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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ESTEBAN ALEMAN GONZALEZ, et al.,  
Plaintiffs,  
v.  
JEFFERSON B. SESSIONS, et al.,  
Defendants.

Case No. [18-cv-01869-JSC](#)

**ORDER RE PLAINTIFFS’ MOTIONS  
FOR CLASS CERTIFICATION AND  
PRELIMINARY INJUNCTION**

Re: Dkt. Nos. 21, 22

In *Diouf v. Napolitano*, 634 F.3d 1081, 1082 (9th Cir. 2011) (“*Diouf II*”), the Ninth Circuit held that an individual facing prolonged detention under 8 U.S.C. section 1231(a)(6) “is entitled to release on bond unless the government establishes that he is a flight risk or a danger to the community.” The government has detained plaintiffs Esteban Aleman Gonzalez and Jose Eduardo Gutierrez Sanchez pursuant to 8 U.S.C. § 1231(a)(6) for more than six months without an individualized bond hearing. Accordingly, they filed this suit on behalf of themselves and a putative class seeking declaratory and injunctive relief. Now pending before the Court are Plaintiffs’ motions for class certification and preliminary injunction. (Dkt. Nos. 21 and 22.)<sup>1</sup> Plaintiffs seek certification of a class of essentially all present and future section 1231(a)(6) detainees in the Ninth Circuit and a preliminary injunction enjoining the government from detaining plaintiffs and the class for more than 180 days without providing them with a bond hearing before an immigration judge at which the government has the burden of justifying detention. The dispositive issue is whether *Diouf II* is clearly irreconcilable with the United States

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<sup>1</sup> Record citations are to material in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

United States District Court  
Northern District of California

1 Supreme Court's recent decision in *Jennings*. As the Court concludes that it is not, it certifies the  
2 class and enjoins the government from failing to provide a bond hearing to 1231(a)(6) detainees  
3 after 180 days in detention.

#### 4 **IMMIGRATION FRAMEWORK**

5 The Immigration and Nationality Act ("INA") authorizes the detention of noncitizens  
6 awaiting removal from the United States. Different sections of the INA govern different phases of  
7 detention. It authorizes "the Government to detain certain aliens seeking admission into the  
8 country under §§ 1225(b)(1) and (b)(2)" and "aliens already in the country pending the outcome of  
9 removal proceedings under §§ 1226(a) and (c)." *Jennings v. Rodriguez*, 138 S. Ct. 830, 838  
10 (2018).

11 If the proceedings result in an order of removal, the Attorney General is required to remove  
12 the noncitizen from the United States within a period of 90 days, known as the "removal period."  
13 *See* 8 U.S.C. § 1231(a)(1)(A). Detention during the 90 day removal period is mandatory. *See id.*  
14 § 1231(a)(2). If the noncitizen is not removed during the removal period, continued detention is  
15 authorized beyond the removal period in the discretion of the Attorney General. *Id.* § 1231(a)(6).  
16 Section 1231(a)(6) encompasses noncitizens "whose collateral challenge to his removal order (a  
17 motion to reopen) is pending in the court of appeals, as well as to aliens who have exhausted all  
18 direct and collateral review of their removal orders but who, for one reason or another, have not  
19 yet been removed from the United States." *Diouf II*, 634 F.3d at 1085.

20 "An alien who expresses a fear of returning to the country designated in the reinstated  
21 order of removal ... must be immediately referred to an asylum officer for an interview to  
22 determine whether the alien has a reasonable fear of persecution or torture." *Andrade v. Sessions*,  
23 828 F.3d 826, 832 (9th Cir. 2016) (quoting 8 C.F.R. § 241.8(e)). "If the officer decides that the  
24 alien does have a reasonable fear of persecution or torture, the case is referred to an immigration  
25 judge ("IJ") for full consideration of the request for withholding of removal only." *Ayala v.*  
26 *Sessions*, 855 F.3d 1012, 1015 (9th Cir. 2017); 8 C.F.R. § 208.31(e)). "If, however, the asylum  
27 officer decides that the alien has not established a reasonable fear of persecution or torture, then  
28 the alien is entitled to appeal that determination to an IJ." *Id.* at 1015-1016; 8 C.F.R. § 208.31(g).

1 “On appeal, if the IJ affirms the officer’s negative fear determination, the case is returned to the  
 2 Service for removal, and the alien is not entitled to appeal further to the BIA.” *Id.* at 1016. The  
 3 noncitizen may, however, petition the Ninth Circuit for review of a negative reasonable fear  
 4 determination. *Id.*

## 5 **FACTUAL BACKGROUND**

### 6 **A. Esteban Aleman Gonzalez**

7 Plaintiff Esteban Aleman Gonzalez is a citizen of Mexico who applied for admission to the  
 8 United States in April 2000. (Dkt. No. 27-1.) During this process Mr. Gonzalez presented an  
 9 entry document that belonged to another person. (*Id.*) An immigration officer found that Mr.  
 10 Gonzalez was inadmissible under 8 U.S.C. § 1182(a)(6)(C)(i) because he sought to procure  
 11 admission “by fraud or by willfully misrepresenting a material fact.” (*Id.*) Mr. Gonzalez was  
 12 removed under an expedited removal order. (*Id.*) Sometime thereafter, Mr. Gonzalez unlawfully  
 13 reentered the United States. (Dkt. No. 27-2.) In August 2017, immigration officers arrested him  
 14 and determined that he was “removable as an alien who ha[d] illegally reentered the United States  
 15 after having been previously removed.” (*Id.*) (citing 8 U.S.C. § 1231(a)(5)). Mr. Gonzalez did not  
 16 contest the finding that he was removable and his removal order was reinstated on August 18,  
 17 2017. (*Id.*)

18 While in custody Mr. Gonzalez expressed a fear that he would persecuted or tortured if he  
 19 was removed him to Mexico. (Dkt. No. 27-3 ¶ 6). An asylum officer interviewed Mr. Gonzalez,  
 20 determined that he “has a reasonable fear persecution or torture,” and then referred him to an  
 21 immigration judge for “withholding-only” proceedings. (*Id.*) Thereafter, Mr. Gonzalez moved for  
 22 a bond hearing. (Dkt. No. 27-4). An immigration judge denied the motion for lack of jurisdiction  
 23 and scheduled a July 9, 2018 hearing on the merits of Mr. Gonzalez’s withholding-of-removal  
 24 claim. (Dkt. Nos. 27-4, 27-5.) On February 26, 2018, an ICE officer reviewed Mr. Gonzalez’s  
 25 custody status and determined that he will remain in ICE custody “[p]ending a ruling on [his  
 26 withholding-of-removal] claim” or until he demonstrates that his “removal is unlikely.” (Dkt. No.  
 27 27-6.)

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**B. Jose Eduardo Gutierrez Sanchez**

Plaintiff Jose Eduardo Gutierrez Sanchez is a citizen of Mexico who unlawfully entered the United States in May 2009. (Dkt. No. 27-7.) Shortly thereafter, Mr. Sanchez was arrested and charged as inadmissible under 8 U.S.C. § 1182(a)(7)(A)(i)(I). (*Id.*) An expedited removal order issued and Mr. Sanchez was removed. (*Id.*) At a later date, Mr. Sanchez unlawfully reentered the United States. (Dkt. No. 27-8.) On September 26, 2017, Mr. Sanchez was arrested and immigration officials determined that he was “removable as an alien who ha[d] illegally reentered the United States after having been previously removed” under 8 U.S.C. § 1231(a)(5). (*Id.*) Mr. Sanchez did not contest he was removable and his May 2009 removal order was reinstated. (*Id.*)

While in custody, Mr. Sanchez also expressed a fear that he would persecuted or tortured if removed to Mexico. (Dkt. No. 27-9 ¶ 6). An asylum officer interviewed him, determined that he reasonably feared persecution or torture, and referred him to an immigration judge for “withholding-only” proceedings. (*Id.*; see 8 C.F.R. §§ 208.31(e), 241.8(e).) In withholding-only proceedings, Mr. Sanchez moved for a bond hearing which was denied for lack of jurisdiction. (Dkt. No. 27-10.)

The IJ has scheduled a June 18, 2018 hearing on the merits of Mr. Sanchez’s withholding-of-removal claim. (Dkt. No. 27-11.) On December 19, 2017, an ICE officer reviewed Mr. Sanchez’s custody status. (Dkt. No. 31-1.) The officer relied on Mr. Sanchez’s criminal history, including “arrests for possession of marijuana, obstruct/resist public officer, battery spouse, robbery: second degree,” and Mr. Sanchez’s “multiple illegal entries” to conclude that Mr. Sanchez “would be a danger and a flight risk if released.” (*Id.*)

**THE CLASS CERTIFICATION MOTION**

Plaintiffs ask the Court to certify as a class “all individuals who are detained pursuant to 8 U.S.C. § 1231(a)(6) in the Ninth Circuit by, or pursuant to the authority of, the U.S. Immigration and Customs Enforcement (“ICE”), and who have reached or will reach six months in detention, and have been or will be denied a prolonged detention bond hearing before an Immigration Judge

1 ('IJ')."<sup>2</sup>

2 **I. Legal Standard**

3 "Federal Rule of Civil Procedure 23 governs the maintenance of class actions in federal  
4 court." *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1124 (9th Cir. 2017). To succeed on  
5 their motion for class certification, Plaintiffs must satisfy the threshold requirements of [Federal](#)  
6 [Rule of Civil Procedure 23\(a\)](#) as well as the requirements for certification under one of the  
7 subsections of Rule 23(b). *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir.  
8 2012). Rule 23(a) provides that a case is appropriate for certification as a class action if:

- 9 (1) the class is so numerous that joinder of all members is impracticable;  
10 (2) there are questions of law or fact common to the class;  
11 (3) the claims or defenses of the representative parties are typical of the claims or  
12 defenses of the class; and  
13 (4) the representative parties will fairly and adequately protect the interests of the  
14 class.

15 [Fed. R. Civ. P. 23\(a\)](#). "[A] party must not only be prepared to prove that there are in fact  
16 sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses,  
17 and adequacy of representation, as required by Rule 23(a)," but "also satisfy through evidentiary  
18 proof at least one of the provisions of Rule 23(b)." *Comcast v. Behrend*, 569 U.S. 27, 133 S.Ct.  
19 1426, 1432, 185 L.Ed.2d 515 (2013) (internal quotation marks, citations, and emphasis omitted).

20 Plaintiffs contends that the putative class satisfies Rule 23(b)(2), which requires that "final  
21 injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."  
22 For certification under Rule 23(b)(2), Plaintiffs must show that "declaratory relief is available to  
23 the class as a whole" and that the challenged conduct is "such that it can be enjoined or declared  
24 unlawful only as to all of the class members or as to none of them." *Wal-Mart Stores, Inc. v.*  
25 *Dukes*, 564 U.S. 338, 360 (2011).

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27  
28 <sup>2</sup> Both the Central District of California and the Western District of Washington have certified  
classes of detainees under section 1231(a)(6). Plaintiffs' proposed class definition excludes those  
individuals that fall within those certified classes. (Dkt. No. 21 at 10 n.3.)

1 Plaintiffs seek certification of a 23(b)(2) class as to their statutory and due process claims.  
2 As they note, however, in *Jennings* the Supreme Court remanded the case to the Ninth Circuit to  
3 address whether Rule 23 authorized class certification of the due process claims. 138 S.Ct. at 832.  
4 The Ninth Circuit has recently asked the parties in that case for supplemental briefing on the  
5 question. In light of this uncertainty, and given that addressing the due process claim is not  
6 necessary to resolution of Plaintiffs' motions, the Court denies without prejudice Plaintiffs'  
7 motion to certify their due process claim. Instead, the Court will analyze the motion solely as to  
8 the statutory claim.

## 9 **II. Analysis**

### 10 **A. Plaintiffs Have Satisfied Rule 23(a)**

11 The Court may certify a class only where "(1) the class is so numerous that joinder of all  
12 members is impracticable; (2) there are questions of law or fact common to the class; (3) the  
13 claims or defenses of the representative parties are typical of the claims or defenses of the class;  
14 and (4) the representative parties will fairly and adequately protect the interests of the class." Fed.  
15 R. Civ. P. 23(A).

#### 16 i. Numerosity

17 A putative class satisfies the numerosity requirement "if the class is so numerous that  
18 joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Impracticability is not  
19 impossibility, and instead refers only to the "difficulty or inconvenience of joining all members of  
20 the class." *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964)  
21 (citation omitted). "While there is no fixed number that satisfies the numerosity requirement, as a  
22 general matter, as class greater than forty often satisfies the requirement, while one less than  
23 twenty-one does not." *Ries v. Ariz. Beverages USA LLC*, 287 F.R.D. 523, 526 (N.D. Cal. Nov. 27,  
24 2012).

25 Plaintiffs estimate that the class currently contains at least 43 proposed members, 18 in  
26 California and 25 in Arizona, but likely many more. (Dkt. No. 21-1 at 10 ¶¶ 6-9, 18 ¶ 5, 24 ¶¶ 5-6,  
27  
28

1 29 ¶ 6, 35 ¶¶ 6,7.)<sup>3</sup> These numbers make it impractical to bring all class members before the  
 2 Court on an individual basis. Further, Plaintiffs estimate this number will grow each day as the  
 3 government places additional individuals in custody who will later reach six months of detention  
 4 under § 1231(a)(6). Accordingly, Plaintiffs have established that the class is sufficiently  
 5 numerous.

6 ii. Commonality

7 “[C]ommonality requires that the class members’ claims depend on a common contention  
 8 such that ‘determination of its truth or falsity will resolve an issue that is central to the validity of  
 9 each [claim] in one stroke.’” *Mazza*, 666 F.3d at 588-89 (quoting *Dukes*, 131 S.Ct. at 2551). “The  
 10 plaintiff must demonstrate the capacity of classwide proceedings to generate common answers to  
 11 common questions of law or fact that are apt to drive the resolution of the litigation.” *Id.* (internal  
 12 quotation marks and citation omitted). To that end, the commonality requirement can be satisfied  
 13 “by even a single question.” *Trahan v. U.S. Bank Nat’l Ass’n*, No. C 09-03111 JSW, 2015 WL  
 14 74139, at \*5 (N.D. Cal. Jan. 6, 2015). It is not necessary that “[a]ll questions of fact and law ... be  
 15 common to satisfy the rule.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). The  
 16 Ninth Circuit has found “[t]he existence of shared legal issues with divergent factual predicates is  
 17 sufficient, as is a common core of salient facts coupled with disparate legal remedies within the  
 18 class.” *Id.* “[T]he commonality requirements asks us to look only for some shared legal issue or  
 19 a common core of facts.” *Id.* Ultimately, commonality “requires the plaintiff to demonstrate the  
 20 class members have suffered the same injury.” *Evon v. Law Offices of Sidney Mickell*, 688 F.3d  
 21 1015, 1029 (9th Cir. 2012) (quoting *Dukes*, 131 S.Ct. at 2551).

22 Plaintiffs satisfy the commonality requirement because they share a common legal  
 23 question: whether detention beyond six months without an individualized bond hearing violates §  
 24 1231(a)(6) as interpreted by the Ninth Circuit in *Diouf*. “This question will be posed by the  
 25 detention of every member of the class and their entitlement to a bond hearing will largely be  
 26

27 \_\_\_\_\_  
 28 <sup>3</sup> Plaintiffs represent this number is at least 60, not 43, however after a review of Plaintiffs’  
 declarations the Court counts only 43 individuals that are represented by Plaintiffs’ counsel or are  
 being detained under section 1231(a)(6) upon Plaintiffs’ counsel’s belief.

1 determined by its answer.” *See Rodriguez v. Hayes*, 591 F.3d 1105, 1123 (9th Cir. 2010) (finding  
2 commonality after petitioner raised the common question of whether detention of the putative  
3 class members “is authorized by statute, and, in the alternative, that if their detention is authorized  
4 it violates the Fifth Amendment’s guarantee of due process.”)

5 The Government’s arguments to the contrary are unpersuasive. They assert “Plaintiffs’  
6 proposed class lacks commonality because the proffered class definition encompasses a broad  
7 range of individuals with different factual bases for their claims, including diverse groups of aliens  
8 whose legal and factual interests differ considerably from each other and from those of the  
9 proposed class representatives.” (Dkt. No. 28 at 18: 4-7.) The Government is right that “members  
10 of the proposed class do not share every fact in common or completely identical legal issues”;  
11 however, “[t]his is not required by Rule 23(a)(1).” *Rodriguez*, 591 F.3d at 1122. Instead, “the  
12 commonality requirement asks us to look only for some shared legal issue or a common core of  
13 facts” and the proposed members have met that here: there is a shared legal question of whether  
14 continued detention after six months without a bond hearing is permissible under § 1231(a)(6).  
15 *See id.* If the Court ultimately rules in favor of Plaintiffs the relief will be the same - each class  
16 member will be entitled to a bond hearing regardless of individual circumstances. This is  
17 sufficient to meet the commonality requirement.

18 The Government further argues “under *Zadvydas*’s construction of § 1231(a)(6), the  
19 detention of named Plaintiffs and their putative class does not raise a serious constitutional  
20 problem, let alone violate the Due Process Clause, unless they can show that they are not  
21 significantly likely to be removed in the reasonably foreseeable future.” *See Zadvydas v. Davis*,  
22 533 U.S. 678, 701 (2001). The Government contends “this is a detail-specific analysis that  
23 necessarily requires a factual assessment of, among other things, the likelihood that individuals  
24 will prevail on their requests for relief from removal and, for those in withholding-only  
25 proceedings, whether there are alternative countries to which they could be removed.” (Dkt. No.  
26 28 at 19:23-20:1.) However, this argument goes to the merits of Plaintiffs’ claim, not whether the  
27 commonality requirement is met. It is the Government’s contention that Plaintiffs and the absent  
28 class members have to show they are not likely to be removed in the reasonably foreseeable



1 future. Plaintiffs, on the other hand, assert that under section 1231(a)(6) as interpreted by the  
2 Ninth Circuit in *Diouf II*, each Plaintiff and putative class member is entitled to a bond hearing  
3 after six months regardless of whether they are likely to be removed in the reasonable foreseeable  
4 future. Whether a Plaintiff has or has not been deemed to have a reasonable fear of return,  
5 whether there are third-party countries where Plaintiffs can be removed, or whether certain  
6 Plaintiffs may be considerably more or less likely to be removed in the reasonably foreseeable  
7 future has no bearing on the common statutory question of whether under section 1231(a)(6)  
8 Plaintiffs are entitled to a bond hearing.

9 Finally, the Government emphasizes that Plaintiffs’ proposed class includes “not only  
10 individuals with reinstated removal orders who are detained pursuant to § 1231(a)(6), but also  
11 individuals ‘who have been issued administratively final removal orders pursuant to 8 U.S.C. §  
12 1228(b), as well as individuals who are awaiting judicial review of the BIA’s denial of a motion to  
13 reopen removal proceedings, see 8 U.S.C. § 1229a(c)(7), and who have been issued a judicial stay  
14 of removal.” (Dkt. Nos. 28 at 21:9-13; 1 ¶ 30.) It argues that these Plaintiffs, although detained  
15 under the same section as immigrants with reinstated removal orders, “are not similarly situated to  
16 individuals in withholding-only proceedings” because they present “substantively different legal  
17 claims challenging their final removal orders, are potentially seeking different forms of relief in  
18 their removal proceedings beyond the narrow relief available in withholding-only proceedings,  
19 and therefore may be considerably more or less likely to be removed in the reasonably foreseeable  
20 future.” However, whether the immigrant was ordered removed under 8 U.S.C. § 1228(b) after  
21 committing an aggravated felony, is seeking review of their motion to reopen removal proceedings  
22 under 8 U.S.C. § 1229a(c)(7), or has been issued a judicial stay of removal, all proposed class  
23 members are detained under the same statute: § 1231(a)(6). And under this common statute  
24 Plaintiffs raise a legal question that applies to all proposed class members regardless of the  
25 underlying reason for their removal.

26 Accordingly, commonality is satisfied.

27 iii. Typicality

28 Rule 23(a)(3) also requires that “the [legal] claims or defenses of the representative parties

1 [be] typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). “Typicality refers to  
2 the nature of the claim or defense of the class representative and not on facts surrounding the  
3 claim or defense.” *Hunt v. Check Recovery Sys., Inc.*, 241 F.R.D. 505, 510 (N.D. Cal. Mar. 21,  
4 2007) (citing *Hanon v. Dataprods. Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). “The test of  
5 typicality is whether other members have the same or similar injury, whether the action is based  
6 on conduct which is not unique to the named plaintiffs, and whether other class members have  
7 been injured by the same course of conduct.” *Evon*, 688 F.3d at 1030 (internal quotation marks  
8 and citation omitted). The typicality requirement ensures that “the named plaintiff’s claim and the  
9 class claims are so interrelated that the interests of the class members will be fairly and adequately  
10 protected in their absence.” *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 158 n.13 (1982). Like  
11 the commonality requirement, the typicality requirement is “permissive” and requires only that the  
12 representative’s claims are “reasonably co-extensive with those of absent class members; they  
13 need not be substantially identical.” *Hanlon*, 150 F.3d at 1020.

14 Plaintiffs have established typicality. Plaintiffs’ claim for a bond hearing “is reasonably  
15 co-extensive with the claims of the class” because the class representatives, as well as the class as  
16 a whole, have been detained pursuant to section 1231(a)(6) for six months or longer and have not  
17 received a bond hearing. *See Rodriguez*, 591 F.3d at 1124. Although Plaintiffs and the proposed  
18 class were ordered removed under different statutes and are at different points in the removal  
19 process and hence do not raise identical claims, they all, as already discussed, are detained under  
20 the same statute, raise the same statutory-based argument, and are “alleged victims of the same  
21 practice of prolonged detention while in immigration proceedings.” *See id.*

22 The Government claims that Plaintiffs’ proposed class lacks typicality for the same reasons  
23 it lacks commonality: that the factual variations in individual cases and Plaintiffs’ differences in  
24 the likeliness of removal preclude typicality. These arguments fail for the reasons described  
25 above.

26 Accordingly the typicality requirement is also met.

27 iv. Adequacy of Representation

28 Rule 23(a)(4) imposes a requirement related to typicality: that the class representative will

1 “fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). The Court must  
2 ask: “(1) do the named plaintiffs and their counsel have any conflicts of interest with other class  
3 members and (2) will the named plaintiffs and their counsel prosecute the actions vigorously on  
4 behalf of the class?” *Evon*, 688 F.3d at 1031 (quoting *Hanlon*, 150 F.3d at 1020); *see also Brown*  
5 *v. Ticor Title Ins.*, 982 F.2d 386, 290 (9th Cir. 1992) (noting that adequacy of representation  
6 “depends on the qualifications of counsel for the representatives, an absence of antagonism, a  
7 sharing of interests between representatives and absentees, and the unlikelihood that the suit is  
8 collusive”) (citations omitted); Fed. R. Civ. P. 23(g)(1)(B) (stating that “class counsel must fairly  
9 and adequately represent the interests of the class”).

10 Both the named Plaintiffs and counsel will adequately represent the class. First, Plaintiffs  
11 represent that they will “think about the other class members and act on those interests.” (Dkt.  
12 No. 21-1 at 52 ¶¶ 19-20, 59 ¶ 12, 60 ¶ 13). Second, Plaintiffs’ counsel is highly experienced in  
13 class action litigation and immigration law. Marc Van Der Hout has four decades of experience  
14 litigating immigration class actions. (Dkt. No. 21-1 at 65-69 ¶¶ 3, 8.) His associates, Judah Lakin  
15 and Amalia Willie, are also experienced in class action litigation and practice exclusively in the  
16 area of immigration. (*Id.* ¶¶ 10-13.) The four attorneys at Centro Legal de la Raza, Alison  
17 Pennington, Lisa Knox, Julia Rabinovich and Jesse Newmark, and the four ACLU attorneys,  
18 Michael Kaufman, Bardis Vakili, Julia Mass and Vasudha Talla, have experience litigating  
19 complex immigration cases. (Dkt. No. 21-1 at 71-77, 81-86.) Finally, Matt Green has several  
20 years of experience in deportation defense, including representing immigrants detained under  
21 section 1231(a)(6). (*Id.* at 32-38.)

22 The Government does not dispute the adequacy of counsel. Instead it argues “the named  
23 Plaintiffs cannot represent the interests of potential putative class members who have already been  
24 denied or granted withholding-only relief.” However, whether a detainee has been denied or  
25 granted withholding-only relief, or like Plaintiffs, have not yet had their request for relief  
26 reviewed, has no bearing on the detainee’s right to a bond hearing under section 1231(a)(6) as  
27 interpreted by the Ninth Circuit in *Diouf II*. In other words, the granting or denial of withholding-  
28 only relief does not mean that the detainee is entitled to a bond hearing, it only means that the

1 detainee's removal process as to a particular country will or will not move forward. *See Padilla-*  
2 *Ramierz v. Bible*, 882 F.3d 826, 836 (9th Cir. 2017) (clarifying that the decision at stake in  
3 withholding-only proceedings is not whether the immigrant is to be removed, but the "more  
4 limited decision of whether he may be removed" to his country of origin). The detainee can still  
5 remain in detention pursuant to § 1231(a)(6) while an alternative country is identified.

6 The Government also asserts "both named Plaintiffs are detained as they have re-entered  
7 the United States illegally" and therefore they "cannot represent the interests of putative class  
8 members who do not have reinstated removal orders, but are detained pursuant to § 1231(a)(6)."  
9 However, the common legal question does not turn on the nature of Plaintiffs' removal but rather  
10 the statute under which Plaintiffs have been detained. Therefore Plaintiffs, who are detained  
11 pursuant to § 1231(a)(6), can adequately represent others detained under § 1231(a)(6). The  
12 Government's remaining challenges are only re-assertions of their commonality and typicality  
13 arguments. For the reasons described above, those arguments fail.

14 Accordingly, adequacy is met.

15 **B. Rule 23(b)(2) is Satisfied**

16 If all four prerequisites of Rule 23(a) are satisfied, the Court must also find that Plaintiffs  
17 "satisfy through evidentiary proof" at least one of the three subsections of Rule 23(b). *Comcast*  
18 *Corp. v. Behrend*, 133 S.Ct. 1426, 1432 (2013). Rule 23(b) sets forth three general types of class  
19 actions. *See Fed. R. Civ. P. 23(b)(1)-(b)(3)*. Of these types, Plaintiffs seek certification under  
20 Rule 23(b)(2). The Court can certify a Rule 23(b)(2) class if "the party opposing the class has  
21 acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or  
22 corresponding declaratory relief is appropriate respecting the class as a whole." *Fed. R. Civ. P.*  
23 *23(b)(2)*. "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would  
24 provide relief to each member of the class." *Dukes*, 564 U.S. at 360. "[U]nlike Rule 23(b)(3), a  
25 plaintiff does not need to show predominance of common issues or superiority of class  
26 adjudication to certify a Rule 23(b)(2) class." *In re Yahoo Mail Lit.*, 308 F.R.D. 577, 587 (N.D.  
27 Cal. May 26, 2015). Rather, "[i]n contrast to Rule 23(b)(3) classes, the focus [in a Rule 23(b)(2)  
28 class] is not on the claims of the individual class members, but rather whether [Defendant] has

1 engaged in a ‘common policy.’” *Id.* at 599.

2 The Rule 23(b)(2) requirements are also met. It is the Government’s uniform policy that  
3 bond hearings are not required under § 1231(a)(6) for those detained for greater than six months.  
4 Further the Government “refuses to act on grounds that apply generally to the class” – class  
5 members are denied the opportunity to request release on bond by an immigration judge.  
6 Plaintiffs seek declaratory and injunctive relief that would benefit all proposed class members:  
7 individualized bond hearings after six months of detention.

8 The Government argues Plaintiffs cannot satisfy Rule 23(b)(2) because 8 U.S.C. §  
9 1252(f)(1) deprives this Court of jurisdiction to grant relief on Plaintiffs’ statutory claims on a  
10 classwide basis. Section 1252(f)(1) provides that “no court (other than the Supreme Court) shall  
11 have jurisdiction or authority to enjoin or restrain the operation of [8 U.S.C. §§ 1221–1232] other  
12 than with respect to the application of such provisions to an individual alien against whom  
13 proceedings under such part have been initiated.” 8 U.S.C. § 1252(f)(1). Respondents in  
14 *Rodriguez* made the same argument to which the Ninth Circuit retorted “Respondents are doubly  
15 mistaken.” *Rodriguez*, 591 F.3d at 1119. 8 U.S.C. § 1252(f)(1) does not bar either declaratory or  
16 injunctive class-wide relief. *Id.* at 1120. “Section 1252(f) prohibits only injunction of the  
17 operation of the detention statutes, not injunction of a violation of the statutes.” *Id.* (internal  
18 quotations omitted). And the text of the Act clearly shows “that Section 1252(f) was not meant to  
19 bar classwide declaratory relief.” *Id.* at 1119.

20 As the Rule 23(a) and (b)(2) requirements are met, Plaintiffs’ motion for class certification  
21 is GRANTED as to their statutory claims. *See Parsons v. Ryan*, 754 F.3d 657, 686 (9th Cir. 2014)  
22 (“the primary role of [Rule 23(b)(2)] has always been the certification of civil rights class  
23 actions”).

### 24 PRELIMINARY INJUNCTION

25 Plaintiffs request this Court issue a class wide preliminary injunction “enjoining the  
26 government from detaining class members for more than 180 days without affording them a bond  
27 hearing” before an IJ. (Dkt. No. 22 at 8:8-11.)

28 A preliminary injunction is an “extraordinary remedy.” *Winter v. Nat. Res. Defense*

1 *Council*, 555 U.S. 7, 24 (2008). “A plaintiff seeking a preliminary injunction must establish that  
2 he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of  
3 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the  
4 public interest.” *Id.* at 20. Alternatively, “if a plaintiff can only show that there are serious  
5 questions going to the merits—a lesser showing than likelihood of success on the merits—then a  
6 preliminary injunction may still issue if the balance of hardships tips sharply in the plaintiff’s  
7 favor, and the other two Winter factors are satisfied.” *Shell Offshore, Inc. v. Greenpeace, Inc.*,  
8 709 F.3d 1281, 1291 (9th Cir. 2013) (internal citation and quotation marks omitted). In this  
9 respect, the Ninth Circuit employs a sliding scale approach, wherein “the elements of the  
10 preliminary injunction test are balanced so that a stronger showing of one element may offset a  
11 weaker showing of another.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th  
12 Cir. 2011). A “serious question” is one on which the movant “has a fair chance of success on the  
13 merits.” *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1421 (9th Cir. 1984)  
14 (internal citation omitted).

15 **A. Likelihood of Success on the Merits**

16 Plaintiffs’ likelihood of success on their now-certified statutory claim turns on whether  
17 *Diouf II* is still good law in the Ninth Circuit. In *Diouf II*, the Ninth Circuit held that immigrants  
18 detained pursuant to section 1231(a)(6) for more than six months are entitled to a bond hearing  
19 before an immigration judge. 634 F.3d at 1086, 1091. Thus, under *Diouf II*, Plaintiffs and the  
20 class members are entitled to an individual bond hearing before an immigration judge and the  
21 likelihood of success prong is satisfied. The Government nonetheless insists that *Diouf II* was  
22 overruled by the United States Supreme Court’s decision in *Jennings v. Rodriguez*, 138 S.Ct. 830  
23 (2018.)

24 This Court is required to follow *Diouf II* unless the theory or underlying reasoning of  
25 *Jennings* is “clearly irreconcilable” with *Diouf II*. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir.  
26 2003).

27 The “clearly irreconcilable” requirement is “a high standard.” So  
28 long as the court “can apply our prior circuit precedent without  
running afoul of the intervening authority” it must do so. “It is not

1 enough for there to be some tension between the intervening higher  
2 authority and prior circuit precedent, or for the intervening higher  
3 authority to cast doubt on the prior circuit precedent.”

4 *United States v. Robertson*, 875 F.3d 1281, 1291 (9th Cir. 2017) (internal quotation marks and  
5 citations omitted). To decide whether *Jennings* is clearly irreconcilable with *Diouf II*, several  
6 cases must be reviewed.

7 In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court applied the doctrine of  
8 constitutional avoidance<sup>4</sup> to construe section 1231(a)(6) “to mean that an alien who has been  
9 ordered removed may not be detained beyond ‘a period reasonably necessary to secure removal,’”  
10 and that “six months is a presumptively reasonable period.” *Jennings*, 138 S.Ct. at 843. After  
11 being detained for six months, and if the noncitizen provides reason to believe he will not be  
12 removed in the reasonably foreseeable future, “the Government must either rebut that showing or  
13 release the alien.” *Zadvydas*, 533 U.S. at 701.

14 Seven years later, in *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942  
15 (9th Cir. 2008), the Ninth Circuit reviewed 8 U.S.C. section 1226(a). The court held that to  
16 construe the statute to allow prolonged detention without adequate procedural protections, that is,  
17 bond hearings before an immigration judge, “would raise serious constitutional concerns.” *Id.* at  
18 950. Applying the canon of constitutional avoidance, the court therefore held that section 1226(a)  
19 “must be construed as *requiring* the Attorney General to provide the alien without such a hearing.”  
20 *Id.* (emphasis in original). In *Diouf II*, the Ninth Circuit extended the holding of *Casas-Castrillon*  
21 to aliens detained under § 1231(a)(6).

22 As was the case in *Casas-Castrillon*, prolonged detention under §  
23 1231(a)(6), without adequate procedural protections, would raise  
24 “serious constitutional concerns.” *Casas-Castrillon*, 535 F.3d at  
25 950. To address those concerns, we apply the canon of constitutional  
26 avoidance and construe § 1231(a)(6) as requiring an individualized  
27 bond hearing, before an immigration judge, for aliens facing  
28 prolonged detention under that provision. *See id.* at 951. Such aliens  
are entitled to release on bond unless the government establishes  
that the alien is a flight risk or will be a danger to the community.

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<sup>4</sup> “The canon of constitutional avoidance is a ‘cardinal principle’ of statutory interpretation. [W]hen an Act of Congress raises a serious doubt as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” *Diouf II*, 634 F.3d 1086 n.7 (internal quotation marks and citations omitted).

1 *See id.* at 1086. Under *Diouf II*, then, the Government is required to provide Plaintiffs and the  
2 class members a bond hearing before an immigration judge.

3 The Supreme Court decided *Jennings v. Rodriguez* in February of this year. *Jennings*  
4 reviewed the Ninth Circuit’s decision in *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015).  
5 According to the Supreme Court, in *Rodriguez v. Robbins* the Ninth Circuit:

6 relying heavily on the canon of constitutional avoidance, . . .  
7 construed §§ 1225(b) and 1226(c) as imposing an implicit 6-month  
8 time limit on an alien's detention under these sections. After that  
9 point, the Court of Appeals held, the Government may continue to  
10 detain the alien only under the authority of § 1226(a). The Court of  
11 Appeals then construed § 1226(a) to mean that an alien must be  
12 given a bond hearing every six months and that detention beyond the  
13 initial 6-month period is permitted only if the Government proves  
14 by clear and convincing evidence that further detention is justified.

15 *Jennings*, 138 S. Ct. at 839. The Supreme Court then went on to reverse the Ninth Circuit. First,  
16 the Court held that the canon of constitutional avoidance—while a valid doctrine—could not be  
17 applied to sections 1225(b) and 1226(c) because those statutes required mandatory detention for a  
18 certain period rather than the discretionary detention called for by section 1231(a)(6). *Id.* at 842-  
19 44, 46-47. Section 1226(a), however, contains the discretionary language “may detain” which the  
20 Court held could render the statute ambiguous and thus permit the application of the canon of  
21 constitutional avoidance. With respect to section 1226(a), the Supreme Court stated:

22 The Court of Appeals ordered the Government to provide procedural  
23 protections that go well beyond the initial bond hearing established  
24 by existing regulations—namely, periodic bond hearings every six  
25 months in which the Attorney General must prove by clear and  
26 convincing evidence that the alien’s continued detention is  
27 necessary. Nothing in § 1226(a)’s text—which says only that the  
28 Attorney General “may release” the alien “on ... bond”—even  
remotely supports the imposition of either of those requirements.  
Nor does § 1226(a)’s text even hint that the length of detention prior  
to a bond hearing must specifically be considered in determining  
whether the alien should be released.

*Jennings*, 138 S. Ct. 830, 847–48.

The Government argues that because in *Jennings* the Supreme Court held that “[N]either  
§ 1225(b)(1) nor § 1225(b)(2) says anything whatsoever about bond hearings;’ § 1226(c) ‘imposes  
an affirmative *prohibition* on releasing detained aliens,’ except under an express exception; and  
‘[n]othing in § 1226(a)’s text . . . even remotely supports the imposition’ of a bond hearing



1 requirement” *Diouf II* is clearly irreconcilable with *Jennings*. (Dkt. No. 27 at 9.) Not so.

2 First, the Supreme Court held that the canon of constitutional avoidance—which the Ninth  
3 Circuit used to interpret section 1225(b)(1) and (2)—could not be applied to those statutes to  
4 imply the procedural requirement of a bond hearing because the statutes “mandate detention until  
5 a certain point and authorize release prior to that point only under limited circumstances.” *Id.* at  
6 844. In doing so, the Court specifically distinguished its earlier decision in *Zadvydas* which  
7 applied the canon of constitutional avoidance to section 1231(a)(6)—the statute at issue here—to  
8 find certain procedural requirements. *Id.* (“While *Zadvydas* found § 1231(a)(6) to be ambiguous,  
9 the same cannot be said of §§ 1225(b)(1) and (b)(2)”); see also *Hurtado-Romero v. Sessions*, 2018  
10 WL 2234500 (N.D. Cal. May 16, 2018) (noting that the factors negating ambiguity, and thus the  
11 appropriateness of the application of the canon of constitutional avoidance, are not present in  
12 section 1231(a)(6)). Thus, far from being clearly irreconcilable with *Diouf II*’s application of the  
13 canon of constitutional avoidance to section 1231(a)(6), *Jennings* reaffirms the canon’s application  
14 to that statute.

15 Second, *Jennings* does not overrule *Diouf II*’s holding that pursuant to the application of  
16 the canon of constitutional avoidance section 1231(a)(6) must be construed as requiring an  
17 individual bond hearing for prolonged detention. The Government argues that since *Jennings* held  
18 that section 1226(a) cannot be construed to require periodic bond hearings every six months at  
19 which the government bears the burden of proof by clear and convincing evidence because  
20 nothing in the text of the statute hints at those requirements, 138 S.Ct. 847-48, section 1231(a)(6)  
21 cannot be interpreted as requiring a bond hearing for prolonged detention. But *Jennings* said  
22 nothing about section 1231(a)(6) not being capable of being plausibly construed as requiring a  
23 bond hearing for prolonged detention. To the contrary, *Jennings* specifically did not overrule  
24 *Zadvydas* and in *Zadvydas* the Supreme Court used the canon of constitutional avoidance to  
25 construe section 1231(a)(6) to include procedural requirements not specifically set forth in the  
26 statute. Thus, the Government’s interpretation of *Jennings* is in tension with *Zadvydas*. See  
27 *Hurtado-Romero*, 2018 WL 2234500 at \*2. This Court can find *Jennings* clearly irreconcilable  
28 with *Diouf II* only by ignoring *Zadvydas*. However, even if “recent Supreme Court jurisprudence

1 has perhaps called into question the continuing viability of [its precedent], [the lower courts] are  
 2 bound to follow a controlling Supreme Court precedent until it is explicitly overruled by that  
 3 Court.” *Nunez-Reyes v. Holder*, 646 F.3d 684, 692 (9th Cir. 2011).

4 *Jennings* is in tension with *Diouf II* and perhaps even calls it and *Zadvydas* into doubt. But  
 5 such circumstances do not permit this federal trial court to not follow *Diouf II*. See *Robertson*,  
 6 875 F.3d at 1291. As *Diouf II* is not clearly irreconcilable with *Jennings* it remains good law in  
 7 this Circuit. Plaintiffs have therefore shown a likelihood of success on the merits of their INA and  
 8 APA statutory claims that under section 1231(a)(6) the Government must provide Plaintiffs and  
 9 the class members an individualized bond hearing.

#### 10 **B. Remaining Injunction Factors**

11 The Government does not address the remaining preliminary injunction factors. Instead, it  
 12 simply asserts that if the Court considers them, “the key point is that the public interest favors  
 13 applying federal law correctly.” As *Jennings* is not clearly irreconcilable with *Diouf II*, the public  
 14 interest weighs in favor of the Government providing Plaintiffs and the class member bond  
 15 hearings as required by *Diouf II*.

16 The remaining factors, irreparable harm and balance of equities, also weigh in favor of an  
 17 injunction. Plaintiffs face compounding harm with each additional day they remain in custody  
 18 without a bond hearing, as required by existing Ninth Circuit authority. See *Villalta v. Sessions*,  
 19 No. 17-CV-05390-LHK, 2017 WL 4355182, at \*3 (N.D. Cal. Oc. 2, 2017). Further, the harm to  
 20 Plaintiffs in remaining in detention without a bond hearing clearly outweighs any “harm” to the  
 21 Government in providing bond hearings.

22 In sum, the four preliminary injunction factors weigh in Plaintiffs’ favor.

#### 23 **CONCLUSION**

24 For the reasons described above, Plaintiffs’ motion for class certification of section  
 25 1231(a)(6) detainees in the Ninth Circuit is GRANTED as to their statutory claims. Van Der  
 26 Hout, Brigagliano & Nightingale, LLP, Centro Legal De La Raza, Matthew Green, ACLU-SC,  
 27 ACLU-NC, and ACLU-SD are appointed as class counsel.

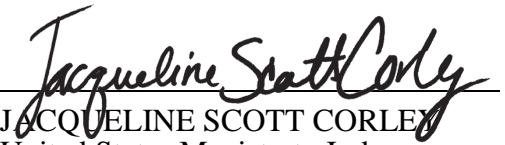
28 Plaintiffs’ motion for a preliminary injunction under the INA and APA is also GRANTED.

1 The Government is enjoined from detaining Plaintiffs and the class members pursuant to section  
2 1231(a)(6) for more than 180 days without a providing each a bond hearing before an IJ as  
3 required by *Diouff II*.

4 This Order disposes of Docket Nos. 21 and 22.

5  
6 **IT IS SO ORDERED.**

7 Dated: June 5, 2018

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10 JACQUELINE SCOTT CORLEY  
11 United States Magistrate Judge

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