatment.

I. The district court erred in granting injunctive relief requiring bond hearings for petitioners with final removal orders who are subject to detention under 8 U.S.C. § 1231—who would be removed if not for the district court's order staying their removal.

The district court granted preliminary injunctive relief to petitioners detained under 8 U.S.C. § 1231 on their claim that, "even if their removal is reasonably foreseeable," they are nonetheless entitled "to receive individualized hearings on the issue of release" and are entitled to "be released on bond unless the government can establish that" the detainee is "a flight risk or a danger to the community." Op., RE 191, Page ID #5335; *see id.,* Page ID #5335–37. This Court should vacate that erroneous ruling.

The district court's ruling defies the statutory text. By its terms, section 1231(a)(6) does not support an immigration-judge bond-hearing requirement—especially a requirement for such a hearing upon six months of detention. Section 1231(a)(6) provides: "An alien ordered removed who is" inadmissible or removable under certain statutory provisions "or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to . . .

supervision . . . ." 8 U.S.C. § 1231(a)(6). That text says nothing about immigration-judge bond hearings—let alone require them after a definite period of time. Indeed, section 1231(a)(6) contemplates that release under that provision—where appropriate, which is only when the alien shows that there is no significant likelihood of their removal in the reasonably foreseeable future, and the government cannot rebut this, *see Zadvydas v. Davis*, 533 U.S. 678, 701 (2001)—will be through an order of supervision; it does not speak of bond hearings. *Cf. Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) ("That express exception to detention implies that there are no *other* circumstances under which aliens detained under § 1225(b) may be released."). And DHS has provided by regulation that determinations concerning release will be made by ICE, with a process for review, which satisfies any due process requirements for an appropriate hearing. 8 C.F.R. §§ 241.4(k)(2)(ii), 241.13(a)–(g).

The constitutional considerations discussed in *Zadvydas* confirm that section 1231(a)(6) cannot be plausibly read to require bond hearings upon six months of detention. In *Zadvydas*, the Supreme Court applied the canon of constitutional avoidance to hold that section 1231(a)(6), "read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States." 533 U.S. at 689. The Court found it "practically necessary" to recognize a presumptively reasonable period of six months of detention under section 1231(a)(6). *Id.* at 690. After six months, if "the alien

provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," the government "must respond with evidence sufficient to rebut that showing." *Id.* at 701. But the Court emphasized that habeas courts must "measure reasonableness primarily in terms of the statute's basic purpose" of "assuring the alien's presence at the moment of removal." *Id.* at 699. *Zadvydas* confirms that section 1231(a)(6) does not impose a bright-line entitlement to release at any one point. For each alien, detention is permitted so long as the government can rebut a showing "that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701. Detention in those circumstances remains "reasonably necessary to bring about th[e] alien's removal from the United States." *Id.* at 689. And DHS has adopted procedures to determine whether the alien will be released during that period. 8 C.F.R. §§ 241.4(k)(2)(ii), 241.13(a)–(g).

In ordering bond hearings for persons detained under section 1231(a)(6), the district court relied on a statement from *Zadvydas* and on the Ninth Circuit's decisions in *Casas-Castrillon v. DHS*, 535 F.3d 942 (9th Cir. 2008), and *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011). *See* Op., RE 191, Page ID #5335–37. These cases do not provide a sound basis for the district court's ruling.

The district court pointed to *Zadvydas*'s statement that, "if removal is reasonably foreseeable, the habeas court should consider the risk of the alien's committing further crimes as a factor potentially justifying confinement within that reasonable removable

period." 533 U.S. at 700; *see* Op., RE 191, Page ID #5335. But this language does not suggest that the sort of bond-hearing requirement that the district court imposed—a bright-line requirement that, at six months' detention, an alien must be released if the government cannot prove before an immigration judge that the alien is a flight risk or danger. The line is best read as recognizing a habeas court's authority to deny relief to dangerous individuals when removal is not so remote as to make detention indefinite—not a suggestion that all aliens are entitled to bond hearings and potential release.

Nor do the Ninth Circuit's cases provide a solid footing for the district court's ruling. In *Casas-Castrillon*, the Ninth Circuit held that "the prolonged detention of an alien" previously detained under 8 U.S.C. § 1226(c) but who remains detained pending judicial review of a removal order "without an individual determination of his dangerousness or flight risk would be constitutionally doubtful," given "'the individual's constitutionally protected interest in avoiding physical restraint.'" 535 F.3d at 951 (quoting *Zadvydas*, 533 U.S.at 690; some internal quotation marks omitted). In *Diouf*, the Ninth Circuit extended *Casas-Castrillon*'s holding to detention under section 1231(a)(6), applying "the canon of constitutional avoidance" in concluding that that provision requires "an individualized bond hearing, before an immigration judge, for aliens facing prolonged detention under that provision." 634 F.3d at 1085, 1086. The court defined prolonged detention to be detention that "has lasted six months and is expected to continue more than minimally beyond six months." *Id.* at 1092 n.13. Aliens

held under that provision, the Ninth Circuit held, "are to be released on bond unless the government can establish that they are a flight risk or a danger to the community." *Id.* at 1085.

Casas and *Diouf* are not good law—particularly after the Supreme Court's decision in *Jennings v. Rodriguez*, 138 S. Ct. 830. In *Jennings*, the Supreme Court rejected the Ninth Circuit's interpretation of 8 U.S.C. §§ 1225(b), 1226(a), and 1226(c) to require bond hearings when detention becomes "prolonged" and to reach that point at the six-month mark. *Id.* at 842. The Supreme Court branded the Ninth Circuit's holding as a misuse of the avoidance canon to "rewrite [immigration detention] statutes as it pleases." *Id.* at 843. *Casas* and *Diouf* are the product of the very same misuse of the avoidance cannon. *Diouf*'s holding has no basis in section 1231(a)(6)'s text and does not even acknowledge *Zadvydas*'s interpretation of that statute. And *Casas*'s holding did not rest on statutory language. Rather, the Ninth Circuit "simply cite[d] the canon of constitutional avoidance and . . . use[d] that canon to read a 'six-month reasonableness limitation' into [the statute]." *Jennings*, 138 S. Ct. at 843; *see Casa-Castrillon*, 535 F.3d at 947–48.

For all of these reasons, the district court had no basis to grant injunctive relief to detainees who are in custody under 8 U.S.C. § 1231(a)(6). To the extent that those detainees wish to seek release from custody, those detainees must individually pursue relief based on the reasonableness analysis established in *Zadvydas*. *See Zadvydas*, 533

U.S. at 701 (establishing burden-shifting framework requiring government to rebut initial showing by alien that there is no significant likelihood of removal in the reasonably foreseeable future). The regulations afford detainees automatic, periodic reviews and constitute sufficient process. This Court should vacate the injunction as to section 1231 detainees and remand for proceedings consistent with the analysis set forth here.

II. The district court erred in granting injunctive relief requiring bond hearings for petitioners who are criminals subject to mandatory detention—and not entitled to bond hearings—under 8 U.S.C. § 1226(c).

A. Section 1226(c)—not, as the district court ruled, section 1226(a)—governs detention of criminal petitioners, so those petitioners are statutorily not entitled to bond hearings.

The district court concluded that criminal petitioners detained under 8 U.S.C. § 1226(c) (which imposes mandatory detention and does not provide for bond hearings) should instead be deemed to be detained under 8 U.S.C. § 1226(a) (which authorizes but does not mandate detention, and allows for release on bond). *See* Op., RE 191, Page ID #5337–41. The district court erred.

Section 1226(c) plainly governs the detention of the relevant criminal petitioners here. Under section 1226(c), the Secretary of Homeland Security "shall take into custody any alien who" is inadmissible or deportable based on commission of certain offenses "when the alien is released" from criminal custody. 8 U.S.C. § 1226(c)(1). Although section 1226(a) provides a more general authority to detain aliens "pending a

decision on whether the alien is to be removed from the United States," 8 U.S.C. § 1226(a), section 1226(c) provides more specific authority for "detention of criminal aliens." Section 1226(c) therefore governs the detention of the aliens at issue here. As the Supreme Court recently emphasized, "§ 1226(c) mandates detention of any alien falling within its scope and that detention may end prior to the conclusion of removal proceedings 'only if' the alien is released for witness-protection purposes." *Jennings*, 138 S. Ct. at 847. As criminal aliens in removal proceedings, the criminal petitioners "fall[] within section 1226(c)'s scope" and therefore "that detention" does not end or transition to some other form of detention (such as detention under section 1226(a)) "prior to the conclusion of removal proceedings." *Id.*

The district court provided two alternative grounds for concluding that section 1226(a), rather than section 1226(c), should be deemed to apply to the criminal petitioners here. *See* Op., RE 191, Page ID #5337–41. Neither ground is sound.

First, the district court concluded that section 1226(c) "does not apply to detention pending reopened removal proceedings." *Id.,* Page ID #5338; *see id,* Page ID #5338–39. Relying on the Supreme Court's decision in *Demore v. Kim*, 538 U.S. 510 (2003), and the Ninth Circuit's decision in *Casas-Castrillon*, the court concluded that mandatory detention under section 1226(c) "is meant to be brief" and does not apply to allow prolonged detention. *Id.,* Page ID #5338; *see id.*, Page ID #5338–39. Because petitioners are pursuing reopened removal proceedings that in many cases "will likely

not conclude for several months or possibly years," the court reasoned, petitioners are going to be detained "well beyond" the sort of brief period acceptable under section 1226(c). *Id.*, Page ID #5339. The court therefore concluded that petitioners should "be deemed held under § 1226(a)." *Id.*

There is no textual support for this view. Section 1226(c) mandates detention of certain criminal aliens while their removability is being determined. Nothing in the text suggests that it does not apply or applies differently when criminal aliens' removability is being determined following a motion to reopen. *See* 8 U.S.C. § 1226(c)(1). This lack of textual support is a sufficient basis for rejecting the district court's conclusion. *See Jiminez v. Quarterman*, 555 U.S. 113, 118 (2009) ("As with any question of statutory interpretation, our analysis begins with the plain language of the statute[.]").

The district court attributed to *Demore*—which upheld the constitutionality of mandatory detention under section 1226(c)—the view that a five-month period of detention is "relatively brief," suggesting that the Supreme Court's holding rested on detention being so brief. Op., RE 191, Page ID #5339 (citing *Demore*, 538 U.S. at 529). But that part of *Demore* was merely describing the average range of length of pre-order detention. Nowhere did *Demore* limit its constitutional ruling to detention falling within that range. Indeed, in *Demore* the Court upheld the detention of a lawful permanent resident alien for more than six months under section 1226(c). 538 U.S. at 530; *see Jennings*, 138 S. Ct. at 846. And *Demore* certainly never suggested that, by exceeding any

particular time period, mandatory detention under section 1226(c) transforms into discretionary detention under section 1226(a). *See* 538 U.S. at 530. *Demore* does not support the district court's view here.

Nor does *Casas-Castrillon* provide solid footing for the district court's ruling. *Casas*—which did not deal with reopened proceedings, but instead with an alien detained after the Ninth Circuit granted his petition for review and remanded his case to the BIA—held that, in these circumstances, the criminal alien's detention authority transformed from section 1226(c) to section 1226(a) because "the mandatory, bureaucratic detention of aliens under § 1226(c) was intended to apply for only a limited time." *Casas-Castrillon*, 535 F.3d at 948 (citing *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005) ("To avoid deciding the constitutional issue" whether Congress can authorize prolonged detention under section 1226(c) "we interpret the authority conferred by § 1226(c) as applying to expedited removal of criminal aliens.")).

Casas is flawed. The text of section 1226(c) makes clear that it does not apply only to aliens subject to an "expedited" removal process. *See* 8 U.S.C. § 1226(c) (providing for mandatory detention for aliens inadmissible under section 1182(a)(2) and 1182(a)(3)(B)). That textual reality alone forecloses *Casas*'s holding, because courts may not read limits into section 1226 that the text does not contain—even in the spirit of constitutional avoidance:

> [Section] 1226(c) does not on its face limit the length of the detention it authorizes. In fact, by allowing aliens to be released "only if" the Attorney General decides that certain conditions are met, § 1226(c) reinforces the conclusion that aliens detained under its authority are not entitled to be released under any circumstances other than those expressly recognized by the statute. And together with § 1226(a), § 1226(c) makes clear that detention of aliens within its scope must continue "pending a decision on whether the alien is to be removed from the United States." § 1226(a).

Jennings, 138 S. Ct. at 846. *Casas* invoked the constitutional-avoidance canon to read in additional limitations: "We conclude that prolonged detention without adequate procedural protections would raise serious constitutional concerns." *Casas-Castrillon*, 535 F.3d at 950. Yet the Supreme Court in *Jennings* explained that imposing additional procedural requirements and limitations—such as bond hearings at six months of detention—on section 1226(a) and 1226(c) detention is an "implausible" interpretation of those provisions, which provide no such limitations in their text. *Jennings*, 138 S. Ct. at 846–48 ("§ 1226(c) is not 'silent' as to the length of detention"). So the Supreme Court has rejected the approach that led to *Casas*'s holding. This Court should reject it as well.

Second, the district court alternatively concluded that section 1226(c) "does not apply to individuals who," like petitioners, "were living in the community prior to detention." Op., RE 191, Page ID #5339; *see id.* Page ID #5339–41. Section 1226(c) "states that '[t]he Attorney General shall take into custody an alien who [has committed enumerated offenses] *when the alien is released*.'" *Id.,* Page ID #5339 (district court's

emphasis). "The terms of § 1226(c) plainly state that mandatory detention is only authorized for those who are taken into custody by DHS 'when . . . released' from their criminal sentence." *Id.,* Page ID #5341. But "[t]hat was not done here": rather, petitioners "were taken into custody years after their release from criminal sentences." *Id.* So again, the district court deemed "those purportedly being held under § 1226(c)" "to be held pursuant to §1226(a)." *Id.*

This Court can reject the district court's conclusion without resolving, as the district court did, the question whether section 1226(c) applies to aliens not taken into immigration custody immediately upon release from criminal custody.[4] The debate over the meaning of the phrase "when . . . released" arises from the delayed apprehension of aliens leaving criminal custody. That debate is not at issue with the criminal petitioners here. The criminal petitioners here were not suddenly detained under section 1226(c) years after leaving criminal custody. Rather, the vast majority[5] of criminal petitioners are now in custody under section 1226 by operation of law by virtue of their own action to seek reopening of their proceedings. When the criminal petitioners' motions to

[4] The Supreme Court recently granted review on this question. *Nielsen v. Preap*, No. 16-1363 (Mar. 19, 2018).

[5] For petitioners who may be coming directly from criminal custody because they were temporarily transferred from ICE custody to criminal custody and then back to ICE, *see* Order, RE 254, Page ID #6228, petitioners have not placed any evidence in the record that such aliens were not apprehended by ICE upon their release from criminal custody.

reopen were granted, their removal orders were no longer final and governed by section 1231. *See* 8 U.S.C. § 1231(a)(1)(B)(I). The authority for detaining them reverted to the pertinent pre-removal-order authority—section 1226(c). The reopening of their removal proceedings placed petitioners back into the position they would be in if removal proceedings were now initiated against them: mandatory detention under section 1226(c). *See, e.g.*, *Verano-Velasco v. Att'y Gen.*, 456 F.3d 1372, 1372 n.1 (11th Cir. 2006). This case is therefore not concerned with the circumstances of petitioners' transition from criminal custody to immigration detention before they initially obtained their final removal orders. Although the district court noted that petitioners "were living in the community for years prior to their immigration detention," this followed their release from detention under 8 U.S.C. § 1231(a)(6) while petitioners had operative final removal orders that the government could not then execute. The government's prior difficulties in effectuating removals to Iraq counselled in favor of their release from detention given the apparent unlikelihood of their removal in the reasonably foreseeable future. *See Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). This Court could therefore reject the district court's decision on the straightforward ground that section 1226(c) by its terms applies to petitioners' detention, and no delay in apprehending petitioners warrants a different result.[6]

[6] This case does not implicate the concern that some courts have found with reading

If the Court decides to resolve the question about the scope of section 1226(c)'s "when . . . released" language, however, it should reject the district court's view that section 1226(c) authorizes detention only when an alien is arrested immediately upon release from criminal custody. The text of section 1226(c), the manifest aim of that provision, and authoritative agency interpretations compel that conclusion.

Starting with text: Section 1226(c) states that the government "shall take into custody any alien who [committed certain offenses] when the alien is released." 8 U.S.C. § 1226(c)(1). "[A] statute directing official action needs more than a mandatory 'shall' before the grant of power can sensibly be read to expire when the job is supposed to be done." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 161 (2003). Here, "[t]here is nothing so limiting" section 1226(c)'s text. *Id.* "The text does not explicitly remove that authority if an alien has already left custody." *Sylvain v. Attorney Gen. of U.S.*, 714 F.3d 150, 157 (3d Cir. 2013); *see id.* at 161 ("[N]othing in the statute suggests that officials lose authority if they delay.").

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section 1226(c) to authorize mandatory detention when an alien is apprehended following criminal custody for a different reason than the crime underlying his eligibility for mandatory detention and removal. *See, e.g.*, *Saysana v. Gillen*, 590 F.3d 7, 18 (1st Cir. 2009) ("the statute contemplates mandatory detention following release from non-DHS custody for an offense specified in the statute, not merely any release from any non-DHS custody"). Here, there was no "release" causing the initiation of section 1226(c) detention, nor were petitioners released from "non-DHS custody" when they reverted from section 1231(a) to section 1226(c) detention. *Id.*

That textual understanding is reinforced by section 1226(c)'s manifest public-safety purpose. Section 1226(c) by its terms limits the government's discretion to release criminal aliens that Congress categorically determined required detention. "Congress adopted the mandatory-detention statute against a backdrop of rising crime by deportable aliens." *Sylvain*, 714 F.3d at 159. Requiring immediate apprehension (as the Ninth Circuit and three of six judges sitting en banc in the First Circuit have done, *see Preap v. Johnson*, 831 F.3d 1193, 1197 (9th Cir. 2016); *Castaneda v. Souza*, 810 F.3d 15, 43 (1st Cir. 2015)) would produce outcomes contrary to the statute's design: a dangerous alien would be eligible for a hearing—which could lead to his release—merely because an official missed the deadline or ICE was not given notice of release. "This reintroduces discretion into the process and bestows a windfall upon dangerous criminals." *Sylvain*, 714 F.3d at 160–61. It makes little sense to believe that Congress intended that serious criminals—persons Congress subjected to *mandatory detention*—be released into communities simply because the federal government could not effectuate a seamless transition from criminal to immigration custody. The Second, Third, Fourth, and Tenth Circuits have rejected such a position, *see Lora v. Shanahan*, 804 F.3d 601, 612 (2d Cir. 2015), *cert. granted vacated for further consideration in light of Jennings*, No. 15-1205 (Mar. 5, 2018); *Sylvain*, 714 F.3d at 157; *Hosh v. Lucero*, 680 F.3d 375, 384 (4th Cir. 2012); *Olmos v. Holder*, 780 F.3d 1313, 1322 (10th Cir. 2015), and this Court should do likewise.

The straightforward, commonsensical interpretation of section 1226(c) is further reinforced by decisions of the BIA. The BIA has held that apprehension of an alien immediately upon release from criminal custody is not a precondition for mandatory detention under section 1226(c). *See In Re Rojas*, 23 I. & N. Dec. 117, 124 (B.I.A. 2001) (noting "strong evidence that Congress was not attempting to restrict mandatory detention to criminal aliens taken immediately into [immigration] custody at the time of their release from a state or federal correctional institution"). *Rojas* held that the plain meaning of the text, the statutory context as a whole, and practical considerations dictated this interpretation. 23 I. & N. Dec. at 121–24. "[T]he BIA's interpretation of § 1226(c) in *Rojas* was reasonable, and must be afforded deference." *Hosh*, 680 F.3d at 384; *accord Lora*, 804 F.3d at 612–13; *Olmos*, 780 F.3d at 1324. This Court should follow the BIA's sound interpretation here too.

For all of these reasons, the district court was wrong to conclude that section 1226(c) does not apply to the criminal petitioners here. Section 1226(c) applies, it imposes mandatory detention, and it does not entitle petitioners to bond hearings. The district court's injunction directing bond hearings should therefore be vacated.

B. The district court erred in imposing a presumptive six-month limitation on detention under 8 U.S.C. § 1226(c).

The district court held that section 1226 detention is subject to a reasonable time limitation, and specifically, that "any presumption of reasonableness ends after six

months." Op., RE 191, Page ID #5343; *see id.* Page ID #5341–46. The district court erred.

The district court's ruling has no basis in the statutory text. Section 1226 states that its detention authority persists "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). For certain criminal aliens specifically, section 1226 provides that the government "shall take" the alien "into custody . . . when the alien is released" from criminal confinement. *Id.* § 1226(c)(1). The text includes no temporal limitation on this detention. As the Supreme Court has explained, under section 1226(c) the government "may release aliens in those categories 'only if the Attorney General decides . . . that release of the alien from custody is necessary' for witness-protection purposes and 'the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.'" *Jennings*, 138 S. Ct. at 838 (quoting 8 U.S.C. § 1226(c)(2)). Section 1226(c) "mandates detention of any alien falling within its scope and that detention may end prior to the conclusion of removal proceedings 'only if' the alien is released for witness-protection purposes." *Id.* at 847. Otherwise, section "1226(c) has 'a definite termination point': the conclusion of removal proceedings." *Id.* at 846. It is that point—"and not some arbitrary time limit devised by courts—[that] marks the end of the Government's detention authority under § 1226(c)." *Id.*

The district court based its contrary conclusion on cases applying the canon of constitutional avoidance to read a time limit into section 1226(c). Op., RE 191, Page ID #5342–43 (citing *Ly v. Hansen*, 351 F.3d 263, 271–72 (6th Cir. 2003); *Sopo v. U.S. Att'y Gen.*, 825 F.3d 1199, 1217–18 (11th Cir. 2016); *Reid v. Donelan*, 819 F.3d 486, 502 (1st Cir. 2016); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 233 (3d Cir. 2011); *Lora*, 804 F.3d at 615; *Rodriguez*, 715 F.3d at 1133)). But the Supreme Court has now rejected the approach that generated the holdings in those cases. As the Supreme Court has explained, the avoidance canon "permits a court to 'choos[e] between competing plausible interpretations of a statutory text'" when the text is ambiguous, but "does not give a court the authority to rewrite a statute as it pleases." *Jennings*, 138 S. Ct. at 843 (quoting *Clark v. Martinez*, 543 U.S. 371, 381 (2005)). Section 1226(c) contains no ambiguity on the length of permissible detention: detention may continue "'pending a decision on whether the alien is to be removed from the United States.'" *Id.* at 846 (quoting 8 U.S.C. § 1226(a)). "Even if courts were permitted to fashion 6-month time limits out of statutory silence, they certainly may not transmute existing statutory language into its polar opposite." *Id.* Thus, there is no statutory basis for the district court's decision that there is a presumptive six-month limitation on detention under 8 U.S.C. § 1226(c). The district court was wrong to rule to the contrary.

C. Any determination about constitutional requirements for bond hearings for detainees in custody under sections 1226(c) and 1231(a) should be decided by the district court in the first instance.

If this Court agrees that section 1226 and section 1231 (*see* Part I, *supra*) do not offer any basis for holding that petitioners are entitled to bond hearings after six months of detention, the Court should vacate the injunction in that respect and remand to the district court to determine whether there is any constitutional right to such hearings. As explained, the district court ruled on statutory grounds in concluding that petitioners were entitled to bond hearings. The district court relied on cases that in turn applied the canon of constitutional avoidance to sections 1226(a) and 1226(c) to interpret the statute to have implicit temporal limitations—specifically to require bond hearings after six months of detention. Op., RE 191, Page ID #5342–43 (citing cases). Likewise, in its section 1231 analysis, *see* Part I, *supra*, the district court relief on *Diouf*, also a statutory-construction ruling. *See* 634 F.3d at 1085, 1086. It conducted no separate constitutional analysis concerning any due process right to bond hearings. *See id.*; *Mathews v. Eldridge*, 424 U.S. 319, 332–33 (1976) (describing the analysis for determining "the process that is constitutionally due before a recipient can be deprived of that [liberty] interest"). Because the district court did not analyze any constitutional entitlement of petitioners to bond hearings, and the parties did not brief this issue in detail there, this Court should not resolve that constitutional question in the first instance now. Remand is instead warranted.

III. Even if some petitioners should be afforded bond hearings, the injunction should still be modified because it erroneously shifts and elevates the burden of proof for the remedial bond hearings.

The district court held that section 1226(c) detainees with reopened removal orders should be deemed to be detained under section 1226(a), and thus be given the procedure entitlements that come with detention under section 1226(a). *See* Op., RE 191, Page ID #5337–41. Yet the district court ordered relief that section 1226(a) does not allow: release, unless the government proves "by clear and convincing evidence, that the detainee is either a flight risk or a public safety risk." *Id.,* Page ID #5361; *see* Order, RE 201, ID #5448. That order cannot stand.

Section 1226(a) provides that an immigration officer "may" release an alien detained under section 1226(a) on bond. 8 U.S.C. § 1226(a). A regulation explains that the officer may grant release if "the alien . . . demonstrate[s] to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding." 8 C.F.R. § 236.1(c)(8). "The burden is on the alien to show to the satisfaction of the Immigration Judge that he or she merits release on bond." *In re Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006); *see In re Adeniji*, 22 I. & N. Dec. 1102, 1111-13 (B.I.A. 1999). In *Jennings*, the Supreme Court held that section 1226(a) cannot be construed to require the government to bear the burden of proof at bond hearings, much less by clear and convincing evidence. *Jennings*, 138 S. Ct. at 847.

The district court erred in imposing a rigorous burden on the government at court-ordered bond hearings. The Court should direct that, to the extent it orders any bond hearings, those hearings should be conducted as under section 1226(a), with the alien having the burden to prove suitability for release.

IV. This Court should provide instructions on remand regarding injunctive relief and class-wide treatment.

For the reasons set forth in Parts I and II, the district court's injunction should be vacated because there is no statutory basis for the district court's rulings on the detention claims at issue. On remand, petitioners might seek to pursue constitutional challenges to purportedly prolonged detention under 8 U.S.C. § 1231(a)(6) and 8 U.S.C. § 1226(c). Given that prospect, and given the nature of the proceedings to date, this Court should provide two instructions to the district court on remand.

First, the Court should direct the district court to assess whether it has authority to grant injunctive relief on a class-wide basis at all, particularly with respect to constitutional claims. *See Jennings,* 138 S. Ct. at 851. Under 8 U.S.C. § 1252(f)(1), "[r]egardless of the nature of the action or claim . . . 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." This provision could bear on the sort of class-wide relief that petitions are seeking here. *See* Op., RE

191, Page ID #5347–62. The district court should evaluate the effect of section 1252(f)(1) on any further proceedings.

Second, this Court should direct the district court to re-assess whether class certification is proper in this case at all. In *Jennings*—decided after the district court's injunction—the Supreme Court counseled caution in evaluating the suitability of due process challenges to immigration detention for class treatment under Federal Rule of Civil Procedure 23(b)(2), especially where, as here, members of the class have minimal interests with respect to their admission to the United States. *Jennings*, 138 S. Ct. at 852. Rule 23(b)(2) permits class certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the 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.'" *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 361 (2011). Thus, certification is appropriate here only if the claims of all subclass detainees can be commonly analyzed and adjudicated without regard to the factual differences between class members.

The district court should be directed to take a hard look at whether that requirement is satisfied here, with respect to any constitutional claims that petitioners may present. The Supreme Court has "stressed repeatedly" that due process requires

an individualized assessment. *Jennings*, 138 S. Ct. at 852; *Landon v. Plasencia*, 459 U.S. 21, 34 (1982); *see Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

The district court should asses the propriety of class treatment given important differences in liberty interests between the subclass members and the government's interest in maintaining custody of aliens likely to become eligible for removal. The subclasses here includes detainees who have limited liberty interests with respect to their release into the United States. *See Demore*, 538 U.S. at 522 n.6, 531. For example, the section 1231 subclass includes detainees whose members, even *nine months* following the district court's order staying their removal, have not filed *any* motion to reopen their final orders of removal. The section 1231 subclass also includes detainees who have already lost their motions to reopen and, therefore, have failed to convince a competent court that they are entitled to relitigate their removal orders. *See* Schlanger Decl., RE 138-2, Page ID #3406 (40% of putative class-member motions to reopen were denied). Similarly, the section 1226 subclass includes aliens who have been ordered removed for a second time, and so have failed to show, after two removal proceedings, any entitlement to remain in the United States. And many other section 1226(c) subclass members have conceded their deportability—and therefore, if permitted to remain in the United States, will do so as an act of Executive grace. Such individuals lack a substantial liberty interest in being released into the United States after only six months of detention, and so confirm the impropriety of relief to the subclass. *See Demore*, 538

U.S. at 522–31 (affirming constitutionality of section 1226(c) detention exceeding six month for lawful permanent resident who conceded removability).

Against these interests for these petitioners, the district court should account for the government's heightened interest in securing these individuals for removal. The section 1231 subclass includes nationals for whom the time for filing motions to reopen under the district court's injunction has expired. For these individuals, their interests under the first injunction have terminated and they will soon become eligible for removal. For individuals with denied motions to reopen or who have again been ordered removed, these individuals may be imminently removable if they either: (1) elect not to file an appeal with the BIA or a petition for review and request a stay; or (2) do so, but their stay is denied by the federal appellate court. *See Nken v. Holder*, 556 U.S. 418 (2009) (setting test for granting a stay of removal).

Given these points, there is a serious question whether the reasonableness of continued detention can be commonly adjudicated as to either of the certified subclasses as a whole in light of the varying strength of class members' interests, the government's interests, and the many reasons why immigration proceedings remain ongoing. This Court should direct the district court to evaluate this matter on remand.

CONCLUSION

The district court's injunction ordering that petitioners receive bond hearings should be vacated, and this case should be remanded for further proceedings.

March 30, 2018

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CERTIFICATE OF SERVICE

I certify that on March 30, 2018, the above brief was served on all counsel of record through the Court's CM/RE system.

/s/ William C. Silvis
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CERTIFICATE OF COMPLIANCE

I certify that the above brief contains 12,934 words, excluding the portions exempted by Rule 32(f) of the Federal Rules of Appellate Procedure. I further certify that the above brief complies with the type size and typeface requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure: it was prepared in a proportionally spaced typeface using Microsoft Word in Garamond, 14-point typeface.

/s/ William C. Silvis
Assistant Director

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Hamama, et al., v. Rebecca Adducci, et al.

Eastern District of Michigan, Case No. 17-cv-11910

Record Entry No.	Page ID #	Date Filed	Description
1	1–26	6/15/2017	Habeas Corpus Class Action Petition
11	45–175	6/15/2017	Petitioners' Motion for a Temporary Restraining Order and/or Stay of Removal
32	497–502	6/22/2017	Opinion and Order Staying Removal of Petitioners Pending Court's Review of Jurisdiction
35	509–48	6/24/2017	First Amended Habeas Corpus Class Action Petition and Class Action Complaint
64	1226, 1245	7/11/17	Opinion & Order Regarding Jurisdiction
77	1717, 1745	7/17/2017	Petitioners' Motion for a Preliminary Stay of Removal and/or Preliminary Injunction
81-4	2006	7/20/2017	Schultz Declaration, Exhibit to Respondents' Opposition to Petitioners' Motion

			for a Preliminary Injunction
87	2355–56	7/24/2017	Opinion & Order Granting Petitioners' Motion for Preliminary Injunction
108	2812–13	9/21/2017	Notice of Appeal
118	2957, 2963	10/13/2017	Petitioners' Second Amended Complaint
135	3271	11/1/2017	Respondents' Motion to Dismiss the Second Amended Complaint
138	3338, 3349, 3379, 3384–92	11/7/2017	Petitioners' Motion for a Preliminary Injunction on Detention Issues
138-2	3406	11/7/2017	(First) Declaration of Margo Schlanger
139	3734–37	11/7/2017	Petitioners' Amended Motion for Class Certification
158-2	4130–31	11/30/2017	Schultz Declaration, Exhibit to Respondents' Opposition to Petitioners' Motion for a Preliminary Injunction on Detention Issues
191	5318, 5328–52, 5359–62	1/2/2018	Opinion & Order Granting Petitioners' Motion

			for Preliminary Injunction
247	6182	3/2/2018	Notice of Appeal
254	6228	3/13/2018	Order Regarding Further Proceedings
265	6445	3/26/2018	Petitioners' Withdrawal of Request for Modification of Subclass Definition