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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 ARTURO MARTINEZ BAÑOS, et al.,

11 Plaintiffs-Petitioners,

12 v.

13 NATHALIE ASHER, et al.,

14 Defendants-Respondents.

CASE NO. C16-1454JLR

ORDER ADOPTING REPORT
AND RECOMMENDATION

15 **I. INTRODUCTION**

16 Before the court are the Report and Recommendation of United States Magistrate
17 Judge Brian A. Tsuchida (R&R (Dkt. # 77)) and Defendants-Respondents Nathalie
18 Asher, Lowell Clark, Thomas D. Homan, John F. Kelly, James McHenry, and Jefferson
19 B. Sessions's (collectively, "the Government") objections thereto (Obj. (Dkt. # 78)). The
20 Government and Plaintiff Edwin Flores Tejada both subsequently filed notices of
21 supplemental authority. (See 1st Pl. Not. (Dkt. # 80); Def. Not. (Dkt. # 81); 2nd Pl. Not.
22 (Dkt. # 82).) Having carefully reviewed all of the foregoing, along with all other relevant

1 documents and the governing law, the court ADOPTS the Report and Recommendation
2 (Dkt. # 77).

3 II. BACKGROUND AND ANALYSIS

4 On January 23, 2018, Magistrate Judge Tsuchida issued a Report and
5 Recommendation that recommends granting in part and denying in part the parties' cross-
6 motions for summary judgment. (R&R at 2.) The Government filed its objections on
7 February 23, 2018, asking that the court reject Magistrate Judge Tsuchida's
8 recommendation. (Obj. at 1.) A few days later, on February 27, 2018, the Supreme
9 Court decided *Jennings v. Rodriguez*, --- U.S. ---, 138 S. Ct. 830 (2018), which held that
10 the Ninth Circuit had erroneously applied the canon of constitutional avoidance in finding
11 that 8 U.S.C. §§ 1225(b)(1), 1225(b)(2), and 1226(c) entitle individuals to periodic bond
12 hearings when their detention becomes prolonged at six months. *Jennings*, 138 S. Ct. at
13 842-47. Both parties submitted notices of supplemental authority discussing the impact
14 of *Jennings* on the case at hand. (See 1st Pl. Not.; Def. Not.; 2nd Pl. Not.)

15 Accordingly, the court first determines the impact, if any, that *Jennings* has on the
16 issues presented in the Report and Recommendation. The court then considers the Report
17 and Recommendation.

18 A. *Jennings* and Its Impact

19 The Report and Recommendation relies upon *Diouf v. Napolitano*, 634 F.3d 1081
20 (9th Cir. 2011) ("*Diouf II*"), and its analysis of U.S.C. § 1231(a)(6) to conclude that class
21 members should "be afforded custody hearings before an [immigration judge] . . . after
22 they have been detained for 180 days and every 180 days thereafter." (R&R at 10-11; see

1 *id.* at 7-11.) The Government argues that *Jennings* calls into question *Diouf II*, and
2 consequently, the Report and Recommendation. (See Def. Not. at 2-3.) The court
3 disagrees.

4 *Diouf II* remains binding circuit authority unless it is “clearly irreconcilable” with
5 higher authority. See *United States v. Robertson*, 875 F.3d 1281, 1291 (9th Cir. 2017).
6 Under the “clearly irreconcilable” standard, “it is not enough for there to be some tension
7 between the intervening high authority and prior circuit precedent.” *Lair v. Bullock*, 697
8 F.3d 1200, 1207 (9th Cir. 2012). So long as the court “can apply . . . prior circuit
9 precedent without running afoul of the intervening authority,” it must do so. *Id.* (internal
10 quotation marks omitted).

11 *Diouf II* and *Jennings* are not “clearly irreconcilable.” See *Robertson*, 875 F.3d at
12 1291. In *Jennings*, the Supreme Court reversed the Ninth Circuit’s holding, pursuant to
13 the canon of constitutional avoidance, regarding §§ 1225(b)(1), 1225(b)(2), and 1226(c).
14 In so concluding, *Jennings* explicitly contrasted §§ 1225 and 1226—the statutes at issue
15 in that case—with § 1231(a)(6)—the statute at issue in *Diouf II*. See 138 S. Ct. at
16 843-44. For instance, the Supreme Court recognized that §§ 1225 and 1226 utilize the
17 mandatory language “shall,” whereas § 1231(a)(6) utilizes the discretionary language
18 “may”; the “may” language in § 1231(a)(6) suggests ambiguity that leaves space for
19 constitutional avoidance. *Jennings*, 138 S. Ct. at 843.

20 Thus, *Jennings* concerns statutes—§§ 1225 and 1226—that were not at issue in
21 *Diouf II* and are not at issue here. See *Jennings*, 138 S. Ct. at 843; *Diouf II*, 634 F.3d at
22 1086. In fact, *Jennings* expressly distinguished § 1231(a)(6), the statute at issue here.

1 See *Jennings*, 138 S. Ct. at 843-44. Thus, the court agrees with the other district courts to
2 have considered the viability of *Diouf II* after *Jennings*: “[A]t a minimum . . . *Jennings*
3 left for another day the question of bond hearing eligibility under [§] 1231(a), and at best,
4 [*Jennings* shows] that the Ninth Circuit correctly invokes the doctrine of constitutional
5 avoidance” in *Diouf II*. See *Ramos v. Sessions, et al.*, No. 18-cv-00413, 2018 WL
6 1317276, at *3 (N.D. Cal. Mar. 13, 2018); see also *Borjas-Calix v. Sessions, et al.*,
7 No. CV-16-00685-TUC-DCB, 2018 WL 1428154, at *6 (D. Ariz. Mar. 22, 2018)
8 (holding that *Jennings* did not impact *Diouf II* because *Jennings* was specifically directed
9 to § 1225, *et seq.*, and not § 1231(a)(6)).

10 The court, therefore, concludes that *Diouf II* remains binding law.

11 **B. Report and Recommendation**


12 The court next addresses the Report and Recommendation. A district court has
13 jurisdiction to review a Magistrate Judge’s report and recommendation on dispositive
14 matters. Fed. R. Civ. P. 72(b). “The district judge must determine de novo any part of
15 the magistrate judge’s disposition that has been properly objected to.” *Id.* “A judge of
16 the court may accept, reject, or modify, in whole or in part, the findings or
17 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). The court
18 reviews de novo those portions of a report and recommendation to which a party
19 specifically objects in writing. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th
20 Cir. 2003) (en banc). “The statute makes it clear that the district judge must review the
21 magistrate judge’s findings and recommendations de novo if objection is made, but not
22 otherwise.” *Id.*

1 The Government's objections do not raise any novel issue that was not addressed
2 by Magistrate Judge Tsuchida's Report and Recommendation. (*See generally* Obj.)
3 Moreover, the court has thoroughly examined the record before it and finds that the
4 reasoning contained in the Report and Recommendation is persuasive in light of that
5 record. Accordingly, the court independently rejects the Government's arguments in its
6 objection for the same reasons as Magistrate Judge Tsuchida did.

7 **III. CONCLUSION**

8 For the foregoing reasons, the court ADOPTS the Report and Recommendation
9 (Dkt. # 77) in its entirety. The court DIRECTS the Clerk to send copies of this Order to
10 the parties and to the Honorable Brian A. Tsuchida.

11 Dated this th4 day of April, 2018.

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13 JAMES L. ROBART
14 United States District Judge
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